ID-DRITT

LAW JOURNAL

VOL. VIII

a publication of the 'Għaqda Studenti tal-Liġi',
University of Malta

Printed at the M.U.P. – December 1977

All contributions, advertisements or enquiries should be addressed to the Editor, Id-Dritt, Faculty of Laws, University of Malta. It would be appreciated if articles are forwarded in double spaced typescript. Original works will be given preference to.

CONTENTS

'FLUCTIBUS HAUD AEQUIS': A BRIEF ANALYSIS OF THE CURRENT TALKS ON THE NEW LAW OF THE SEA

DAVID J. ATTARD

The nations of the world are now facing decisions of momentus importance to mankind's use of the oceans for decades ahead. At issue is whether the oceans will be used rationally and equitably and for the benefit of all mankind, or whether they will become an arena of unrestrained exploitation and conflicting jurisdictional claims in which even the most advantaged states will be the losers.

The technological and political developments[1] that mankind has been witnessing throughout the past few decades, have tended to sharpen the historical collision between two doctrines which can be considered as the very basis of the traditional maritime order. One doctrine gives the right of ownership over the sea and its resources, the other insists that the sea should be free from any dominion and open to use by all. The former was implicit in the Spanish and Portugese claims to the Gulf of Mexico and the entire Atlantic Ocean; the latter was important to the great trading companies such as the Dutch East India Company.

However, even in their seventeenth century formulation both doctrines seem remarkably pertinent to the contemporary clashes between coastal and maritime interests of states. The Dutch lawyer Hugo Grotius was in favour of free access to the seas, whilst John Selden, the British jurist argued in favour of the right of dominion.

Grotius held that nations must not exercise any acts of ownership over the seas because it would violate right reason, equity and nature:

'The sea, since it is as incapable of being seized as the air,

[1] Vide D.J. Attard: 'Ocean Space and the New International Economic Order': Lecture given during a course 'Introduction to the Mediterranean' organised by the Extension Studies Board of the University of Malta (Summer 1976).

cannot be attached to the possessions of any particular nation.'[2]

What he called the 'boundless ocean' was indivisible open, intangible, and had infinite rescources. Moreover, maritime freedom should serve the national interest, international public order and 'the society of all mankind'.

Selden[3] on the other hand, was more concerned with the strength of historical experience, and the realities of state power and practice rather than ideals and philosophy. For him the important issues were national safety and national self-interest. The right of dominion gave nations the right to exclude others from claimed portions of the sea, to prevent fishing, navigation, landing and 'the taking of gems'. He challenged Grotius description of the sea: its resources *were* exhaustible, its space *could* be divided, and its uses *could* be effectively controlled.

We all know future was on Grotius' side; freedom of the seas provided generations of maritime powers with doctrinal support in diplomacy and legitimacy in international law. However, during the last decades technological and political developments have begun to undermine the freedom of the seas doctrine. The ever-increasing claims of states over the oceans may seem as if Selden was winning over Grotius.

The truth, however, is that neither doctrine comes to grips with the fundamental revolution in man's spatial relationship to the sea. The oceans can no longer be conceived primarily as two dimensional space defined by surface longitude and latitude.[4] We have come today, it being possible to exploit the seabed and fly within the airspace above the sea, to see them as pluridimensional in character. In this regard the trend in specialized circles is to supplant the words 'sea and ocean' with the universal expression 'Ocean Space'.[5]

[2] Vide: 'Mare Liberium' (1605) trans. R. Van Deman Magoffin, London: Oxford University Press (1916).

[3] Vide: Wolfgang Friedman: 'Selden Redivivus – Towards a partition of the Seas?' (65AJIL 757 (1971).

[4] Resolution 2750 (XXV) of December 17, 1970 includes in its preamble 'The General Assembly ... conscious that the problems of the marine environment are closely linked to each other and should be examined in their totality'.

[5] The father of this new concept is Arvid Pardo, who has described it as comprising the surface of the sea, the water column, the seabed and its subsoil; vide also Lawrence Juda: 'Ocean Space Rights' (Praeger Special Studies in International Politics and Government New York); W.L. Griffin: 'Emerging Law of Ocean Space', The International Lawyer 546 (July 1967); F. Shick: 'Problems of Space in the U.N.' B.I.C.Q.L. 969 (July 1964).

'Ocean Space' has been described as a new continent, which is opening to full utilization and intensive exploitation by man. All states, whether large or small, developed or developing, coastal or land locked are intimately interested in the legal regime which will regulate mankind's activity in 'Ocean Space'. The increasing problems which this development has brought about are insoouble on the basis of the present law of the sea. It was under these circumstances that on August 17, 1967, the Permanent Mission of Malta to the U.N. proposed the inclusion in the Agenda of the twenty-second session of the General Assembly, of an item entitled 'Declaration and Treaty concerning the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and of the Ocean Floor, underlying the Seas beyond the Limits of Present National Jurisdiction, and the Use of their Resources in the Interests of Mankind'.[6]

After six years of pre-Conference deliberations[7] during which dozens of governments proposed draft treaties, the General Assembly on November 16, 1973 took the final steps necessary for the implementation of the Conference. By adopting Resolution 3067 (XXVIII),[8] it confirmed the preliminary agenda for the meeting at the U.N. Headquarters in New York for the purpose of: 'dealing with matters relating to the organisation of the Conference, including the election of officers, the adoption of the agenda and the rules of procedure of the Conference, the establishment of subsidary organs and the allocations of work to these organs ... to adopt a convention dealing with all matters relating to the law of the sea ...' Before turning our attention to how matters stand, as the sixth session of the third U.N. Conference on the Law of the Sea[9] reconvenes, it is useful to trace the events which got us where we are today.

[6]U.N. Doc A/6695 (Aug. 18, 1967); The Memorandum attached to the 'Note verbale' expressed fear that rapid progressive Marine technology by the developed countries would lead to national appropriation and use of the seabed and ocean floor.

[7]A major part of this work was done by the U.N. Seabed Committee. The topics it dealt with were subdivided amongst its three sub-committees. Sub-committee I was concerned with an international regime and international organisation; sub-committee II with most of the traditional law of the sea issues, including territorial seas, straits, the high seas, fisheries and the seabed within national jurisdiction; sub-committee III was concerned with pollution and scientific research.

[8]U.N. G.A. Res. 3067 (XXVIII), 2169th meeting Nov. 16, 1973, 1 Official Records VII (1975).

[9]Hereinafter referred to as U.N.C.L.O.S. III.

U.N.C.L.O.S. III is reputed to be the longest, largest and most expensive conference in the history of mankind. At its second session in Caracas,[10] there were about 2,000 delegates representing over 143 states many of whom relatively new countries with no prior experience in dealing with ocean issues. Facing the Conference was an agenda with over 100 items which had to be agreed upon, before a comprehensive law of the sea treaty could be achieved. Unlike the previous 1958 Law of the Sea Conferences, there was no draft treaty prepared in advance by the International Law Commission. It was, therefore, necessary to divide the Conference into three formal negotiating groups: Committee I dealing with the concept of common heritage and the new international authority to be created; Committee II focusing on the territorial sea, the 200 mile zone and the high seas; and Committee III concentrating on scientific research and environmental issues.

Notwithstanding, a warning by Dr. Waldheim U.N. Secretary General, that new conflicts concerning the sea were 'very considerable and, given the inevitable development of marine technology, ... bound to increase unless we resolve to reach agreement while there still is time to do so, ...' attitudes at the Geneva Session[11] were still somewhat militant.

It was only at the end of this session that the three principal Conference-committee chairmen[12] were able to reduce a wide variety of differing claims and proposals into one three-part Informal Single Negotiating Text[13] to which the President of the Conference later added a separate text on Settlement of Disputes.[14]

This Text has served as a basis for discussion during the fourth session which took place in New York.[15] Several changes were introduced varying from technical and editorial improvements

[10] This session was held in August 1974, the previous session took place in New York in 1973.

[11] This session was held between March 17 to May 19 and was attended by some 1,700 delegates from 141 countries.

[12] Committee I: M. Bamela Eugo (Cameroon); Committee II: St. Reynaldo Galindo – Polil (El Salvador); Committee III: Mr. Alexander Yankor (Bulgaria).

[13] Hereinafter referred to as S.N.T.; vide also U.N. Doc. A/CONF. 62/WP. 8 Parts I, II, III, May 7, 1975.

[14] Mr. Hamilton Shirely Amerasinghe (Sri Lanka); vide U.N. Doc. A/CONF. 62/WP9 Part IV, July 21, 1975.

[15] Held on March 15 to May 7 1976 and was attended by 137 out of 147 members states of the U.N. and 12 other states which are members of the U.N. Specialised agencies; In Committee II A. Qguilar (Venezuela) succeeded Galendo – Polel.

to significant transformation of basic concepts. In spite of the fact, that significant progress was made in the negotiations towards a consensus in some areas, the resulting new Text known as the Revised Single Negotiating Text[16] still has the status of an 'informal' document drafted under the sole responsibility of the Chairmen of the Committees and the President of the Conference. The latest session in New York ended inconclusively for although the session had clarified the ideas of various parties and had indicated the outlines of possible compromise, several important countries were not able to accept them.[17]

The politics of the Conference are very complex. In relation to the oceans, no two nations are alike – but all have a considerable interest. Two basic factors tend to dominate the workings and negotiations within the Conference. The first factor is an idealogical one, which tends to separate the developed countries from the the developing ones (Since U.N.C.T.A.D. 1964 the latter have formed the so-called 'Group of 77', which attempts to put forward a unified front at international meetings.)[18] This factor is most clearly illustrated in the various and conflicting views put forward by both sides in the debate over how the 'International Seabed Authority'[19] should be structured and how the resources of the deep seabed are to be exploited. The second factor is a geographical one. Some countries, for example, have miles of coastline, whilst others have little or none.[20] This factor cuts across all ideological differences effecting various developed and developing states.[21]

Moreover, the major visible product of substance that emerged at the first session of U.N.C.L.O.S. III was an agreement to agree. A new comprehensive treaty was to be formed by consensus, in-

[16] Hereinafter referred to as R.S.N.T.; vide also U.N. Doc. A/60NF 62/WP 8/Rev. 1/Pt. May 6, 1976.

[17] Held from Aug. 2 to Sept. 17, 1976 and was attended by over 2,000 delegates from 147 states.

[18] Vide D. J. Attard: 'The New International Economic Order: Myth or Reality?' 8 Cobweb (Winter 1976) Dept. of Economics, University of Malta.

[19] Hereinafter referred to as the 'Authority'.

[20] Thirty landlocked countries, ranging from Austria in the developed world to Zambia in the 'Group of 77' have no coastline.

[21] In fact, if the generally agreed to 200 mile zone is introduced, of the 35% of total ocean space within the new zone, almost one-third (including the area where it is most probable to expect oil) will belong to ten states, seven of which are developed: Mexico, India, Brazil, New Zealand, Australia, Norway, USSR, USA, Canada and Japan.

stead of by a majority or two-thirds of those voting, which had been a popular method in the past.[22]

In the document containing the rules of procedure for the Conference[23] we read: 'bearing in mind that the problems of ocean space are closely interrelated and need to be considered as a whole and the desirability of adopting a convention ... which will recure the widest possible acceptance, the Conference should make every effort to reach agreement on substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus have been exhausted.' This agreement which came to be known as the 'Gentleman's Agreement' has now matured into a major accomplishment and a significant development in process of international treaty law. The reason behind 'consensus politics' emerges from the bitter experiences the international community faced with the 1958 Law of the Sea treaties, when fewer than two-thirds of the participants ultimately ratified the treaties.

Against this background we can now turn to a detailed discussion of three issues, negotiations over which have come to a deadlock. These are (a) the legal status of the exclusive economic zone;[24] (b) the intersts of landlocked and geographic disadvantaged countries; (c) the nature of the proposed 'Authority'. These issues are generally considered as 'critical' for unless they are resolved, the international community will be faced with a renewed wave of unilateral claims and action over 'ocean space' which would lead to serious friction if not outright conflict.[25] It would be pertinent to point out that between 1967, when Ambassador Pardo spoke out, and 1973, the year of the formal opening of U.N.C.L.O.S., no less than 81 states asserted over 230 new juris-

[22] Although the practise of decision by consensus has been introduced 'de facto' into the operation of several U.N. bodies, it has never managed to force its way into rules of procedure. Apart from the Law of the Sea Conference, there has only been one major debate where the matter was raised; this was in a meeting of the U.N. Population Commission and the Economic and Social Council held in preparation for the World Population Conference. Moreover, it has been held that the consensus procedure does exist 'de facto' in the Security Council where no decision may be taken without the consensus of the permanent members.

[23] U.N. Doc. A/CONF 62/WP 2 (Rules of Procedure 1974).

[24] Hereafter referred to as E.E.Z.

[25] Ireland's move to a 50 mile exclusive fishing zone, participated the famous 'Cod War'; Greece and Turkey were up in arms over the right to search for resources in disputed Aegean waters.

dictional claims of varying degrees of importance.[26] Within this short period the 'common heritage of mankind' was reduced to 65 per cent of ocean space. The remaining 35 per cent claimed by coastal state appears to have virtually all gas and oil resources and 95 per cent of all harvestable living resources.

(A) THE LEGAL STATUS OF THE EXCLUSIVE ECONOMIC ZONE

Traditional international law, in principle, does not recognise the jurisdiction of a coastal state beyond the Contigous Zone[27] apart from sovereign rights over the natural resources the of continental shelf. The 1958 Convention set a maximum limit of 12 miles for the Contigous Zone and allowed the Coastal state authority to exercise control within the Zone under certain circumstances.[28] Over the last couple of decades, however, there has been a movement to claim jurisdiction and sovereign rights over marine areas often up to 200 nautical miles from the coast. This movement was sparked off by the Truman Proclamation in 1945 on the continental shelf and fisheries; this Proclamation inspired by America's fear of a shortage of hydrocarbons, was followed by the Latin American States, who have large continental shelves off their Atlantic coasts.[29] Various other countries have followed suit. Both the 1975 and 1976 Texts offer international recognition to this trend by proposing the establishment of an exclusive economic zone extending to a maximum distance of 200 nautical miles, not from the coast but from the baselines from which the breadth of the territorial sea is measured.

Many countries including the U.S.A.[30] have announced their

[26] Vide: D.J. Attard 'Malta's 1967 initiative in U.N. on Seabed Problems'. S.T.O.M. May 2, 1972 (Malta).

[27] Vide S. Oda: 'The Concept of the Contiguous Zone', I.CLQ vol.11 Jan. 1962; G. Fitzmaurice 'Some Results of the Geneva Conference on the law of the Sea' ICLQ Vol. 8 1959; A. Dean 'The Geneva Conference on the Law of the Sea: What was Accomplished'. 1958, 52AJIL 607.

[28] Vide R.S.N.T. Article 14 et: U.N. Documents A/CONF/62/WP8/Rev. 1/ Part II for a proposed increase to 24 miles of the Contiguous Zone.

[29] For an excellent analysis of the Latin American claims vide: F.V. Garua Amador, 'The Latin American Contribution to the Development of the Law of the Sea' (1974) 68 AJIL 33.

[30] The American Law is called 'The Fishery Conservation and Management Act of 1976'. It takes effect on March 1, 1977 and provides for control of foreign fishing within 200 miles of the U.S. coasts; most provisions are in accordance with the R.S.N.T. Also Mexico has claimed an E.E.Z. by a decree of January 22, 1976 amending article 27 of the Constitution. The decree is elaborated further in implementing legislation which is also largely based on the R.S.N.T. Although neither India nor

intention to claim E.E.Z.'s regardless of the outcome of the Conference. Both the 1975 and 1976 Texts offer international recognition to this trend by proposing the establishment of an E.E.Z. extending to a maximum distance of 200 nautical miles, not from the coast but from the baselines from which the breadth of the territorial sea is measured.[31]

The critical unsolved issue, however, concerns the nature and scope of the 'national jurisdiction' within the E.E.Z. One group of nations, mostly South American, assert that such jurisdiction should be total; this would in effect transfer the E.E.Z. into a territorial sea, in which other nations would enjoy only subordinate rights of navigation, over flight and communication. On the other hand, coastal states which have great maritime traditions would like to see the E.E.Z. remaining part of the high seas whilst jurisdiction is limited to certain economic rights of the coastal state, thereby enabling freedom of navigation and over flight.[32]

A popular moderate view, which is now embodied in the R.S.N.T.,[33] considers this Zone as 'sui generis', neither high seas nor territorial seas, subject to 'national jurisdiction'; however, the freedom of navigation and overflight, and the right to lay cables and pipelines is protected.[34] Indeed, the coastal state will have the right to explore and exploit the area and to conserve and manage its natural resources. It will also be possible for such states to erect artificial islands, installations and structures.[35] When the proposed convention does not attribute rights of jurisdiction within the E.E.Z., conflicts between the interests of the coastal states and of other states are to be resolved 'on the basis of equity and in the light of all relevant circumstances taking into account the respective importance of the interests involved to the

Sri Lanka had at the time of writing claimed an E.E.Z., both had signed an agreement to draw a boundary line where their zones overlap; either state will be allowed to fish in each other's zone.

[31] U.N. Document A/CONF 62/WP 8/Rev. 1/Part II, Article 45.

[32] For example: T. Vicent Leaison, the leader of the US delegation stated that it was 'critical to the U.S. that the economic zone (between 12 and 200 miles offshore) should remain high seas' (Address to the fifth session of U.N.C.L.O.S., New York Aug. 2 to Sept. 17 1976).

[33] Vide U.N. Document A/CONF 62/WP8/Rev. 1/Part II, Article 46(1).

[34] See the Introductory Note of the Chairman of the Second Committee to Part II, the Revised Single Text, P. 4.

[35] Vide Article 44(1) of the R.S.N.T. The text of this article is based on the sixth revision of a text prepared by the 'Evensen Group'. (This is an informal group of some 40 representatives chaired by Jens Eversen of Norway).

international community as a whole'.[36]

It is possible to identify four interests which various developed countries including the Soviet Union[37] have sought to protect. First, some maritime nations frequently conduct naval and aircraft activities within 200 miles of other nations shores (for example, the Superpower activities in the Mediterranean).[38] They, therefore, reject the 'sui generis' position as it might be construed to vest important 'residual' or unspecified uses of the Zone by the coastal state. In fact, the Soviet Union announced on February 12, 1976, that it would, at the fourth session of U.N.C.L.O.S. III, support a 12 mile territorial sea limit and a 200 mile economic zone for all coastal states; it condemned countries, such as China, supporting a 200 mile territorial limit, as it would mean that 40 per cent of the world's ocean area would fall under the control of coastal states. Thus the North Sea, the Mediterranean and the Caribbean, it feared, would be divided among a few coastal states.

The problem is that although specific treaty language could conceivably be drafted to protect this essentially military interest most developing nations strongly oppose any open recognition of a right to conduct military activities in the Zone. In fact, this interest is only discussed privately and it has been hard to bring the issue out into the open.[39]

The second interest of the maritime states is that of protecting their merchantile navies from undue interference of coastal states. Although, this interest seems adequately protected in the current Text, it is very possible that the issue will be reopened in the forthcoming session due mainly to the recent spate of oil spills and other accidents to shipping operating in the coastal waters of various states. The result could produce more extensive asser-

[36] Vide Article 47 of the R.S.N.T.

[37] For the position taken by the U.S. see Dr. H. Kissinger's speech made on April 8, in New York before members of the Foreign Policy Association, the U.S. Council of the International Chamber of Commerce and the U.N. Association of the U.S.A.

[38] Professor Lawrence Martin of King's College London in his paper 'The Role of Force in the Ocean' has studied the implications of a change in legal regimes of oceans on the role of navies. Vide 'Perspectives on Ocean Policy' National Science Foundation (Grant No. GL 39643, John Hopkins University, Washington D.C.).

[39] J.A. Knauss: 'The Military Role in the Ocean and its Relation to the Law of the Sea' 6th Annual Conference of the Law of the Sea Institute, Kingston 1972 P. 77-86.

tions of coastal states rights to lay down safety and other standards.

The third of the 'maritime-coastal' issues concerns freedom to engage in scientific research within the 200 mile zone. All parties agree that at present, and for the forseeable future, the most important areas of marine scientific research will take place within this 200 mile zone. It is also recognised that a significant number of such studies will require transit through more than one zone, since fish schools, geologic structures and currents cross various zones. Hence, a regime that imposes the requirement of single state and especially multiple-state consent, to conduct research activities presents the risks of substantially impairing marine scientific research.

The 1958 Convention on the Continental Shelf had provided that: 'the consent of the coastal state shall be obtained in respect of any research concerning the Continental Shelf and undertaken there. Nevertheless the coastal state shall not normally withhold its consent if the request is submitted by a qualified institution with a view to purely scientific research into the physical or biological characteristics of the Continental Shelf, subject to the proviso that the coastal state shall have the right, if it so desires, to participate or to be represented in the research and that in any event the results be published'.[40]

In the current negotiations the U.S.A. together with Western Countries have taken the lead in holding that freedom of scientific research will produce results of benefit to all nations. The U.S. proposals permit the provisions requiring the researcher to give prior notification to the coastal state, to disclose the results, and to permit representatives of the coastal state to take part in the research. However, the American view would permit the coastal state rejections of a research activity only when the coastal state determines that the activity has direct application to the profitable exploitation of resources within the Zone.[41]

The developing states oppose this view and assume that the direct benefits of research accrue primarily to the researcher; it is

[40] Vide Article 5 (8) of the 1958 Convention on the Continental Shelf.

[41] The scientific community within the U.S. is generally quite concemed to maintain the maximum possible freedom. In this respect see C.H. Check: 'Law of the Sea: Effects of varying coastal State Controls on Marine Research, A Survey of the U.S. Ocean Science Community', Ocean Development and International Law. Summer 1973 pp. 209-19; 'Ocean Researchers See a threat in Law of the Sea Conference' The New York Times August 30, 1975, P. 7.

therefore feared that the latter may take undue economic advantage of the discoveries. What they would like to see is the maximization of their benefits through technology transfer and fees; they also would like to have a control in the access to information.

The R.S.N.T. provides that 'the consent of the coastal state shall be obtained in respect of any research concerning the E.E.Z. to coastal state consent, which, however, shall not be withheld';[42] unless the research project '(a) bears substantially upon the exploration and exploitation of living and non living resources; the exploration and exploitation of living and non living resources; (b) involves drilling or the use of explosives; (c) unduly interferes with economic activities performed by the coastal state; (d) involves the construction, operation or use of ... artificial islands, installations and structures ...' (Article 60, Part III). The conduct of marine scientific research in the marine environment is restricted to states and competent international organisations. Moreover, the results of a research project bearing substantially upon the exploration and exploitation of the living and non-living resources of the economic zone shall not be published against the express wish of the coastal state. Another important aspect of this problem is provided for by the R.S.N.T. in providing procedures for the settlement of disputes relating to marine scientific research.

The fourth agreement is based on the experiences which resulted from the incompetence of the 1958 Conventions to deal with the development of marine technology.[43] It is held that new and important uses of the 200 mile zone may develop in the future just as the recent post has seen the development of new uses of the seabed. It is felt that if the 200 mile zone is regarded as high seas, the developed countries would have a better opportunity to

[42] Vide U.N. Document A/CONF/62/WP8/Rev. 1/Part III Article 49.

[43] One notorious article which has not managed to overcome the effects brought by new technologies is Article 1 of the 1958 Continental Shelf Convention. This article, described by Wolfgang Friedman as 'surely one of the disastrous clauses ever inserted in a treaty of vital importance to mankind', by allowing the legal Continental Shelf to be defined as '(a) the Seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploration of the natural resources of the said areas; ...' Over the past fifteen years states have interpreted the definition in a manner so as to give the coastal state with the progress of technology the right to expand their sovereign rights over seabed resources at unlimited distances.

take advantage of these uses when and if they arise. They claim that the 'status quo' is more flexible. If the coastal states are given residual rights such control may never be divested. Whilst, if in the future it becomes desirable to grant a particular set of rights to the coastal states this can be readily accomplished.

(B) LAND LOCKED AND GEOGRAPHICALLY DISADVANTAGED STATES

Another major issue facing U.N.C.L.O.S. relates to the problem of over 50 landlocked and geographically disadvantaged states.[44] The caucus of this group met regularly during the Conference sessions as early as the 1975 Geneva meeting. Initially the group was viewed as a potential source of pressure to maintain high seas freedoms as it had little or nothing to gain by increased zones of coastal state jurisdiction; however, due to procastination it developed into a political force too late to prevent the establishment of a 200 mile economic zone. It is therefore now concentrating its efforts to obtaining access to the economic zones of certain neighbouring states (Part II Articles 58 and 59).

Moreover, some landlocked states are seeking to gain improved access to the sea. Here again the efforts have not proved to be as effective as has been hoped. Their main weakness was that out of the group of 30 landlocked states, nine are European (in fact 4 are mini states[45] whilst the other 5 are developed states[46]) who have different interests from their developing counterparts.

Also whilst two South American States, Paraguay and Bolivia, have the potential for access through transit states to highly productive fishing grounds, practically none of the nineteen landlocked states of Africa and Asia have this opportunity. Most of the waters that face their coastal neighbours are poor in resource potential. The major exception to this is South Africa whose landlocked neighbours of Swaziland, Lesotho, and Botswana may perhaps in time find it possible to share in the fisheries resources off the Cape of Good Hope Area.

A final point is that several coastal states, particularly in Africa, border on two or more landlocked states. Tanzania and Zaire, for example, each have five neighbours, any or all of whom claim rights to fisheries of the transit states' economic zones. This would render such coastal countries themselves, in a sense, 'geographically disadvantaged'. In such cases unless regional

[44] Vide D.J. Attard 'Who will own the Sea around us?', S.T.O.M. Jan. 30, 1977.

[45] Andorra, Liechtenstein, San Marino and the Vatican City.

[46] Austria, Belgium, Czechoslovakia, Hungary and Luxemburg.

arrangements are worked out it is possible that they be reluctant to allow any transit from their landlock neighbours.

Towards the end of the fifth session of U.N.C.L.O.S. in New York[47] private negotiations between the landlocked and geographically disadvantaged states and a group of developed and less-developed coastal states seemed to be making progress on these issues rendering a break through possible early in the next session of the Conference.

(C) The Establishment of an International Seabed Authority and its Activities

Under a resolution by the General Assembly in 1970[48] it was decided that efforts would be made to establish an equitable international regime – including an international machinery – for the 'Area'[49] and resources of the seabed beyond the limits of national jurisdiction. Accordingly, the U.N. Seabed Committee took cognisance of the matter and attempted to formulate the objectives, nature, scope, powers and functions of this international mechanism. However, whilst all states represented in the Committee took into consideration the 'Declaration of Principles governing the Seabed beyond National Jurisdiction' their approach to the problems varied widely.[50]

In the so-called 'Area' large amounts of manganese, copper, cobalt and nickel contained in the tennis-ball sized manganese nodules are found located in the Abyssal Plain of the ocean. The developed countries led by the U.S.A., hold that the exploitation[51]

[47] In fact at this Session the Conference was faced with a newly formed group of some 90 coastal states (other than the big maritime powers) under the chairmanship of Sr. Jorge Castaneda (Mexico). He claimed his group had decided to take a common stand in view of the 'somewhat militant attitude' of the landlocked and geographically disadvantaged states; that they were willing to discuss access to living resources in the E.E.Z. but that access of landlocked states to non-renewable mineral resources in the Zone was 'absolutely unacceptable'.

[48] Vide Resolution 2750 (XXV) December 17, 1970: U.N. General Assembly.

[49] Hereinafter referred to as the 'Area'; a precise definition of this concept is still badly needed.

[50] Vide Resolution 2749 (XXV) U.N. General Assembly.

[51] For more information regarding the state of deep seabed technology vide 'Economic Implications of Seabed Mineral Development in the International Area: Report of the Secretary General' U.N. Doc. A/CONF 62/25 LOS III O.R. Vol. III p. 4. 1974. Although it must be added that from the date this report was written further progress in this field has been done,

of these nodules is to be considered to be derived from the principal of the freedom of the High Seas. On the other hand, the developing countries have been keen to see that this wealth is declared to be the 'common heritage of mankind' and that a new international regime is set up before it is exploited.[52] This is due to two main factors:

Firstly, the land-based producers of these metals were largely developing countries, and are therefore anxious to avoid costly competition. Secondly, the 'Group of 77' want to obtain a substantial share of the benefits of deep-sea mining as well as greater control over international economic decision-making. It was clear that unless a legal regime was created to cater for an equitable distribution of the proceeds of mineral exploitation, only the developed states, who had the technology would benefit.

The First Committee at Caracas held 17 formal and 23 informal meetings to discuss the legal regime to control the 'Area'.[53] The basic document which formed the ground work for the discussions was drafted by members of the Seabed Committee.[54] However, the more substantial analysis was reserved for the Geneva Session, where Committee I had six formal meetings and numerous informal ones. Emphasis in the discussions of the draft centred around article 9,[55] dealing with the exploitation of the sea bed and the en-

see for instance: Bastanelli 'Minere in Fondo al Mare'; ECOS rivista a cura dell'ENIN. 45/46 (1977) Roma.

[52] Vide: D.J. Attard 'The New Law of the Sea' paper delivered at the Sonnerburg Conference, April 1977, Malta.

[53] Annex 1. para. 6; 3 official records 102 (1975).

[54] 2 seabed Rept. 51-69 (1973).

[55] Since a synthesis of the various proposals is likely to emerge as the new law of the Sea it may prove instructive to summarise some proposals. The Soviet Union proposed that the Sea Bed Authority authorise states to search for minerals and mine them within the 'Area'. Each state would be entitled to a limited equal number of contracts, preference being given to the developing states. The 'Authority' would be able to carry out exploration in sectors reserved for itself, and states presently unable to carry out exploration would have sections reserved for them. The 'Group of 77' favoured a strong 'Authority' which would have a 'direct and effective' control over all resource exploration and exploitation. The 'Authority' would take care of the needs of the developing countries, landlocked states though contracts would be awarded on a competitive basis. The E.E.C. proposal favoured a weak 'Authority'. Any applicant would be permitted to engage in 'prospecting' including drilling to depths not greater than 80 meters, merely upon notification to the 'Authority'. Contracts would be awarded upon receipt of applications to

forcement mechanism to be operated by the proposed 'Authority'. Over 400 proposals were submitted; however, after extensive consultation, the chairman presented an informal negotiating text. Part III of this Text dealt with the creation of the proposed 'Authority' which would administer all activities in the 'Area', and through its own organisation, known as the 'Enterprise' would be able to enter into agreements with states or their nationals to mine or recover the resources of the 'Area'.[56] In fact under this text[57] the 'Authority' would be founded on three basic principles: (a) sovereign equality of all members; (b) all members must fulfil in good faith the obligations assumed by them; and (c) 'the Authority is the organization through which states parties ahall administer the Area, manage its resources and control the activities of the Area in accordance with the provisions of the Convention.'[58]

The scope of the 'Authority' in principle, was held to have jurisdiction over 'all activities of exploration of the "Area" and of the exploitation of its resources as well as other associated activities in the "Arena", including scientific research.'[59] Such 'activities' would be conducted directly by the 'Authority', which could if it considered appropriate carry out such activities through state parties, state enterprises or individuals.[60]

the 'Authority', except that no applicant could hold more than six contracts at a time. The duration of contracts would be 30 years, with two renewable ten-year options. The U.S.A. also favoured a weak 'Authority' to the extent that states would be the dominant element in its proposed system. The 'Authority' could enter into contracts with states as well as individuals and corporations. Any person or group would be permitted to engage in 'Commercial prospecting', though the 'Authority' would have to be notified. The working paper submitted by Japan provided for registration of contracts with the 'Authority' by states or their corporate or individual agents, termed subcontractors, who could transfer their rights merely by notifying the 'Authority'. The latter would be given the power to negotiate over fixed blocs of ocean, defined by reference to longitude and latitude. Exploitation contracts would be for 20 years, with a renewable option to ten years.

[56] This part and the Base S.N.T. generally were subject to general criticism see 'Hearing on Geneva Session of the Third U.N.C.L.O. Before the National Ocean Policy Study of the Senate Comm. on Commerce.' 94th Congress; 1st session, series No. 94-80 (June 3-4 1975).

[57] This Text, which predominantly reflects the views of the developing countries, was issued as U.N. Doc. A/CONF 62/WP 8/Part I, on the last day of the Geneva session of the Conference.

[58] Vide U.N. Doc. A/CONF 62/WP 8/Part I, Article 2/(i).

[59] Vide U.N. Doc. A/CONF 62/WP 8/Part I Article 1 (ii).

[60] Vide U.N. Doc. A/CONF 62/WP 8/Part I, Article 22 (1) (2).

The Geneva session also witnessed strong efforts by some states in the 'Group of 77' to produce a moratorium resolution on seabed exploitation; eventually it was realised that any insistence on the matter could have adverse consequences for the negotiations especially in view of the fact that the U.N. General Assembly had already passed such a resolution[61] over the negative votes of the U.S.A. and other developed countries.

When U.N.C.L.O.S. reconvened in New York in March 1976, it became immediately apparent that major provisions in the 1975 Informal Single Negotiating Text were not acceptable to a majority of the developed countries which had the technological capability of exploiting the deep seabed in the foreseeable future.

The first two basic principles on which the 'Authority' was to be based were not altered in the R.S.N.T. But the last was revised to read: 'The Authority is the organisation through which states Parties shall organise and control activities in the Area, particularly with a view towards the administration of the resources of the Area, in accordance with this part of the Convention.'[62] This reformulation is important and vital for whilst in the S.N.T. the 'Authority' was conceived as directly responsible for the administration of the 'Area' on behalf of the community of states; in the R.S.N.T. on the other hand, the 'Authority' has no direct competence with respect to the 'Area', and its functions are limited to controlling activities (in principal undertaken by other entities) focussed essentially on resource exploration and exploitation.[63] The latter text defines the term 'activities in the Area' as 'all activities of exploration for, and exploitation of, the resources of the Area'.[64] These 'activities', according to the 1976 Text, could be conducted either by the 'Authority' itself or 'in association with the authority and under its control ... by State Parties or State enterprises or persons natural or juridical which possess

[61] Vide Res. 2574 D (XXIV); GAOR, 24th Session; Supp. 30, at 11, U.N. Doc. A/7630. In regard to this problem President Amerasinghe on the last day of the Geneva session appealed to delegates: 'to use their nationals from taking any action or adopting any j easures, which would place in jeopardy the conclusion of a universally acceptable treaty of a just and equitable nature.'

[62] U.N. Doc. A/CONF 62/WP 8/Rev. 1/Part I Article 21 (i).

[63] In the R.S.N.T. all references to any direct competence of the 'Authority' over the 'Area' have disappeared and have been replaced by references to 'Authority' control over activities in the 'Area'. This control is exercised only for 'the purpose of receiving effective compliance with the relevant, provisions of the Convention ...'

[64] U.N. Doc. A/CONF 62/WP 8/Rev. 1/Part I, Article I.

the nationality of States Parties ... when sponsored by such States ...'[65] It is clear to see that there is a substantive difference between the two texts; in the 1975 Text the 'Authority' is primary responsible for undertaking all activities in the 'Area', although it may also enter in some form of association with other entities. In the later Text, State parties and private enterprises are placed virtually on the same footing as the 'Authority' itself.[66]

Another major change which came about through the 1970 Text, and which many states particularly the developing states consider vital, is that all references, to the equitable sharing by states in the benefits derived from activities in the 'Area' has been removed. Reference to equitable sharing has, however, been retained regarding the financial and economic benefits.

At the fifth session the different approaches to the system of exploitation were produced by the USSR, the U.S.A. and the 'Group of 77'. The Soviet Union wanted to utilise the 'Authority' to direct the activities of states and to regulate fiscal and administrative matters. It could undertake its own activities, but could not acrry them out on a scale such that the area involved exceeded that allocated to States for exploitation purposes. Individual parties would be excluded if they lacked state sponsership.[67]

The American proposal allows a dual access, the 'Authority' would be forbidden to impair the rights granted under the seabed part of the convention. Title to resources would vest in a contractor at the time of a successful recovery, pursuant to contract. The right to let contracts would be automatic, provided financial guarantees to the Authority were met.[68]

The developing world called again for a strong 'Authority' which would have full and effective control over the exploitation of resources within the 'Area'.[69] It would also have the exclusive

[65] U.N. Doc. A/CONF 62/WP 8/Rev. 1/Part I Article 22 (1). Vide also W. Sullivan 'Sea Mining: Difficult but not Impossible' New York Times Nov. 21, 1976 Para. 4 Page 9.

[66] Vide: D. J. Attard: 'Will Malta replace Jamaica as home for ISA?' S.T.O.M. May 22 1977 (Malta).

[67] It is interesting to note that the reason behind the Soviet exclusion of private independent entities was based on their interpretation of the concept of the 'common heritage of mankind.' It was claimed that only states who were the juridical representatives of mankind under International Law, could exploit and explore that area belonging to the 'common heritage of mankind'.

[68] Vide U.N. Doc. Press Release SEA/235; Sept. 9, 1976.

[69] The most extreme among the developing countries, such as Algeria, Kuwait, Libya and India would like to give ultimate and unrestricted

right to conduct the said 'activities', either through its proposed executive organ 'The Enterprise' or through the help of private parties pursuant to contract. In either case the 'Authority' would retain 'full and effective control over the activities in the Area'. There was also a natural desire to ensure that developing countries would be entitled to certain priorities and all private parties, including states, would have to apply to the 'Authority' or the 'Enterprise' in order to engage in exploitation within the 'Area'. Furthermore, they denounced the proposals of the two superpowers, as failing to consider the concept of mankind's common heritage of the oceans.

As between these contrasting positions, the 1976 Text reflects a compromise, so far unsatisfactory to and side. In fact throughout the fifth session no side gave ground. As a result, the discussions in Committee I were primarily limited to procedural debates, and to the kind of non-substantive rhetoric heard three years previously at the second session in Caracas. Disagreement remained so widespread, that the President of the Conference, obtained the agreement of the Conference that it would devote the first three weeks of the next session mainly to the regime of the deep seabed, with heads of delegations expected to conduct the negotiations.

Conclusion

If the treaty produced by U.N.C.L.O.S. III is to be truly meaningful, it must not only deal reasonably with all specific issues but, more importantly, it must justify acquiescence in its terms on the basis of the broader purposes of establishing an equitable system of order for the oceans. In this regard two elements are important: first, the treaty must be widely accepted by all segments of the international community; secondly, it should provide a peaceful and compulsory settlement of disputes arising under the treaty must be ensured.[70]

Failure to reach agreement on the three main critical issues discussed above could mean the failure of the whole Conference; with its failure all issues that have so far been resolved will go down the drain. For example, there is considerable agreement on a

power over to the Assembly rather than the Council of the 'Authority' where voting is on a one-national one-vote basis. In addition they would like to see the Enterprise as the sole exploiter of the deep seabed.

[70] Vide: A. Pardo's settlement on Dispute Settlement at U.N.C.L.O.S. III (April 8); S.T.O.M. April 25th, 1976.

12 mile territorial sea, a 200-mile exclusive economic zone that will add resource control to the coastal state, the need for new dispute settlement procedures, and the transit to the sea for land-locked states. In fact, negotiations have gone a long way since Caracas in 1975 where delegations were advocating hardline nationalistic views and spurned accomodation.

In the final analysis, U.N.C.L.O.S. III must be seen from a wider perspective. Inescapably, these negotiations pose the broader issue of world order. As U.N. General-Secretary Waldheim made clear in his inaugural address to the New York session of the Conference: 'We will have lost a unique opportunity, and one that may never occur again, if the uses made of the sea are not subjected to orderly development for the benefit of all, and if the law of the sea does not succeed in contributing to a more equitable global economic system.' For, he concluded 'it is not only the law of the sea that is at stake. The whole structure of international co-operation will be affected, for good or for ill, by the success or failure of this Conference.'[71]

[71] Vide U.N.C.L.O.S. III Official Records Volume 5 Page 3.

THE ELEMENTS OF CRIME

ELSPETH ATTWOOLL

APART from those offences that are defined to exclude such considerations,[1] the commission of a crime is normally understood to involve the presence of *mens rea* on the part of the actor. And the corresponding maxim *actus non facit reum nisi mens sit rea* is a well established one.

A crime is thus taken, standardly at least, to be comprised of two main elements: the actus *reus* or guilty act, comprising all the physical or material ingredients of the crime; and the *mens rea* or guilty mind, comprising all the mental ones. Within this traditional dichotomy, the *actus reus* is seen as an event occurring in space and time and, as such, open to observation and verification. Although brought about by the actor and hence ascribable to him it is not in any sense part of him. The element of *mens rea*, however, while also accepted as existing in space and time, is not observable and is, hence, unverifiable. And, although it must be imputed to the actor, it is internal to him and thus an aspect of him.

On the above account, then, a crime consists in two separate elements linked through the actor – a guilty act perpetrated by him and a guilty mind with respect to it on his part. This account is, however, too simplistic by far and highly misleading in consequence.

In the first place it may well be the existence of a guilty mind on the part of the actor that renders an otherwise innocent act of his a guilty one. In fact the whole import of the maxim *actus non facit reum nisi mens sit rea* is to the effect that it is, in whole or in part, the presence of *mens rea* that qualifies an *actus* as *reus*.

Gordon recognises as much when he writes 'strictly speaking it is improper to call any situation an *actus reus* unless it was created with *mens rea*', although he rather detracts from this recognition by adding 'but it is possible and convenient to treat mens rea as different from any other defeasing factor. The term "actus reus" can then be used for situations that would be crimi-

[1] Strict liability offences as created by statute, prominent in e.g. road traffic and food and drugs legislation.

nal were they accompanied by mens rea; a term is necessary for all the objective or external ingredients of a crime and "actus reus" is the obvious one to use'.[2]

Such a resolution of the problem is not, however, altogether satisfactory. One may define homicide as the destruction of a self-existent human life. Homicide, then, clearly qualifies as an *actus*. But not all homicide is necessarily criminal – it may well not be so where casual or coerced or justifiable.[3] Thus the destruction of a self-existent human life may not be an *actus reus*; rather, the *actus reus* 'homicide' is the destruction of self-existent human life in a particular kind of way – a way typically characterised by *mens rea*.[4]

Thus the forbidden or guilty act and the guilty mind do not exist side by side. Instead, the forbidden act involves the presence of a guilty mind on the part of the actor among the elements by which it is defined. Accordingly, it becomes apparent that the term *actus reus* does not merely serve to identify the physical or material, objective or external ingredients of a crime but rather comprises the totality of the elements involved. The *actus reus* and the *reum* or crime are one.

Various objections, however, may be raised to this equation. First, it leaves us without any term for the physical or material, objective or external ingredients of a crime, taken in isolation from the mental ones. But it will be contended below that such analytic isolation is anyway undesirable.

Secondly, it may be argued that to equate the *actus reus* and the crime is to leave us without means of distinguishing between a crime as a category of forbidden human behaviour and some particular manifestation of it: that the term crime should be reserved for the category and the term *actus reus* for the individual occurrence.

It is, of course, obvious that each actual instance of, say, 'homicide' will differ in terms of person, time, place method etc. from any other. But so equally, does each individual example of a table or chair differ, in some measure at least, from any other. And we do not feel any need to use different terms for designating

[2] Gerald H. Gordon, *The Criminal Law of Scotland*, (Edinburgh, 1967) p. 60.

[3] By accident or mischance, under force or duress, in the furtherance of public justice or out of necessity or in self-defence.

[4] Or, on the kind of account given by H.L.A. Hart in 'Legal Responsibility and Excuses' in *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford, 1968), pp. 28-53, in a way characterised by absence of the excusing conditions that negate *mens rea*.

tables and chairs as class concepts and actual examples of tables and chairs. Further the term *actus reus* is preferred for analysis since it gives some indication of the factors to be analysed and lacks the emotional connotations of 'a crime'.

Thirdly, the equation of the *actus reus* and the crime may be said to ignore the fact that some, although relatively few, crimes are constituted by omissions rather than acts. 'Failing to observe a traffic sign' might be cited as an instance of such. It has sometimes been argued that no real problem is involved here and that the distinction between acts and omissions is a false one, since in all cases statements about omissions can be reframed in positive terms. Even if this is so, the approach seems an unnecessarily laborious one and liable to introduce distortions. And, although the discussion below concentrates on acts, it is hoped that the analysis given will be accepted as equally viable where omissions are concerned. If so, the alleged defect in the equation may be remedied simply enough either by subsuming omissions under the class of acts or, probably more properly, by equating instead an *actus vel omissus reus* and a crime.

But, whether or not the main equation is accepted, enough should have been said to show that *actus reus* is not a simple concept. Nor, as investigation will demonstrate, is *mens rea*. The present intention is to consider more closely what elements are involved in the concepts of *actus* and *mens rea* and to point to the ways in which these may combine to form an *actus reus*.

Actus

If one accepts, temporarily, the explanation given of the *actus* as the physical or material, objective or external, ingredients of a crime, it may be seen to be divisible into three parts. These are (a) the action, (b) the material circumstances of the action and (c) the consequences or results of the action-in-material-circumstances.

By action here is meant simply a muscular movement.[5] It is at this juncture that the only difference between an analysis of acts and an analysis of omissions occurs. In the case of omissions there is a corresponding lack of muscular movement – there is an inaction. But this inaction occurs in material circumstances and may be followed by consequences in precisely the same way as an action.

By material circumstances are meant those practical contexts

[5] Contrary e.g. to H.L.A. Hart, 'Acts of Will and Responsibility', *loc. cit.*, pp. 90-112.

within which the action takes place. Thus the movement which may be termed 'crooking a finger' takes on a different character according as the finger is already around the trigger of a gun or is being held up to a friend. In the first case, the activity becomes that of shooting, in the second case that of beckoning.

By the consequences or results of the action-in-material circumstances are meant those events we treat as causally connected with it, such as the bullet entering the person at whom the gun was pointed or the approach of the friend beckoned to. However not all crimes include any consequences of the action-in-material-circumstances as part of their definition. Theft[6] and indecent exposure[7] are clear examples of what may be termed conduct, as opposed to result, crimes.[8] And the relationship between circumstances and consequences is rather more complex than it initially seems.

First, the dividing line between a circumstance and a consequence is not always an easy one to draw. For example, the fact of the bullet leaving the gun may be seen as a consequence of the trigger being pulled. But it may equally be seen as a circumstance precedent to someone being hit by that bullet. And the latter event may itself become a circumstance precedent to the death of the person hit.

Result crimes are usually defined by what is regarded as the end point in some causal chain[9] and all events prior to this are treated as circumstances precedent to it. Nonetheless it is possible, and sometimes necessary, to make a distinction between the immediate and the consequential circumstances of an action – as, for instance, between the immediate circumstance of the finger being crooked round the trigger of a gun which is loaded and the consequential circumstance of a bullet leaving the muzzle. For the point or points in the causal chain at which the various questions relating to *mens rea* are asked may be effective in determining the nature of the *actus reus* committed or, indeed, whether the accused person is guilty of any crime at all.[10]

[6] Commonly defined as 'the dishonest taking of the goods of another'. See Gordon, *op. cit.*, pp. 401-2, 406.

[7] Exposure of those parts of the person usually concealed to a particular person or persons in a public place or to a person not consenting as a gesture of sexual invitation or gratification on the part of the accused. See Gordon, *op. cit.*, pp. 848-9.

[8] Cf. the distinction made by Gordon, *op. cit.*, p. 61.

[9] Cf. the distinction in English law between grievous bodily harm and murder.

[10] See, for example, the case of *Chandler v. D.P.P.* [1964] A.C. 763.

Secondly, human behaviour never occurs in isolation. How we describe the behaviour of X, what we consider to be his *actus* at any given time, may depend largely on our purpose in describing it. Thus it is possible to make the following statements, all of them true, at one and the same time: 'X is changing gear', 'X is driving', 'X is driving a foreign car', 'X is going into town' and 'X is going shopping'. Further, if we ask the question 'why?' in relation to all these statements in turn, we may obtain the following answers. 'Because he is slowing down for a red light', 'Because he is in a hurry', 'Because he prefers foreign cars', 'Because he wants to do some shopping' and 'Because there is no food in the house'.

Thus, no matter what behaviour we choose to isolate as an *actus*, it will always have circumstances and consequences beyond itself.[11] There are thus certain practical and theoretical difficulties in determining what, within certain causally related events, is to be accounted an *actus* for the purpose of allocating it to some particular category of *actus reus*.

For example, where consequences are concerned, when is the death of the person injured too remote from the injury received for it to be appropriate to find the gunman guilty of murder? What should happen when some *novus actus interveniens* alters the course of events – as for example a bungled operation 'causing' the death of a person otherwise not seriously injured? Where has an *actus reus* been committed if the *actus* is 'split', the initial action occurring in one jurisdiction and the consequences in another.[12] And such questions are further complicated by the introduction of matters relating to *mens rea* – for instance, how far should the *mens rea* of the accused in relation to the forseeable consequences of his action be projected onto the unforseeable ones?

Further, while an *actus* is usually conceived as having a defined starting point, namely the muscular movement initiating the consequences, the situation is rarely as simple as this. Some judgment has to be made as to what it is that sets off the causal chain. And the movement selected may be more or less remote from the consequences or, it may be not one movement but several. A clear example of this is that of the motorist who, though unconscious at the time of crashing, is nonetheless convicted of a

[11] As Salmond points out, an act has no natural boundaries, *Jurisprudence* (11th edn.) pp. 401-2.

[12] As for instance where a shot is fired across a border or poison is sent from one country to another and death or injury results.

driving offence – his *actus* being taken to have begun at the time of his overconsumption of alcohol.

And, even though an *actus* may be taken to have certain physical movements as its starting point, these movements themselves are the product of some cause. The question thus arises as to the extent, if any, that factors determining the action should be regarded as part of the *actus*. And, as an examination of the elements of *mens rea* will show, the law does not treat them as totally irrelevant to it.

Especially in a system which relies heavily on precedent, any particular category of *actus reus* is liable to constant modification by reference to the forms of *actus* that are treated as falling within it. But the physical, material or external aspects of the actus *reus* are not as 'objective' as they might at first seem. For the delimination of the *actus*, in terms of initial cause and final consequence, is clearly an evaluative process, conditioned largely by the purpose for which it is done.[13]

But while matters of the above kind are cause-related, questions of causality come into more direct account in establishing the coherence of the *actus* as delimited – in justifying the linking of the action-in-immediate-circumstance, the consequential circumstances and the consequences. And causal judgments, having their basis in induction, can never be certain but only more or less probable. Thus the greater the number of consequential circumstances that intervene between the action in immediate circumstances (the initial cause) and the final consequences, the less reliable the judgments made.[14]

Thus the concept of an *actus*, even insofar as it can be analysed in isolation from any mental elements, is not an altogether straight-forward one. And it becomes even less so once questions of *mens rea* are admitted.

Mens Rea

To *mens rea* questions of (a) voluntariness and (b) intention, recklessness and negligence are usually regarded as appropriate. And matters of motive are sometimes also brought into account.

It has, however, been argued that the elements of *mens rea* are not open to any positive explanation. For example, H.L.A. Hart has written '... what is meant by the mental element in criminal

[13] H.L.A. Hart & A.M. Honoré, *Causation in the Law* (Oxford, 1959), Chap. II.

[14] And the connections established by the law may well be tenuous ones – e.g. *R. v. Jarmain* [1946] K.B. 74.

liability (*mens rea*) is only to be understood by considering certain defences or exceptions, such as Mistake of Fact, Accident, Coercion, Duress, Provocation, Insanity, Infancy, most of which have come to be admitted in most crimes, and in some cases exclude liability altogether, and in others merely 'reduce' it. The fact that these are admitted as defences or exceptions constitutes the cash value of the maxim 'actus non ...'[15]

And, he continues, 'in pursuit of the will-o'-the-wisp of a general formula, legal theorists have sought to impose a spurious unity ... upon these heterogeneous defences or exceptions, suggesting that they are admitted as merely evidence of the absence of some single element ('intention') or in more recent theory, two elements ('foresight' and 'voluntariness') universally required as necessary conditions of criminal responsibility'.[16]

Hart admits that it is *possible* to represent the admission of such defences as showing the existence of a mental element or elements but argues that in order to determine what they are and 'how their presence and absence are established it is necessary to refer back to the various defences; and then these general words assume merely the status of convenient but sometimes misleading summaries expressing the absence of all the various conditions referring to the agent's knowledge or will which eliminate or reduce responsibility'.[17]

Hart's argument is not without force and it is substantiated in some measure by the operation of the legal process, in the United Kingdom at least. For, while in relation to the '*actus*' it is for the prosecution to prove its case beyond reasonable doubt, the onus shifts where *mens rea* is concerned. It becomes for the accused to show, if only on the balance of probabilities, that he acted while insane or by mistake or in self-defence. If he is successful in this then the existence of *mens rea* is negated and he is not open to conviction for the crime.

Hart's analysis does provide a valuable caveat against attempting to impose a spurious unity of the kind he rejects. It is clearly unsatisfactory to build a positive and unified concept of *mens rea* on the basis of a heterogeneous collection of instances of its absence. It appears equally unsatisfactory, however, to have no greater grasp of *mens rea* than that which may be obtained by setting out a list of excusing conditions.

[15] 'The Ascription of Responsibility and Rights' *Proceedings of the Aristotelian Society*, XLIX (1949), pp. 171-94.
[16] *ibis.*
[17] *ibid.*

In fact, Hart's analysis ignores the implications of the very variety of the defences to which he points. For it is not only convenient but sometimes imperative to classify such defences, to the end of showing the level at which they operate in relation to the *actus*. And, within these limits, the defences can be seen as an expression, albeit in negative form, of positive theses about what is involved in human behaviour.

There exists, for example, a common – although perhaps untenable[18] – thesis about human beings to the effect that they are possessed of free will – that they are capable of exercising choice in and control over what they do. But even those most convinced of the thesis admit that there are circumstances in which this does not apply. Normally behaviour is voluntary but exceptionally it is involuntary and in such event it is inappropriate[19] to praise or blame the 'agent' for what has occurred.

The precise conditions under which behaviour is accepted to be involuntary are subject to considerable variation. In some legal systems they are limited to instances where the agent is unconscious or in some other automatic state – to cases where it might acceptably be argued that he was not really 'an agent' or 'acting' at all. But other systems also admit behaviour to be involuntary where it occurs under coercion – whether it be occasioned by direct physical force or some subtler means.

What such conditions of involuntariness have in common, however, is the idea that the exercise of choice and control by the agent has been vitiated. And the question is raised whether matters of voluntariness do properly belong to the realm of *mens rea*. For, in the cases of unconsciousness and automatism at least, it can be argued that they do not simply disqualify the *actus* from being *reus* but rather preclude the constitution of an *actus* at all.[20] In such cases the behaviour is traced to certain physiological causes,[21] and questions about the insights and attitudes of the accused are thereby excluded. Certain extreme cases apart,[22] the same does not apply where coercion and duress are concerned.

[18] If the claims of determinists are to be believed.

[19] Whether because pointless or unjust.

[20] It can thus be argued that involuntariness is a proper defence where strict liability offences are concerned. Cf. *Hill v. Baxter* [1958] 1 Q.B. 277.

[21] The courts are reluctant to admit automatism as a defence unless it can be traced to such. See the remarks of Viscount Kilmuir in *Bratty v. Attorney General for Northern Ireland* [1963] A.C. 386.

[22] e.g. hypnotism, direct physical force.

Here there is an *actus*, albeit a reluctant one, but the coercion or duress may preclude it from being *reus*.[23]

These two types of case where behaviour may be treated as involuntary have a common genesis in the view that certain causal factors may operate on human beings so as to render nugatory any choice or control on their part. Yet the cases differ in terms of the nature of the causal factors involved and as to the degree to which these factors are regarded as determining behaviour.

Yet, even though the factors of the second type may be seen as negating *mens rea*, they are clearly not internal to the 'psyche' of the accused. It is the existence of the coercion or duress, and not the fear or other emotions engendered by it, that exculpates. Thus, on a return to the analysis of an *actus* as an action-in-circumstances etc., coercion and duress can be seen as ranking amongst the material circumstances that surround the action. And to claim that it is lack of *mens rea* here that precludes the *actus* from being *reus* is only to justify the inclusion of coercion and duress as excluding conditions – it is not to explain how the concept operates in logical and practical terms.

To the mental state of the actor questions about motive and intention are, however, properly appropriate. But the criminal law treats the motives of an accused person as largely irrelevant. While they may be used to explain his *actus* and even to diminish his liability to punishment, they do not affect its nature. At least, this is the theory. However, to date no really satisfactory account of motives has been given and a similarly satisfactory account of their operation in the criminal law must be dependent on such.

Although no attempt at such a philosophical account will be made here, it would seem appropriate to mention a few of the senses in which 'motive' may be used. For example, 'motive' may characterise the dominant emotion attendant upon the action – pity, fear, anger; or a character trait of the actor – greed, vanity; or the type of satisfaction the *actus* is expected to yield – money, revenge.

For the most part, the law is not concerned with motive in any of these senses. A fraud is still a fraud whether perpetuated as a practical joke or for pecuniary advantage.[24] And words such as 'wilfully' or 'maliciously' in an indictment are treated as meaning simply intentionally or recklessly. Equally 'corruptly', in one

[23] Or in some systems merely diminish liability to punishment.
[24] Gordon, *op. cit.*, p. 559.

English case[25] was held to mean 'deliberately offering a person money with intent that he should enter a corrupt bargain' and the Court of Criminal Appeal held that the accused's motive – that of actually exposing corruption – was irrelevant. And, in *Chandler v. D.P.P.*,[26] where the accused were charged with conspiring to enter an aircraft base for a purpose prejudicial to the interests of the state, their motive, that of bringing about nuclear disarmament, was ruled out of account.[27]

A case in which matters of motive were, arguably, treated as relevant, however, was that of *R. vs. Steane.*[28] Steane was charged under the Defence Regulations with doing an act likely to assist the enemy with intent to assist the enemy. The act concerned was that of broadcasting for the Germans, under the threat that his wife and children would be taken to a concentration camp if he did not. Steane was acquitted on appeal on the basis that, since he was acting under subjection, he could not be presumed to have intended to assist the enemy, even though this was a natural and probable consequence of his broadcasting.

This decision has been strongly criticised. Glanville Williams[29] has argued that the case should properly have been decided on the basis of duress. And Gerald Gordon has written that it 'involves a departure not merely from the rule that a man is presumed to intend the natural consequences of his acts, if such a rule exists, but from the generally accepted view that intention and motive are separate, that the law is interested only in intention in ascribing responsibility, and that a man must be taken to intend the certain consequences of his actings, whether or not he desires them, and for whatever reason he embarks on them'.[30]

Were the test meant to be an entirely objective one, however, the second part of the charge would be redundant. And while it is indeed proper to keep separate the concepts of intention and motive, it might be argued that the decision can be justified on two separate grounds. First, that the word 'intent' was inappropriately used in this context and that the reference was to motive, taken in the sense of the type of satisfaction that the *actus* was expected

[25] *R. v. Smith* [1960] 2 Q.B. 423. However, see *Campbell v. H.M. Adv.* 1941 J.C. 86 and the doubts expressed by Gordon (*op. cit.* pp. 947-8) as to whether the same decision as in Smith would be reached in Scotland.

[26] [1964] A.C. 763.

[27] Their purpose was treated as that of obstructing aircraft.

[28] [1947] 1 K.B. 997.

[29] Glanville L. Williams, *Criminal Law: The General Part* 2nd edn. (London, 1961) p. 41.

[30] Gordon, *op. cit.*, p. 389.

to yield. More plausibly, perhaps, it could be maintained that a matter of intention was indeed involved, but that if any subjective account of intention is to be given it must be heavily dependent on inference from motives. And, the motive in Steane's case being alternatively describable as fear for his family or the protection of his family, an intention to assist the enemy could not be inferred from it.

Nor are motives solely relevant in respect of the consequences of an action. For example exposure of 'those parts of the person that are usually concealed' is only criminal where, *inter alia*, 'the exposure is made to a particular person or persons in such a way as to indicate an improper motive on the part of the accused, that is to say, where the exposure is a form of sexual gesture or invitation, and is something from which the exposer derives gratification, something which is for him a sexual act'.[31]

And there are instances where motives are taken into account in a more general fashion. As Gordon writes 'Where a crime has been committed in the absence of circumstances indicating a corrupt and malignant disposition or wickedness, or, as it is often called, malice, then, even although it has been intentionally committed, and so is *reus* according to modern ideas of *mens rea*, the court will almost certainly take the absence of malice into account in passing sentence'.[32] Further, the jury may actually reduce the charge of murder to one of culpable homicide on this basis, if indeed the prosecution has not already limited itself to the latter indictment.

Thus motives, in the possible senses of the term taken here, may qualify behaviour in such a way that it either falls within the scope of one *actus reus* rather than another or else does not fall within the scope of an *actus reus* at all. Yet the role accorded to motives by the law is both an inconsistent and an incoherent one – and is probably dictated more by policy considerations in individual cases than by any other factors. If, however, as seems likely, motive explanations are a species of causal explanations, then some pattern might be made to emerge by linking them with causal factors that are accepted as precluding the constitution of an *actus reus* or mitigating liability for it. Thus, as already happens with coercion, duress and provocation, one would look to the objective state of affairs that engenders the motive rather than to the motive itself.

Such an approach would not, though, fully illuminate the role

[31] Gordon, *op. cit.* p. 848. See *M'Kenzie v. Whyte* (1864) 4 Irving 570.
[32] Gordon, *op. cit.* p. 195.

played by motive in relation to intention. To appreciate why this is so, it is necessary to look more closely at the concept of intention. And such a procedure reveals that, in terms of *mens rea* at least, intention is to be understood in at least two senses.

The first sense of intention is equivalent to knowingly, awarely, deliberately. This involves knowledge and awareness of the action and its immediate circumstances and foresight of the consequential circumstances and consequences. It is in fact difficult to conceive of an action (in the sense of muscular movement) of which the actor is unaware unless that movement is anyway already classed as involuntary,[33] although it is possible that such may occur. However, there are clearly numerous instances where people are unaware, or else not fully aware, of the circumstances surrounding their actions. And there are also numerous instances where people, although well enough aware of the circumstances of their actions, do not have any foresight of the natural and probable consequences of that action-in-circumstances.

For the most part, if it can be established that a person was unaware of the circumstances of his action, he will not be said to have acted intentionally in this first sense. Thus someone who, by genuine mistake, puts poisonous crystals instead of sugar into a cup of tea cannot be said to have intended to poison the tea. And, obviously, someone who is unaware of the true circumstances of his action cannot have foresight of its consequences and thus cannot be held to intend them. However, the law, for practical reasons, tends to rather more objective tests than these, operating on the basis of the patentness of the circumstances[34] and the forseeability of the consequences to the ordinary, if somewhat mythical, reasonable man.

It is at this level of intention that questions concerning the sanity of the accused are mainly treated as relevant. This is pointed to by the M'Naghten Rules which obtained in England from 1843[35] until the Homicide Act of 1957. They read in part: 'To establish a defence on the ground of insanity it must be clearly proved that, at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or,

[33] Reflex actions also falling into this category according to the criteria discussed earlier.

[34] The law, in Scotland at least, does not expect knowledge of latent defects, such as a weak heart or an 'eggshell' skull.

[35] *R. v. M'Naghten* (1843) 10 Ch. & F. 200. The rules, in whole or in part, have also been incorporated into the law of a number of other systems.

if he did know it, that he did not know he was doing what was wrong'.[36]

The M'Naghten rules, however, were never fully adopted into Scots law, being regarded as unduly restrictive. And it is, in fact, difficult to make any clear statement as to how insanity is defined in Scotland for legal purposes. It is regarded as appropriate to ask, though, whether the accused was capable of a normal understanding of the facts, a sound assessment of their significance and a sane appreciation of right and wrong.[37] Whether a person is adjudged insane will be dependent on the extent to which his or her reason is regarded as alienated in any or all of these respects.

The alternative to asking such questions at the level of intention is to adopt what is known as the causal approach. This involves a decision by the jury as to whether the accused was suffering from 'a mental disease, and whether the killing of his wife was the product of such disease'.[38] As Gordon points out[39] this approach gives rise to the considerable, but not necessarily insurmountable, problems that occur whereby causal judgments are concerned. Whether its greater flexibility nonetheless renders it preferable to the 'intentional approach' is a moot point.

It must, however, be admitted that testing insanity in terms of intention only is insufficient. For an accused person may be fully aware of the nature and quality of his act, but nevertheless be incapable of controlling his part in it. And, in such instances, the questions to be asked are clearly causal ones. Yet arguments as to their precise status are often somewhat confused.

In *Attorney-General for South Australia v. Brown*[40] it was argued that the defence of irresistible impulse 'introduces a volitional exemption from liability which (unlike the cognitive rules of *mens rea*) is wholly unknown to the law'. This statement appears somewhat odd in view of the traditional equation of volition and voluntariness and the extent to which the law excludes involuntary 'acts' from its scope or limits liability for them. The confusion probably arises from the fact that, on this traditional view, the 'actor's' behaviour is regarded as involuntary because the element of volition is lacking – while with irresistible impulse it is,

[36] Part of Rule 3 as set out by Gordon (*op. cit.* at p. 307) and as expressed by the judges in the House of Lords.

[37] As opposed to mere capacity to formulate ideas of these.

[38] An American (New Hampshire) case: *State v. Pike* 49 N.H. 399, per Doe, J.

[39] Gordon, *op. cit.* p. 315.

[40] [1960] A.C. 432.

rather, there to an overwhelming extent. But if, as suggested earlier, voluntariness is to be properly understood in terms of the operation of causal factors that render nugatory any possibility of choice or control on the part of the accused, this objection falls.

The other problem relating to irresistible impulse is raised by Gordon as follows 'Motive is always regarded as irrelevant to responsibility[41] – it does not matter whether A steals out of greed or to save his starving baby – and irresistible impulse is a defence that the motive of the crime was the desire to commit the crime'. But he continues 'It should be obvious, however, that where this desire is the result of insanity the question of motive does not really enter at all unless insanity is to be described as a motive. And if it is said that the motive was insanity it should be obvious that the accused was not responsible since, so to speak, "Twas not Hamlet wronged you, but his madness"'.[42]

And, in fact, this appears to be the basis of operation of the concept in most, if not all, the legal systems that recognise it. Irresistible impulse, like automatism, is not a category per se – it must be linked to 'a disease which renders the accused incapable of acting according to his knowledge of the wrongness of the act'.[43] Thus mental disease, in relation both to automatism and irresistible impulse, ranks along with physical disease or injury, coercion, duress and provocation amongst the causal factors that may be treated as rendering conduct involuntary.

Another point, however, arises from *Attorney-General for South Australia v. Brown*, and that is the claim that the rules of *mens rea* are cognitive. This is clearly so in relation to the sense of intention discussed to date. But there is a second sense in which it may be relevant to the legal process. And this relates to the consequences of the action-in-circumstances. It is argued that for an *actus* as a whole to have been intentional the accused must not only have been aware of the nature of his action-in-circumstances and had foresight of its consequences, he must also have intended these consequences.

There has been considerable philosophical argument as to what is meant by intention in this second sense. It has been variously explained in terms of desire for and expectation of the consequences. But one may desire certain events to occur without thereby intending them to do so. However much I may desire good weather tomorrow, I cannot intend the sun to shine. Nor, even though from

[41] This assertion has been disputed earlier in the present text.
[42] Gordon, *op. cit.* p. 311, as also the previous extra.
[43] Gordon, *op. cit.* p. 310.

the weather forecast I may expect good weather tomorrow, I cannot be said to intend that it should happen.

Without going into any detailed analysis of intention in this second sense, it is suggested that it cannot properly be explained in isolation from intention in the first sense; so also that it cannot properly be explained in isolation from the action or inaction deemed to be the cause of the consequences. Thus, tentatively, the consequences of an action are intended insofar as the action is performed (in knowledge of the circumstances and foresight of the possible consequences) with the purpose of bringing about those particular consequences and no others. (And it would seem that motives must form at least part of the basis of the inference and imputation of such purpose).

The main defect of this attempted definition is that it may be far too narrow for legal purposes. For example, if someone throws a bomb into a crowded railway compartment and succeeds in his aim of hitting the Crown Prince of Ruritania, he will be guilty of murder – but only of the Crown Prince. Since the death of any other members of the party was a possible but not purposed consequence of his action, his crime in their case is merely that of culpable homicide.

For reasons such as this, the law does not normally embrace such a subjective view of intention but rather deems a man to intend the certain or virtually certain consequences of his actions. This does, however, distort the concept of intention and it is probably more satisfactory to adopt the Scots solution and to extend the scope of type of *mens rea* relevant to murder, viz: 'Murder is constituted by any wilful act causing the destruction of life, whether intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences ...'[44]

By recklessness is to be understood the presence of intention in the first sense of the term – namely awareness of the circumstances and foresight of the consequences – with an action perpetrated in disregard of the latter. The degree of recklessness involved is to be judged by reference to the blameworthiness of the accused and this in turn is affected by the nature of the consequences that actually occurred and the likelihood of their having done so.

There are obvious disadvantages in requiring a distinction to be made between different types of recklessness, particularly as

[44] J.H.A. Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (Edinburgh, 1867) 5th edn. 1948 p. 89.

evaluative criteria are involved and no hard and fast line can be drawn between the two. But some distinction must be made if a corresponding classification into murder and culpable homicide is to be maintained. And the problems involved in the opposite approach of stretching the concept of intention are even greater.

For some time in England, following the case of *D. P. P. v. Smith*,[45] a person was deemed to intend not merely the certain or virtually certain consequences of his action but also the natural and probable ones. But such an approach leaves little or no scope for the concept of recklessness, besides judging the accused by a more objective standard than is always warranted.

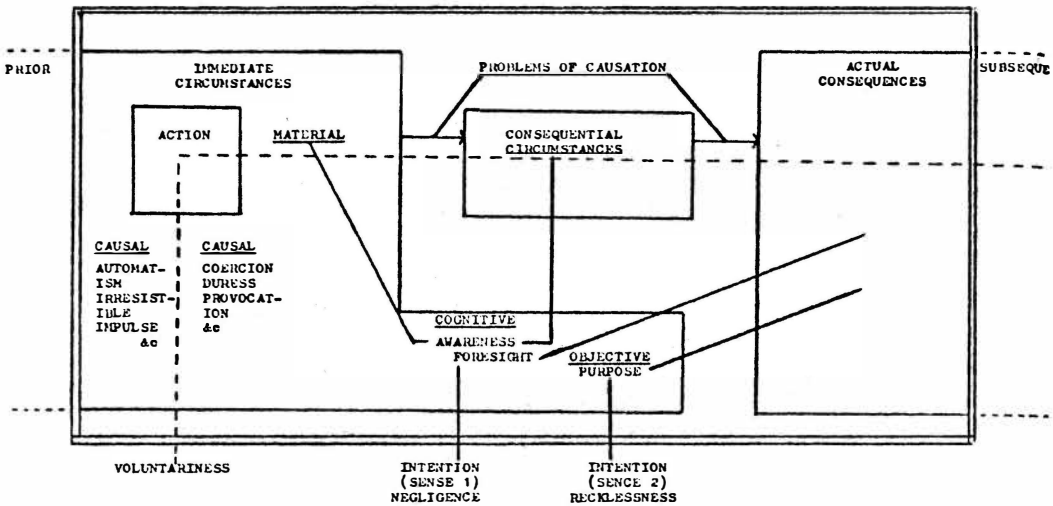
It should be added, though, that the concept of recklessness is not always well defined. Theoretically it involves a subjective test – a judgment about the actual state of mind of the accused: to the effect that awareness and foresight are present but purpose is lacking. And to this, in Scots law, may be added an objective test – an assessment of the culpability of the accused, based on what a reasonable man would do, given such awareness and foresight.

Negligence, by comparison, theoretically involves either lack of awareness or lack of foresight or both, with culpability for such where a reasonable man would have known or foreseen – again a subjective and an objective test. But in practice the subjective basis of both recklessness and negligence is often ignored. Given that intention in the second sense is not alleged, questions about intention in the first sense are ignored. Instead, the behaviour of the accused is judged by reference to the standard of the reasonable man and the line between recklessness and negligence is drawn by reference to the grossness of the aberration from this standard.

Given all the foregoing it does seem clear that a crime does not consist in a simple conjunction of *actus rea* and *mens rea*, as traditional theory would suggest. And the actual complexity of the situation can be demonstrated, although not exhaustively,[46] in the following diagrammatic fashion:

[45] [1961] A.C. 290, until reversed by the Criminal Justice Act, 1967, s. 8.

[46] e.g. the diagram ignores any role played by motive and oversimplifies certain relationships. For example provocation requires awareness of prior and perhaps immediate circumstances and duress foresight of consequences, though not necessarily ones part of the actus reus.



Thus, although the maxim *actus non facit reum nisi mens rea* indicates the proper path, it is far from giving a comprehensive map of the route.

VIOLENCE IN CONTEXT

VINCENT A. DE GAETANO

INTRODUCTION

'We live in an increasingly violent world.' This 'statement of fact' sums up one of the most popular ideas of our time, an idea that is affirmed and confirmed almost daily in the media's coverage of acts of brutality, aggression and violence. The message of the media is clear – violence is bad, abnormal, irrational and mindless, and its prevalence to-day is symptomatic of the ills of our society; senseless actions in a sick society; something must be done.

What history teaches us, however, is that violence is not atypical, or anomalous; on the contrary it is usual and endemic in the historical development of all nations. Virtually every study points to the fact that violence has been pervasive, and sometimes chronic, as far as history records. In an early study, Sorokin[1] surveyed the history of eleven nations over many centuries and concluded: 'Disturbances occur much oftener than is usually realised ... On the average of from four to seven years, as a rule, one considerable social disturbance may be expected. The fact that these phenomena occur so frequently confirms our conclusions that they are inseparable from the very existence and functioning of social bodies'. Sorokin also felt that he had been able to explode such myths as the belief that history exhibits a trend towards peacefulness, towards 'civilization', and that violence is thus atavistic, that only some countries are violent and not others, that outbreaks of violence occur only in cases of decay and decline and not 'in periods of blossoming and healthy growth'.[2]

In this short essay I propose to elaborate further on some of the

[1] *Social and Cultural Dynamics*, Vol. III: Fluctuation of Social Relationships, War and Revolution (Allen and Unwin) London, 1937.

[2] This conclusion contrasts sharply with the words attributed by the Italian philosopher and journalist Andrea Caffi to Condorcet, namely that 'the more (a) civilization will spread over the earth, the more war and conquests will disappear, together with slavery and poverty.' See, Caffi: *A Critique of Violence* (Bobbs-Merrill) N. York, 1966.

more popular 'myths' associated with violence as well as briefly go over the main theories that have been put forward in order to explain it. I make no apologies for attempting to simplify a topic that, is by its very nature, complicated with branches and offshoots in psychology, psychiatry, law, sociology, history and criminology. Nor is this essay intended as a phenomenological[3] account of violence over any given period of time or with reference to any particular country. My aim is simply to tackle the subject from a succession of different angles, all of which are relatively complex in themselves.

The Problem of Definition

A major problem in any essay on violence is how to define the word. There are many and varied forms of violence, and perhaps as many definitions. Indeed, one Swedish philosopher has entitled his essay 'Violence is a Porous Term'[4] and he goes on to explain that 'with porosity I mean that the borders of the term are not fixed in normal use of language. This non-determination is the very reason for the usefulness of the term in, for example, political propaganda'.

Among the many definitions of violence that have been proposed we find: 'behaviour designed to inflict personal injury to people or damage to property';[5] 'the intentional use of force to injure, kill or destroy property';[6] 'destructive harm ... including not only physical assaults that damage the body but also ... the many techniques of inflicting harm by mental or emotional means'.[7] These definitions valuable as they may seem, fail to take account of a very important distinction, namely the distinction between legitimate and illegitimate violence and, to carry the discussion into the field of the criminal law, the distinction between criminal and non-criminal violence. To-day's violence may often, through the passage of time, become tomorrow's heroism and martyrdom. The problem of legitimate or illegitimate violence is undoubtedly ex-

[3] By 'phenomenological' is meant the attempt to identify and describe the essences of experience as directly apprehended, without reference to any metaphysical or epistemological presuppositions.

[4] Tage Johansson: Om Väld-ett peröst begrapp, *Statsvetenskaplig tidskrift*, 1971.

[5] Graham and Gurr: *The History of Violence in America: A Report to the National Commission on the Causes and Prevention of Violence* (Bantam), N. York, 1969.

[6] Skolnick: *The Politics of Protest* (Clarion) N. York, 1969.

[7] Walter: *Terror and Resistance – A Study of Political Violence* (Oxford U.P.) 1969.

tremely complex. For example, a declared war, in which many thousands or even millions of men, women, and children are slaughtered is regarded as legitimate violence.[8] Yet undeclared acts of war, such as the IRA bombings in England are regarded as illegitimate violence although many fewer people are injured, maimed or killed. The fact that the action is regarded as terrorism (a convenient 'political' label) rather than the action of one sovereign State against another means that the violence is regarded as illegitimate and unacceptable.

A further example is provided by the resistance movements which operated during the Second World War. These carried out violent actions against the enemy occupying armies and were applauded by the population and regarded as heroes. Actions of a similar nature now against their own governments would be regarded as murder and high treason. Thus very often the distinction between legitimate and illegitimate violence is related to political and partisan perceptions and not to any intrinsic element of the act itself or to clear legal principles. Similar issues arise when lesser forms of violence in terms of physical contact are examined. For instance, in a game of rugby a good deal of physical contact takes place, sometimes of a very brutal nature, in which punches, kicks or vicious tackles may be aimed by one member of a team against a member of the opposing team. This is regarded as legitimate as long as it takes place during the hour and a half of play and on the playing ground. If the same behaviour took place in the dressing rooms or in a bar it would become a brawl and illegitimate, the police would intervene and the whole criminal process could be brought to bear against the perpetrators.

In an attempt to resolve the problem of the distinction between legitimate and illegitimate violence, Macfarlane[9] proposes the following definition: 'Violence is the capacity to impose, or the act of imposing one's will upon another, where the imposition is held to be illegitimate. Force is the capacity to impose, or the act of imposing one's will upon another where the imposition is held to be legitimate'. Though this definition does not avoid the subjective perception of the act in question, it emphasises that if we see an action as good or desirable we will tend to avoid calling it violent, but instead talk of *force*. Frequently, in fact, we ascribe

[8] One of the unresolved problems in the sphere of public international law is whether war or an act of war (other than resort to war in self-defence) can in any circumstances be *legal* in the light of the United Nations Charter and the judgements of the Nuremburg and Tokyo Tribunals.

[9] *Violence and the State* (Nelson) London, 1974.

to actions some particular quality that they do not in themselves possess; our judgement of the actions is contained in the words we select to 'describe' them.[10] We thus tend to 'see' violence according to our cultural, social and political values and biases. One recalls how in the Vietnam war, the Viet Cong regarded American military activity as violent aggression, whereas the U.S. Chief of Staff insisted that it was a show of force. The Communist take over of the South was hailed by Hanoi as the reunification of Vietnam; others saw in it the violent subjugation of a plucky little nation for whom freedom is nowhere in sight.[11]

We can add to this confusion by considering the possibility of verbal violence. Another form of violence is that which Tutt calls 'emotional violence' as the opposite of verbal violence, '... the emotional violence of strictly observed silence within a home, in which a father and mother refuse to talk to one another, the pregnant pause, these can be a form of violence to the emotions and the senses'.[12]

So the first and most important point about violence as behaviour is that it is not a homogeneous concept. It lumps together a whole range of behaviour, and all-embracing definitions and simple explanations cannot therefore be expected since it is unlikely that such heterogeneous behaviour could arise from one single cause.[13] Not surprisingly, most legislation refrains from giving one single

[10] This is one aspect of the *labelling theory* which one comes across in the literature on the sociology of deviance.

[11] Rulli: *La Guerra 'Americana' nel Vietnam* (ASCA) Rome, 1973.

[12] Tutt: *Violence* (HMSO) 1976. See also, Storr: *Human Destructiveness* (Chatto-Heinemann) Sussex U.P., 1972.

[13] Psychologists frequently distinguish between aggressiveness, aggression and violence. The word *aggressiveness* describes a state of mind, a tension which keeps the organism in motion until the motivation is reduced. This definition – a very broad one indeed – implies that aggressiveness is an essential state of mind without which the personality cannot develop and, in a wider context, without which a living being cannot take its place in the social and geographical environment. This 'state of mind' which aggressiveness constitutes does not necessarily lead to *aggression* itself. The word *aggression* takes us a step further, from a potentiality to an *act*, and this act is often defined as a form of behaviour aimed at the partial or total, literal or figurative destruction of an object or a person. Finally, the term *violence* is held to involve an *illegitimate* or at least *illegal* use of force. Hence psychologists and psychoanalists speak of a specifically *human* type of behaviour when talking of violence, because it is assessed by reference to rules or laws. See, Debuyst: Etiology of Violence, *Report of Conference on Violence* (Council of Europe), 1974.

definition of violence and sometimes refrains entirely from defining it; at other times, the constituent elements of violence as defined for legal purposes do not tally with popular notions of violent behaviour. All of this is certainly true of our criminal law (Ch.12, Revised Ed. of the Laws of Malta 1942) where the basic distinction is between public and private violence. *Private* violence constitutes in itself those offences belonging to the class of offences against the person or the liberty of the individual, such as illegal arrest, detention and confinement (Section 85), bodily harm caused to Judge, Attorney-General, Magistrate or Juror (S.93), wilful homicide (S. 225), involuntary bodily harm (S. 240), abandoning or exposing a child under seven years (S. 259); or it may constitute an ingredient of a particular offence such as the crimes contemplated in Sections 90, 95, and 212; or it may constitute an aggravation of certain other offences (e.g. Sections 217(1)(a) and 275). With the exception of Section 275 (theft aggravated by violence), in none of the abovementioned instances is violence defined, not even when violence is an essential ingredient of the crime (as in Section 212, rape or camal knowledge with violence). As regards *public* violence, this is considered as a special crime against public tranquility and constitutes a crime in itself (Section 66) and it aggravates all other offences which it accompanies (Section 63). The crime of public violence contemplated by Section 66 is constituted and completed by the mere act of the assembling of three or more persons with intent to commit an offence and two of whom carry arms proper.[14] Surely this crime is far removed from what most people would consider as a 'violent crime', as far removed, in fact, from popular notions of violence as the definition of aggression used by psychologists in laboratory experiments on violence, namely, the 'delivery of noxious stimuli by one person to another'.

The Interest in Violence

I think it may be helpful, at this stage, if some brief consideration is given to the reasons why people are interested in criminal violence. For what is most striking in the literature on violence published over the last two decades is not just the variations in the level of knowledge of the subject, but also the different levels of reality and images which form the basis of attempted understanding and communication of the subject. Broadly speaking, the interest in the subject springs from four main motives.

First there is a strong feeling in many European countries and in the U.S.A. that this kind of behaviour has been getting worse

[14] i.e., 'armi regulari'.

and has probably been increasing in recent years to an extent which gives rise to concern in relation to community safety and well-being; as a result of this members of the public wish to be better informed and to receive answers to the questions whether there has really been an increase and, if so, what is the extent and nature and why it has occurred. Secondly, there is the concern of those who have an immediate practical share in, and duty of, prevention and control; namely, in the law-enforcement sphere, the police, the judiciary, the administrators and the correctional treatment personnel. Thirdly there is the academic thirst for investigation stimulating those who make an objective study of the phenomena, substituting hypotheses by empirical research; building up theoretical explanations; or attempting to understand the phenomena on the basis of the existentialist experience of the violators and victims in the context of the social, ideological and cultural setting in which it occurs. Lastly, there is the inherent fascination of the subject, a fascination which seems to be lacking in property (non-violent) crimes and in white-collar crime in general. This curiosity may be merely a morbid appetite or it may spring from some primary disposition or instinct, because aggression, in one form or another, seems to be elemental in each of us as human beings. This is reflected in the vast literature of murder 'thrillers' which is found in all Western types of societies.

The Increase in Violence

Therefore, the second important factor to consider in any discussion on violence is whether, as the media is continually telling us, violence is increasing and we now live in a violent age. It is important, of course, to bear in mind that not all media may be willing or able to portray violence as on the increase. Censorship, government monopoly, vested interests of all kinds determine, say, a newspaper's choice of news items, news headlines, and covert or overt distortion of facts.[15]

Despite the existence of statistics purporting to show an 'increase' in violence, we do not know enough of the facts to make a quantitative investigation of the amount or intensity of violence in the history of any particular nation. 'It is only through knowledge of its history that a society can have knowledge of itself. As a man without memory and self-knowledge is a man adrift, so a society without memory ... and self-knowledge is a society adrift'.[16]

[15] See, Cohen and Young: *The Manufacture of News – Deviance, Social Problems and the Mass Media* (Constable) London, 1973.
[16] Marwick: *The Nature of History* (Macmillan) London, 1970.

Writing at the end of the last century, Emile Durkheim was categorical in his assertion that crime, and consequently criminal violence, had increased. 'It has everywhere increased. In France the increase (from the beginning of the nineteenth century) is nearly 300%'.[17] Yet very often apparently historical assessments are invalidated by the demonstration that not only the form of violence but the ways contemporaries had of identifying the problem have changed from one age to the next. A clear illustration of this is over the matter of baby 'battering' which in some countries (certainly in England) is regarded as a major social problem.[18] And yet in the past one hundred and fifty years infant mortality was much greater and the treatment of children often brutal; but because the relationship between parents and children was regarded differently and the State's right of intervention in family affairs was limited, to most people it was not a cause for great concern. A similar argument is traced by Gibbens[19] with regard to wife battering, a problem which, he argues, has for a number of social reasons become more visible and less acceptable, independently of whether or not it has changed in extent. McClintock in his well-known book *Crimes of Violence*[20] puts forward a number of reasons why we should not accept at face value the increase in the rate of violent crimes as it emerges from the statistics. McClintock calculated that changes in police methods of recording crime would by themselves have caused an apparent increase of 13% between 1938 and 1960. Another important factor was the increased readiness of ordinary members of the public to report such crimes. The wider the margin of unreported crime, the greater the scope for apparent increases of this kind. In districts where fights are an everyday occurrence and antagonism to the police is endemic, acts of violence often come to the notice of the police only when one of the participants reaches the casualty department of a hospital. McClintock believes that even in 1960 there were in England many

[17] *The Rules of Sociological Method* (Free Press of Glencoe) N. York, 1958.
[18] See, Smith: *The Battered Child Syndrome* (Butterworths) London, 1975.
[19] Violence in the Family, in *Medico-Legal Journal*, 43, 1975.
[20] (Macmillan) London, 1963. The sample studied consisted of recorded crimes of violence in England and Wales in 1950, 1957 and 1960 (first six months). A more detailed analysis was made of those occuring in the Metropolitan area, including sexual offences in which violence or threats were used, and data analysed in this part included, (a) the locations, methods and victims, and injuries to the victims; (b) the characteristics of crimes not 'cleared up' or not leading to prosecutions or convictions; (c) the characteristics, histories, sentences and subsequent reconvictions of the convicted offenders.

areas where only a fifth or a sixth of the assaults which occurred become known to the police. If so, such areas must have been even more numerous before the rehousing operations of the post-war decade. Moreover, if it is true that the middle class outlook is being acquired by an increasing number of skilled manual workers, the percentage of the population who regard the police as their natural enemies is probably decreasing. McClintock also suggests that the publicity given to crimes of violence by the press, radio and television may also have persuaded more people that it is their duty to report them. If the margin of unreported offences is as wide as McClintock estimates, such influences could account for a very large apparent increase. We have only to suppose that in pre-war England 10% of minor indictable assaults were reported, and that by the nineteen sixties 25% were reported, to see how the statistics would show an apparent increase of 250%. In other words, statistics of offences committed within any period or locality include only those 'known to the police'. If criminologists are to use these data to study the comparative incidence of different types of violent offences or changes in the level of criminality over time – through, for example, the construction of a crime index – or its relative occurrence in different social environments, they must investigate three major questions, namely: (a) what proportion of crime committed is known to the police, and does this ratio vary for different types of offences?; (b) is the ratio of crimes committed to crimes known constant over time and between different areas of the same country or in different countries?; (c) is the 'quality' of the crime reported constant over time and between different areas? Are, for example, 'n' cases of violence in 1938 similar to 'n' cases of violence in 1967 in terms of their seriousness and the circumstances in which they are committed? Only by answering these questions (and particularly (b), i.e. if it can be shown that a constant ratio of certain crimes is reported) will it be possible to develop an index from official statistics – like a price index – to measure fluctuations in the quantity and quality of violent crime that is committed. Without the assumption of constancy in reporting and recording practices an uncertain amount of any fluctuations in recorded crimes might be due to changes in reporting behaviour by victims and other witnesses of crime and to the actions of the police.[21]

[21] Hood and Sparks: *Key Issues in Criminology* (World University Library) London, 1970, esp. chs. 1 and 2; and, McClintock: Criminological and penological aspects of the dark figure of crime and criminality, in, *European Conference of Directors of Criminological Research Institutes* (Strasbourg) 1968.

'We cannot, of course, dismiss the whole of the apparent increase (as shown in official statistics) in this way; almost certainly some of it reflects a real trend. But equally certainly the real trend is not nearly as spectacular as the statistics makes it seem'.[22] Indeed the literature is replete with authors claiming that violence *is* on the increase.[23] Using arguments very similar to those outlined above, these authors purport to show that official statistics as well as self-report studies on hidden delinquency and victimization studies in fact *underestimate* the amount of violence and crime around us. As Box rightly observes:

> 'At one extreme there are persons with a conviction that the facts speak for themselves; at another extreme there are persons with a conviction that they ought to speak for the facts. Whilst neither motive should intrinsically arouse our suspicion, we should nonetheless be cautious and reserve our judgement; for allowing the facts to speak for themselves often masks an ignorance of the meaning of these facts and how they are officially compiled; and speaking for the facts is often a means of selective perception and interpretation to support and further personal, group or political interests'.[24]

THE NEWS MEDIA

Since the news media in most Western countries play such an important part in the orchestration of public crusades and moral panics about violent events, a word on the media at this stage seems opportune. The media are one of the principal agencies continually exploring society's normative boundaries, what are the breaking points and limits of social tolerance. This deconstruction and reconstruction of consensus is compounded by two aspects of media work. The first is news value, that structure of professional ideas and practices, of routine and know-how which organise the routine work of news-selection and construction. For news values, tied both to the professional requirements of journalists and the competitive requirements of the media, will always prefer the sensational, unpredictable, unexpected, dramatic, conflict and the extreme contrast over what is normal and predictable. In Jock Young's famous phrase, the media 'select events which are *atypical*, present them in a *stereotypical* fashion and contrast them

[22] Walker: *Crime and Punishment in Britain* (Edinburgh U.P.) 1968.

[23] Suffice it to mention, Wertham: *A Sign for Cain* (Collier-Macmillan) London, 1966; and, Porterfield: *Cultures of Violence* (Leo Potisham Foundation) Texas, 1965.

[24] *Deviance, Reality and Society* (Holt, Rinehart & Winston) London, 1971.

against a backcloth of normality which is *overtypical'*.[25] The second aspect is *visual* news value (especially in the case of television) and the choice of dramatic or sensational pictures as a way of making an impact compared with almost any other way of relaying information or analysing situations. The operation of news values through the media, and particularly the operation of visual news values in television, has the effect of representing every event at its most dramatic moment, which almost by definition, is its most violent moment. In the general search for the dramatic the media are inclined to select the most illegal aspect of something which is morally disapproved; the most subversive side of something which is illegal; and the most violent side of something which is subversive.

Closely allied with the notion of news selection is the concept of *deviance amplification.* The major exponent of this concept is the criminologist Leslie Wilkins, who notes that when society, usually via the media, defines a group of people as deviant it tends to react against them so as to isolate them from the company of 'normal' people. In this situation of isolation and alienation, the group tends to develop its own norms and values, which society perceives as even more deviant than before. As a consequence of this 'increase' in deviance, social reaction increases even further, the group is even more isolated and alienated, it acts even more deviantly, society acts increasingly strongly against it, and a spiral of deviance amplification occurs.[26] It is easy to see how, with some slight modifications, this concept can be applied to 'violence amplification': during a period of actual increase in the rate of violent crime, the feedback of information about this rise increases public sensitivity to this 'social problem', which in turn is reflected in increased reporting by this public to the police, hence amplifying the initial increase. All this is not intended to suggest that there is no violence or that it is not a 'social problem'. My point is simply that the media does use the considerable power at its disposal to keep alive, direct and to some extent exaggerate the problem as it is purveyed to the public.

There is still, however, divergence of opinion among researchers as to the extent of the actual impact of the media (particularly the press) on public perceptions of, and opinions about, crime and violence. The findings of one survey carried out in England by

[25] Young: Mass Media, Drugs and Deviance, in, *Deviance and Social Control*, ed. by Rock and Macintosh (Tavistock) London, 1974.

[26] Wilkins: Some Sociological Factors in Drug Addiction Control, in, *Narcotics* ed. by Wilner and Kassebaum (McGraw Hill) N. York, 1965.

Roshier and reported in *The Manufacture of News*[27] suggest that although the press does present a consistently biased picture of crime and criminals there is little evidence to show that this is very influential on public perceptions of, and opinions about, these phenomena. Roshier maintains that the simple, deterministic conception of the effects of the mass media, whether on attitudes, knowledge or behaviour, grossly underestimates the abilities of the recipients to differentiate and interpret the information they receive. 'Not only do they not confuse media fiction with reality but nor, it seems from this study, do they take media presentations of real events to be necessarily representative of reality'. In a somewhat similar survey carried out in Colorado (U.S.A.) different results emerged.[28] This study was designed to test two hypotheses: (a) that there is no consistent relationship between the amount of crime news in Colorado newspapers and the State crime rates, either for total crime or for various types of crime; (b) that public opinion about Colorado crime trends reflects trends in the amount of newspaper coverage rather than in actual Colorado crime rates. The findings of this study bear out the first hypothesis and lend considerable support to the second one. Which of course, can simply mean that the inhabitants of Colorado are more impressionable than the average Englishman!

A Historical Perspective

In one sense, the further back one goes in time the more the use of violence is inseparable from other features of social activity and political organisation. It is trite knowledge that in the past there was more 'justice' than law, and the exaction of the blood price for violent crime and murder was for a long time more important than the punishment of the offender as such. In England the task of the monarchy was, for centuries, to contain domestic warfare (and to channel the impulse to fight into service against national enemies) while establishing throughout the land respect for the king's peace underpinned by a growing body of customary and statute law. Even so, however, the main task was to maintain law and order in the towns and cities, not in the country-side. 'The urban activities of commerce and manufacture flourish best in conditions of civic peace and for four or five hundred years the greatest part of the effort to contain violence has been directed at the preservation of order and the promotion of seemly behaviour in

[27] *supra*, f.n. 15.
[28] Davis: Crime News in Colorado Newspapers, in, *The Manufacture of News, supra.*

our towns'.[29]

And yet, town dwellers were far from docile, as can be gleaned from this passage from *Itinerarium Britanniae*, by Andreas Franciscius written in 1497: 'Londoners have such fierce tempers and violent dispositions that they not only despise the way in which the Italians live but actually pursue them with uncontrollable hatred ... they sometimes drive us off with fists and blows of the truncheon'.[30]

This was tame stuff, however, compared with the terrifying tergiversations of the mob as it swung its destructive way into the smarter squares of 18th century London to the cries of 'No Popery', 'Give us back our eleven days', 'Wilkes and Liberty'. These events lie at the beginning of a hundred years in English History, from the mid-18th to the mid-19th century, which constitute a sort of golden age of challenge to law and order. Provincial towns suffered food riots and the violent destruction of turnpike gates. Gangs of labouring men marched to break machinery in the Plug and Luddite riots and, joined by craftsmen and lesser trades people, to demonstrate for parliamentary reforms or the People's Charter.

To emphasise the usualness, normality and continuity of violence is not to say that it is desirable. But surely, as hinted in the foregoing paragraph, it *might* be. Tyrants have been banished and despots deposed by violent means, by the use of violence. The assassinations of the Kennedys and of Martin Luther King outraged us – but the attempts to kill Hitler and the summary execution of Mussolini at the hands of the *Corpo Volontari della Libertà* are not similarly notorious. Indeed some philosophers (e.g. Suàrez) have even advocated regicide[31] as a final means of redressing gross evil when all other means had failed. Slavery in America and elsewhere was only abolished after considerable turmoil and violence. Historians who have concentrated not on leaders, emperors, governments and on events which have proved significant or cathartic to political development, but on the day to day lives of ordinary folk provide markedly different interpretations of historical development. One historian concludes that 'the chief moments at which ordinary people appeared unmistakably on the European historical scene before the industrial age were moments of revolts'.[32] On the other hand it must be pointed out that

[29] Robottom: A History of Violence, in, *Violence, supra.*

[30] *A Journey to England in 1497* ed. McFault C.V., Barcelona, 1953.

[31] more precisely, tyrannicide.

[32] Tilly: Collective Violence in European Perspective, in, *The History of Violence in America* ed. by Graham and Gurr, *supra.*

Marx's high sounding, pompous dictum, 'Violence is the midwife of history', lacks subtlety. The hemorrhages caused by the historical forceps may be more or less serious; the operation may succeed to one degree or another, but may also fail. There are insurrections brought about by desparation or fanaticism and drowned in blood: violence burst out with savagery and, often maiming the foetus, the patient -civilization- finds herself so very weakened that she can no longer recover.

When confronted with the statement that violence (whether in the sense of political violence or of ordinary crime) is harmful to the body politic, we must moreover bear in mind that in a way the prevailing authority structures of the State necessarily redefine the harm emanating from violent acts. Thus in most primitive societies individual or interpersonal violence is accepted as usual and in some cases even desirable – the feud, the brawl, the tribal conflict, the small local intense battle and feuding between religious groups. It is really only with the development of the modern nation-State and the centralisation of political authority that we find rulers claiming a monopoly of force and even of threats of violence. This claim to monopolise the rights to use violence and the claim to receive allegiance from citizens has become usual in modern States. Yet we should also remember that the political map of the world and the Sovereignty of nation-States is arbitrary and the result of accidents of history. We are not entitled to assume that there will not be further shifts in sovereignty and continual realignment (though certainly this appears to-day to be more difficult than it was, say a hundred years ago). In other words while the State's insistence on its right to monopolise force and receive allegiance may be usual, so too is the refusal to recognise such claims.

Finally, it is important to recognise that West European society is capable now of much greater tolerance than ever before. We live in what the sociologists call a *pluralistic society*. By this they mean that society consists of a range of groups, different life styles, different attitudes, different norms of behaviour, the whole heterogeneous mass being welded and held together by a more or less loose but stable structure of government. It is difficult not to hypothesise that had Western society shown the same degree of tolerance in the past, the Protestant Reformation might have been averted and we would not to-day have the English Martyrs, St. Bartholomew's Day and Bloody Mary!

The above arguments are not intended to defend violence, much of which in *any* society is to be condemned. But if we come to accept the usualness and the normality of violence we may begin

to view it in other than purely emotional terms. If we put violence in perspective and in its particular context we may understand it better. In other words we might move from simple condemnation to some form of comprehension.

Aetiology of Violence

Given that violence is not a homogeneous concept and that changes in society may be reflected in changes in the level of violent behaviour, it is not surprising therefore that when an explanation is sought, no one explanation is sufficient. Any theory to explain human or social behaviour merely attempts to give the best description of the facts available and such a theory is always open to change as society's view of the behaviour changes. Conflicting views on the causes of violence does not mean that one view is correct while the other is incorrect; both may be correct or incorrect depending on different stages in society's development and how cultural attitudes have changed within the intervening period.

A further complication is that many theories put forward to explain violent behaviour are more relevant to *aggressive* behaviour, though in the criminological literature the difference between aggression and violence is often difficult to define.[33] For the remainder of this essay the terms aggressive behaviour and violent behaviour will be used interchangeably.

Violence is by no means peculiar to humans, nor to primates; many forms of animal life have the capacity to fight among themselves. On the other hand not all animals are violent. Fairly obvious examples of non-aggressive creatures are caterpillars and butterflies, earthworms, mussels and barnacles. What is the difference between these animals and those that are aggressors? One basic difference is that the creatures listed do not really have any mechanisms for fighting. 'Aggression and violence are meaningless concepts unless there is the possibility of a real destructive force being brought into play'.[34] However it is probably also true to say that man has special 'skills' and attributes for violence. Indeed man is perhaps the only creature which in the course of intraspecific aggressive relationships is capable of killing his opponents. Other species limit themselves to agonistic or ritual fights and do not go so far as to kill the opponent of the same species.[35] Indeed most animal species – especially those equipped with dangerous weapons, such as wolves, crows and rattle snakes

[33] *supra*, f.n. 13.
[34] Gunn: *Violence in Human Society* (David & Charles) 1973.

– are equipped with certain inhibitory mechanisms which are triggered off by stereotyped or ritual patterns of behaviour which serve as signals for the fight to be broken off when one of the combatants appears to be in serious danger. Thus the gesture whereby the defeated animal presents the most vulnerable part of its body constitutes a genuine signal which inhibits the aggression attitude of its opponent.[36]

However, the essential distinction between man and animals is that the social behaviour of animals is controlled by regulating mechanisms which cannot be by-passed and which condition their relational horizons within strict limits. The functioning of these mechanisms is based essentially on a system of stimulus signals; the animal produces a conditioned response to these stimuli, which trigger a given form of behaviour or inhibiting mechanisms. This factor considerably limits aggression – particularly intraspecific aggression – in animals.[37] It is characteristic of man, as opposed to animals, that this balance in bio-ethological relations is upset; it is upset for a variety of reasons. The most obvious reason is probably man's brain development, accompanied by a substantial increase in cognitive capacity (his discovery and use of the principle of causality, his ability to foresee the consequence of an act and so to make plans and carry them through, the development of a system of communications based on signs which exist independently of what they signify, etc.). The result is a new kind of relationship with the outside world; the latter becomes an environment to which man is no longer content to submit but which he dominates and is able to transform.

Through such transformations man discovers his conative poten-

[35] Reference is made principally to two books by Lorenz: *Essays on Animal and Human Behaviour*, containing a series of articles, the first of which dates from 1935, and, *On Aggression* (University Paperbacks) 1968.

[36] Occasionally animals do kill members of their own species, but these are in reality 'errors' arising from faults in the 'signalling system'. The problem arises mainly in connection with aberrant behaviour on the part of a mother towards her young. The classic example given by Lorenz is of deaf turkeys massacring their young because on an error of identification: the young, whose cheeping is not heard by the mother, are taken for intruders because the mother is unable to receive the signals which would enable her to identify them as young birds needing her protection.

[37] This in no way means that other aggression-eliciting mechanisms are not to be found in animals; in them, as in human beings, aggressive reactions may be sparked off by frustration, and there is even a persistent tendency to react aggressively to repeated frustration. See, Moyer: *The Physiology of Hostility* (Markham Publ. Co.) Chicago, 1971.

tial; in other words he acquires an ability, for the purposes of the project in hand, to inhibit his immediate reactions or to control them in such a way that they do not jeopardise that project.

Thus he is able to maintain an emotional state – whether love or hate – aroused by external circumstances, but at the same time to make it fit in with his programme.

This being so, it is fair to say that man is indeed the only animal capable of killing systematically, because he is the only animal able to make the destruction of others part of a plan and to place himself in circumstances such that anything which might jeopardise that plan is avoided.

On the other hand, man is the only being in which a hiatus exists between his actual potential at birth (which is extremely limited) and the experience he subsequently amasses, which leads him beyond this initial impotence to 'solutions' which lie in the realm of the imagination and which rely on the psychological mechanisms of introjection and projection, in other words, on the incorporation or absorption in oneself of certain qualities of the outside world and on the discarding of distressing inner realities (anxiety-producing sensations, etc.).

The first and perhaps most popular view of violence in the past has been that violence (and consequently criminality resulting from violent behaviour) is an inherited quality. Certain animal species have been bred for their aggressive or violent behaviour (e.g. terrier dogs and hounds which excell in tenacity and aggression). Also mice have been inbred for generation so as to produce many strains, each of which is genetically almost homogeneous; and yet it is possible to grade the strains according to the amount of aggression shown in standardized tests.[38] In species with a relatively short life span, it is possible to breed for more or less aggression by selecting animals which show the appropriate behavioural trait. Thus, compared to the wild stock from which they originated, laboratory rats are remarkably peaceful, because aggressive rats are usually removed by the experimenter. It has therefore been suggested that in animals where artificial selective breeding has not taken place, and in humans it is likely that individuals will have varying thresholds for aggression depending on their genetic Constitution. While extrapolation from the animal world to that of human beings may be scientifically dangerous (for the reasons outlined in the foregoing paragraphs) there is a con-

[38] Scott: Genetics and the development of social behaviour in ammmals, in, *American Journal of Orthopsychiatry*, Vol. 32, pp. 878-893.

siderable amount of literature purporting to show that violence, and crime in general, is associated[39] with certain mental or physical characteristics which are inherited. Leaving aside the all-encompassing Lombrosian theories which sought to explain all criminal and violent behaviour as related to some biological deficit (the atavistic man),[40] one could mention the works of Lange,[41] Christiansen,[42] Shields,[43] Page,[44] Mittler,[45] and Mednick *et al.*[46] While most of these works are not concerned with violent criminal behaviour as such, they nevertheless provide strong, though not conclusive, evidence of an underlying hereditary element in the case of certain abnormal and violent behaviour.

An extension of the inheritance theories are the theories of transmission of abnormalities from chromosomal sources. Some studies[47] have suggested that individuals (males) with an XYY chromosomal combination, suffer from some kind of predisposition to violence or sexual misbehaviour and perhaps also to mental disorders, for they seem to be over represented not only among the populations of some penal institutions in England but also of the special hospitals for dangerous mental patients. Moreover, sex hormones are also known to facilitate aggression, and castration is a long-established practice in animal husbandry for reducing aggression. However, sex hormones allow behaviour to occur, but do not cause it. Other changes in body chemistry, such as the lowering of blood sugar associated with hunger or an increase in adrenal secretion during stress, may also affect the threshold for aggression.

Physical factors have also been considered as possible explanations of violent behaviour. The foremost exponent of this theory was Sheldon.[48] Briefly and crudely summarised, Sheldon's typology

[39] An *association* or *positive correlation* does not necessarily imply a *causal connection* or *causality*; it may simply indicate a *predisposition.*

[40] Lombroso: *Crime: Its Causes and Remedies* (Little, Brown) Boston, 1918.

[41] *Crime as Destiny* (Allen and Unwin) London, 1931.

[42] Threshold of Tolerance in Various Population Groups, in, *The Mentally Abnormal Offender*, a CIBA Foundation Symposium (Churchill) London, 1968.

[43] *Monozygotic Twins brought up Apart and Together* (Oxford U.P.) 1962.

[44] *Psychopathology* (Aldine) Chicago, 1971.

[45] *The Study of Twins* (Harmondsworth: Penguin) 1971.

[46] *Genetics, Environment and Psychopathology*, Amsterdam, 1974.

[47] Summarised in, Medical Research Council, *Current Medical Research* (HMSO) 1967.

[48] Sheldon *et al: Varieties of Delinquent Youth* (Harper) N. York, 1949.

of body types is based on the relative predominance of digestive viscera, of bone and muscle, and of neural and cutaneous tissues. The first component makes for softness and roundness; the second for hardness and rectangularity; the third for leanness and fragility. The first component he called *endomorphy*, the second *mesomorphy*, the third *ectomorphy*. The endomorph tends to be easygoing. sociable and self-indulgent; the mesomorph restless, energetic, insensitive and aggressive; the ectomorph introspective, sensitive and nervous. Sheldon analysed detailed physical and biographical data on 200 boys at Boston's Hyden Goodwill Inn, a rehabilitation home for boys, and concluded that although mesomorphy did not necessarily produce delinquency it was the constitutional background most favourable to it and to violence. Other studies[49] have also found a great preponderance of mesomorphs among delinquents. This apparently well established association between mesomorphy and delinquency does not necessarily reflect an inherent tendency in mesomorphs to be anti-social and violent (as Sheldon and the Gluecks seem to have thought). It could simply be a question of natural selection. If for 'mesomorphy' we substitute 'a muscular', athletic boy' and for 'juvenile delinquent' we substitute 'a boy who fights, robs and steals', it is easy to see how the mesomorph's physique is the best adapted of the somatotypes for the sort of things that juvenile delinquents do – assault other people, climb walls, run away from the police. Children begin to learn at an early age what they are physically able to do successfully, and what is not their strong point. Similarly, a tall, muscular person may gain self-esteem through utilising his strength in a violent manner. A short person may become gruff and aggressive to compensate for feelings of inferiority. An ugly or deformed person may seek out involuntary sexual partners because he cannot find willing partners.

Certain pathological abnormalities are also often linked with violence, particularly abnormalities of the brain structure in some form either due to illness such as menengitis, or to physical trauma resulting in brain damage.[50] Brain damage reduces an individual's ability to inhibit certain behaviour; his behaviour, therefore, tends to be uncontrolled and being uncontrolled, if he becomes angry with people he is more likely to lash out and be violent. There is currently some highly controversial evidence that

[49] Glueck and Glueck: *Physique and Delinquency* (Harper) N. York, 1956; and, Gibbens: *Psychiatric Studies of Borstal Lads* (Oxford U.P.) 1963.
[50] Reference is made to Mark and Irvin: *Violence and the Brain* (Harper) London, 1970.

people who suffer certain specific brain lesions may be subject to periodic, epileptic type behaviours that are characterised by violence.

It may also be that people whose capacity to perceive the environment accurately is impaired by some type of general brain disfunction (usually referred to as an acute or chronic brain syndrome) are more susceptible to violent behaviour than those who are not so impaired. These explanations obviously account for a very small number of violent cases appearing before the courts or occuring in society generally.

Other theories attribute violence or aggression to a drive like hunger or sex which builds up until it explodes into behaviour. Alternatively the Freudian view attributes violence to an instinct deep within the *id* of the individual and occasionally arising to the surface and being expressed in behaviour.[51] More recent theories have argued the frustration/aggression approach to violence. Broadly speaking, according to these theories the source of frustration may lie within the personality – in one's own conscience, for example – or in the environment. The strength of frustration depends on the strength of the needs, wishes or impulses that are thwarted, and as the strength of frustration varies, so does the intensity of the impulse to aggression. However, the manner in which it is expressed and the object at which it is directed will depend on controls operating at the time. If the controls are strong enough to prevent the expression of aggression outwardly, it may be directed against the self. If it is directed outwardly, its object (the victim) may be the source of aggression itself, though perhaps internal and external controls will deflect it towards some substitute target. It may also be rendered harmless, so to speak, by sublimation; in this case the aggressive energy is used up in some socially acceptable or constructive way. Possibly no mechanism has been used to explain so much deviant behaviour as the frustration/aggression hypothesis, and it is as popular in commonsense thinking as it is in the professional literature.

Although the frustration/aggression theory has been cultivated mostly by psychologists and psychiatrists, Andrew Henry and James Short in their work *Suicide and Homicide*[52] applied it in an attempt to solve a sociological problem: to account for variations in rates of suicide and homicide among different social categories and through time. Countless sociologists have put forward their

[51] Friedlander: *The Psychoanalytic Approach to Juvenile Delinquency* (Routledge) London, 1947.

[52] (The Free Press of Glencoe) Illinois, 1954.

own views on the source of violence. These range from Durkheim's 'normalessness' of society and the individual's inability to be a part of a social system taken as an organic whole;[53] to Merton's 'disjunction between socially approved goals and socially available means';[54] down to subcultural theorists like Thrasher, Downes, Miller and Matza[55] who in one sense or another all emphasise how violence is 'learned' as a result of growing up in a particular environment where violence is either tolerated, admired or positively approved, and where parental control is reduced to a minimum.

THE SMALL SCREEN

One important factor which looms large in any contemporary discussion on violence must be the media. Something has already been said about the effect of the media on our perception of violence as a 'social problem'. Another question is: does the portrayal of violence on the screen or in comics and newspapers *relieve* aggressive tendencies or does it *strengthen* them? People to-day watch television for hours every week; many of the programmes contain violence in one form or another, whether real and actual violence as transmitted through news programmes or phantasy violence in cartoon programmes and westerns. It has been established for some time that children and young people are impressionable and imitative creatures. In a short time they learn a great deal, in an irregular sort of way, and may imitate and mimic what they see and hear from almost any and every significant educational force they come into contact with: parents, school, the media, significant others in the community. Nobody who has watched young people emerge from some of our cinemas after an hour and a half of kung fu fighting and karatè can have much doubt about the effect of such viewing, And yet the literature on the subject is divided. Experimental psychologists like Berkowitz and Leibowitz[56] maintain that even the mere sight of a weapon is sufficient to increase aggression. Others take a very different view.

[53] Simpson ed.: *Emile Durkheim: Selections from his Works* (Thomas Y. Crowell) N. York, 1963.

[54] Clinard ed.: *Anomie and Deviant Behaviour: a discussion and critique* (Free Press of Glencoe) London, 1964.

[55] Thrasher: *The Gang* (Chicago U.P.) 1927; Downes: *The Delinquent Solution* (Routledge) London, 1966; Miller: Lower Class Culture as a Generating Milieu of Gang Delinquency, in, *Journal of Social Issues*, 14, 1958; Matza: *Delinquency and Drift* (Wiley) N. York, 1964.

[56] Berkowitz, in *Psychological Review*, 81, pp. 165-176; Leibowitz, in *Journal of Consulting and Clinical Psychology*, 32, pp. 21-25.

Thus Stuart Hall, in an essay entitled *Violence and the Media*[57] maintains that the influence of television on children does not appear to be either strikingly strong or deep and long-lasting, or anywhere nearly as significant as, say, school and parents. 'We know the impact of televised violence is much sharper for a very small proportion of the younger audience, but they appear to be the vulnerable group, already predisposed by a host of other circumstantial factors[58] to 'act out aggressively'. Hall maintains that television merely provides the trigger, and so might any other violent or vigorous stimulus. Under limited circumstances and given certain conditions, most research suggests, television may have the effect of stimulating aggressive behaviour, either through imitation or instigation. The trouble here is precisely; 'under what circumstance and conditions?' Unfortunately most of the clear-cut evidence comes from highly controlled social-psychological experiments, conducted under extraordinarily well-controlled laboratory environments, so unlike the conditions of normal viewing and so crude in their symbolic conception, as to be virtually useless for extrapolating to wider, more normal, social settings. In other words, these experiments have a high degree of *internal* validity, but a very low degree of *external* validity.

One of the most recent (and perhaps most sober) studies of the effects of T.V. violence on young people is Grant Noble's book *Children in Front of the Small Screen.*[59] The author observes: 'The limited evidence from naturalistic studies, including my own, suggests that the effects of televised aggression are less marked (than most people think) and can even be beneficial ... My own view on the effects of televised violence is that nine times out of ten it has no effect on the viewer. In the remaining 10 per cent of cases the effects depend first on the type of televised violence, and secondly on how aggressive the viewer feels'.

Violence and Deterrance

The last few paragraphs of this essay will be culled mainly from Hans Toch's brilliant work entitled *Violent Men.*[60]

After pointing out that we must try and deepen our understanding of the violent man (of *each* violent man) and of his personality if the goal of criminal justice to rehabilitate the offender is to be achieved, the author goes on to consider a fundamental problem

[57] in *Violence, supra.*

[58] including, no doubt, such variables as personality, temperament, parental control, socio-economic level of the family, religious persuasion, etc.

[59] (Constable) London, 1975.

[60] (Pelican Books) London, 1972.

within the whole penal system: are violent men deterred by prison? 'Nothing suggests that they would be. On the contrary, in fact: violence feeds on low self-esteem and self-doubt, and prison unmans and dehumanizes; violence rests on exploitation and exploitiveness, and prison is a power centred jungle. We do try to teach inmates that the use of force can only produce more difficulty for them, but we make this lesson far from convincing. If a man harms others in a prison, where else can he go? What extremity of discouragement can we give him? ... Destructive behaviour is the least loss-and-gain motivated conduct of all antisocial activity. The rewards and punishments of violence are measured in increments and decrements to the ego, rather than in terms of future well-being. The perspective is short-term and impulsive rather than calculated with a view to the future. The violent man measures his worth by his physical impact, rather than his ability to pursue a life plan. He has no career to be threatened, no stake to be impaired by prospective imprisonment. Of course, he would rather be at large than in prison; but his violence is neither stimulated nor inhibited by such remote and general needs. It is curiously true that deterrance is most effective with those who least require it – rational, career-oriented, future-invested individuals of the non-violent, law abiding middle class'.

It is important, however, to understand what Toch means by the 'violent man'. Not every person who commits a crime (or even more than one crime) of violence is necessarily a violent man. According to Toch 'the consummate robber is a professional who is usually skilled at avoiding the use of the weapons he may carry. Such a man must be separated – for purposes of treatment – from the unstable amateur, who may shoot because of a propensity to be clumsy, boisterous, fearful, touchy or sadistic. This is a violent man, and he must be precessed as such, having been identified through a systematic review of his past conduct'. For Toch, a violent man is a person who has a propensity to take actions that culminate in harm to other persons.

Finally it is also interesting to note that Toch considers most police officers as violent men. Their violence is largely engendered by police organisation and procedures, by formal and informal indoctrination; they reflect the same fears and insecurities, the same fragile, self-centred perspectiveness, and display the same bluster, bluff, panic, punitiveness, rancour and revenge as violent men not in uniform. However their violent propensities are circumscribed by social pressures and administrative rules, and protected by a code of mutual support and strong *esprit de corps*. It would certainly be interesting if it could be established to what extent

(if at all) these characteristics are applicable to members of the Malta Police Corps.

Conclusion

This short paper certainly cannot do justice to such a complex topic. Certain aspects of the subject have been deliberately omitted since they constitute almost untrodden ground even in the professional literature. The reader will also have observed that the topic has been discussed with virtually no reference to the Maltese scene. It is sincerely hoped that sociological or criminological research into the 'problem' of criminal violence in Malta will in the not too distant future be carried out under the aegis of the University of Malta.

JURISDICTION IN ACTIONS BY MORTGAGEES

J.M. GANADO and H. PERALTA*

IN the May 1975 issue of 'Id-Dritt', there was an article on 'Actions in Rem and Exclusive Jurisdiction Clauses'.[1] The article was inspired by the case 'Dr. Edward Fenech Adami noe. vs. Arsemis Christos noe.[2] There was subsequently another case raising similar issues of Maritime Law: 'Dr. Hugh Peralta noe. vs. Stefanos Chatzakis noe.'[3] There were various points discussed in this second case that deserve particular attention.

The plaintiff company had made a loan to a Liberian registered company for the purpose of the purchase of a ship by the latter Company. The lenders were granted a first preferred mortgage over the vessel. According to the Mortgage Agreement, the plaintiff company had the right to take possession of the vessel in various eventualities envisaged in the Agreement.

The ship, which had a Liberian registration, had been for some time undergoing repairs at the Malta Drydocks. The plaintiff company claimed that the loan was repayable under the terms of the Agreement and requested the borrowers to repay the loan and to hand over possession of the ship. The borrowers failed to pay and hand over possession to the Mortgagees and the plaintiff company by summons filed before the Commercial Court requested that the defendants, (i.e. the Master on behalf of the said ship and on behalf of the owners and charterers of the ship) be condemned to pay the amounts due under the Loan Agreement and hand over possession of the ship to the plaintiffs with such modalities as shall be ordered by the Court. Prior to the said action being instituted a warrant of impediment of departure of the said vessel was obtained from the Commercial Court and subsequently also a precautionary warrant of seizure of the ship.

The defendant pleaded that the Commercial Court did not have

*We would like to acknowledge our indebtedness to Prof. J.A. Micallef for his assistance in the compilation of this article.

[1] 'Id-Dritt', Vol. V, pages 48-54.

[2] Withdrawn before the Court of Appeal on the 9th June, 1972.

[3] Withdrawn before the Court of Appeal on the 13th February, 1976 and subsequently decided by the Commercial Court on the 17th February, 1976.

jurisdiction to hear the case. Other pleas were raised in regard to the merits of the case, but we are here concerned only with the question of jurisdiction.

The Commercial Court dismissed the said plea and upheld its jurisdiction.[4] The reasons followed in the judgment call for some analysis. The Court stated that, were it not for the claim for possession of the ship, it would have unhesitatingly declined jurisdiction on the basis of s.743 of the Code of Civil Procedure. Both parties were non-Maltese and the loan transaction did not have any Maltese connection. The Maltese Merchant Shipping Act (Act XI/1973 s. 370) provided that the Commercial Court continued to exercise, as part of its ordinary jurisdiction, the jurisdiction which it previously had as a Vice-Admiralty Court. The Court explained that the crucial point related to the nature of the action i.e. if the action was an action *in rem*, the Court had jurisdiction; on the contrary, if it was an action *in personam*, the Court did not have jurisdiction to hear the case.

The Court explained that the action *in rem* was known in the Admiralty Division of the High Court in England as an action against a ship or other things (such as cargo) connected with a ship and its primary purpose was for the claim to be satisfied from the *res* itself. The Court's jurisdiction in actions *in rem* rested on the sole basis that the *res* was in the territorial waters of the country and the *res* was held so that execution could proceed on it.

The Court held that the action in this case was an action *in rem* as it was directed against the vessel represented by her Master and the objective was for the plaintiff to take possession of the ship.

The defendant, while admitting that the Court had jurisdiction to entertain the claim for possession, contended that jurisdiction to entertain one claim did not in any way imply jurisdiction to entertain the other demand. He contended that the claim for the payment of the debt was not an action *in rem* but a purely personal action. The Court itself had stated that, were it not for the claim for possession, it would have declined jurisdiction. Therefore, defendant contended that, as the Court was satisfied that it did not have jurisdiction to entertain the action for the debt, it should have declined its jurisdiction to take cognisance of that particular claim. The defendant quoted from Aspinall's Reports (page 608) which defined the action *in rem* as:

> 'A proceeding directed *against a ship* or other chattel in which the plaintiff seeks *either* to have the *res* adjudged to him in

[4] Judgment delivered on the 5th December, 1975 per Mr. Justice G.O. Refalo.

property or possession, *or* to have it sold under the authority of the Court'.

He submitted that the action for the payment of the debt was not an action for the sale of the ship, as there was no specific claim for a sale and the judgment condeminng the defendant to pay the debt did not *necessarily* lead to the sale of the ship. It was true that plaintiffs had declared during the hearing that their intention was to sell the ship under the authority of the Court in Malta, but objectively the condemnation for the payment of the debt had as its legal consequence also the possibility of execution on other assets of the defendant company, apart from the ship, and the mere intention of subsequent action could not change or restrict the nature and effects of the claims contained in the Writ.

One must grant the defendant's argument that jurisdiction to entertain one claim did not imply in any way jurisdiction to entertain the other, in view of the fact that they were two distinct claims which had to be considered separately. There was no question as to the *in rem* nature of the claim for possession. On the contrary, the claim for the debt caused a great deal of controversy.

The first point to be examined is whether a claim of the mortgagee for the condemnation of the Master on behalf of the ship and on behalf of the ship owners (who were the borrowers) for the repayment of the loan and interest can be exercised as an action *in rem* or not. It must be emphasised that the notion of an action *in rem* in maritime cases bears no relationship whatsoever to the traditional continental distinction between real and personal actions. This point was clearly made out also in the judgment of the Commercial Court. It may easily happen that a personal action (e.g. for the payment of a debt) qualifies under the heading of an action *in rem* for the purposes of Maritime Law. In fact, as will be seen, the majority of actions *in rem* are meant for the enforcement of obligations and are personal actions, according to the traditional classification of actions. Failure to appreciate this point has given rise to unnecessary doubts on the jurisdiction of the Courts in maritime issues, and it would be useful if one were to try to eliminate such doubts.

The Admiralty Courts possessed jurisdiction both *in rem* and *in personam*, as is clearly stated in the 1861 Act:[5]

> 'The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings *in rem* or by proceedings *in personam*'. (s. 35)

[5] Admiralty Court Jurisdiction Act, 1861 – 24 Vict. 1861.

As is stated in Williams and Bruce,

'It is provided by the Admiralty Courts Act 1854 that in all cases in which a party has a cause or right of action in the Court of Admiralty against any ship, or freight, goods or other effects whatever, it shall not be necessary to the institution of the suit for such person to sue out a warrant for the arrest thereof, but it shall be competent to him to proceed by way of personal action, citing the owner or owners of such ship, freight, goods or other effects to appear and defend the suit'.[6]

The whole jurisdiction, be it *in rem* or *in personam*, was vested in the Commercial Court in 1892. Therefore, in a case in which a foreign creditor sues in Admiralty his debtor, who happens to be even by sheer accident in Malta, it is arguable that the Commercial Court has jurisdiction to entertain the action, (although it may be beyond the limits traced by s. 743 of the Code of Civil Procedure) on condition that the case fell within the Vice-Admiralty Court's Jurisdiction in 1892.[7]

The Merchant Shipping Act 1973 refers to the position obtaining under the earlier law in Malta. The jurisdiction of the Commercial Court remained as it was in 1892, when the jurisdiction hitherto enjoyed by the Vice-Admiralty Court was vested in it by Ord. III of 1892.[8] In 1892 the relevant Act was the Colonial Courts of Admiralty Act 1890.[9] This Act had been preceded by the 1863 Act[10] which had regulated the Court's jurisdiction and which was abrogated by the 1890 Act. By this latter Act of 1890, jurisdiction became based on the position applicable in England at that time:

'The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons,

[6] Admiralty Practice, Part II, page 186 et seq.

[7] This principle has not as yet been clearly accepted by the Courts. Vide Strano vs. Zahra decided by the Court of Appeal on the 30th June, 1975. The Court declined jurisdiction, because it came to the conclusion that the action was not an action *in rem*. The action was not made against the ship but a request for the appointment of a curator to represent the debtor who was absent from Malta was made by plaintiff. Had the defendant been present in Malta and served with the writ there would have been Admiralty jurisdiction *in personam*. It would have been interesting to see if the Court would have upheld its jurisdiction in such a case.

[8] Chap. 41 of the Laws of Malta. Subsequent enactments made in the United Kingdom, viz. the Administration of Justice Act, 1920 and the Supreme Court of Judicature Consolidation Act, 1925 were not applicable to the Colonial Courts of Admiralty (Vide Halsbury, Statutes, Vol. I, p. 15).

[9] 53 and 54 Vict. c. 27.

[10] 26 Vict. 1863 c. 24 – concerning Vice-Admiralty Courts in Her Majesty's Possessions abroad.

matters and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations'. (s. 2(2))

In so far as jurisdiction in regard to actions by mortgagees was concerned, the Admiralty Court Act of 1840[11] had made the position clear:

'And be it enacted, that after the passing of this Act, whenever any ship or vessel shall be under arrest by process issuing from the said High Court of Admiralty or the proceeds of any ship or vessel having been so arrested shall have been brought into and be in the Registry of the said Court, in either case the said Court shall have full jurisdiction to take cognisance of all claims and causes of Action of any person in respect of any mortgage of such ship or vessel and to decide any suit instituted by any such person in respect of any such claims or causes of action respectively'. (s. III)

A somewhat ambiguous provision in the 1863 Act (s. 10(8)) is of no relevance, as it was repealed by the 1890 Act, as already stated. That section included among the cases falling within the Court's jurisdiction:

'claims in respect of any mortgage where the ship has been sold by a decree of the Vice-Admiralty Court and the proceeds are under its control'.

It is possible that that provision was only meant to extend the Court's jurisdiction over the proceeds obtained from the judicial sale of the ship and was not meant to put in doubt the Court's jurisdiction *in rem* when the *res* herself had been arrested. However, s. 10 seems intended to set out an exhaustive list of cases, and by contrast with the much wider wording of the 1840 Act, posed difficulties of interpretation.

In the case of a Mortgage registered under the Merchant Shipping Act, the High Court of Admiralty was given jurisdiction to take cognisance of a claim 'whether the ship or the proceeds thereof be under Arrest of the said Court or not'.[12] This provision came within the all-embracing effect of the 1890 Act abovementioned, and must be regarded as applicable to the Commercial Court.

[11] An Act to improve the practice and extend the jurisdiction of the High Court of Admiralty of England (3 and 4 Vict. c. 65.)

[12] S. 11 of the Admiralty Court Jurisdiction Act, 1861 (24 Vict. 1861 c. 10). Vide also Maude & Pollock, Law of Merchant Shipping (4th Edit.) Vol. I, p. 60.

the territorial waters over which the authority of the Court extended. Reference may be made to judgments in the following cases:

(a) 'Nikolaki vs. Dr. Agius noe'[16]

'In virtù della giurisdizione alla Corte di Commercio trasferita come Corte di Vice Ammiragliato la detta Corte di Commercio è competente a conoscere *di qualunque credito dedotto contro una nave*, sia essa nazionale o estera, e chiunque sia il proprietario della nave quando la stessa trovasi nella giurisdizione di queste isole e molto più quando la stessa è elevata sotto la autorità di questa Corte'.

(b) 'Vadalà vs. Zammit Cutajar'[17]

'La giurisdizione è duplice. È nella giurisdizione della nostra Corte di Commercio come Corte di Vice Ammiragliato di ordinare l'elevazione di nave a domanda di creditori, qualunque sia la loro nazionalità, quando trattasi *di obligazione comunque nascente contro l'identica nave*'.

(c) 'Mifsud vs. Capitano Leonardo Migliori'[18]

'Come Corte di Vice Ammiragliato la nostra Corte di Commercio prende cognizione delle domande relative a proviste fatte ad una nave anche fuori la giurisdizione di queste isole quando tale nave si trovi nelle acque territoriali di queste isole ...'

A joint demand is a feature in a number of English cases, e.g. the Lord Stratchona[19] in which in the same action there was a request for a declaration of the validity of the mortgage and for the sale of the ship. Also in another case[20] there was a claim both for the recovery of possession of the ship and for the sale of the ship.

An examination of the questions discussed in the 'Peralta vs. Chatzakis' case does reveal a marked difference between the procedure followed by the Maltese Courts and the procedure of the Courts of Admiralty in the United Kingdom and it is imperative to bear these differences in mind in applying the relative Acts.

However, one can safely say that, when an action is made by a mortgagee to obtain possession of the ship and/or to enforce payment of the debt when the *res* is within the territorial limits of the Island and is subject to a Court warrant, such an action, as an action *in rem*, clearly comes within the jurisdiction of the Commercial Court.

[16] Vol. XX.III.60
[17] Vol. XXV.III.667
[18] Vol. XXV.III.762
[19] Aspinall's Maritime Cases, Vol. 16, p. 536.
[20] Aspinall's Maritime Cases, Vol. 11, p. 93.

The characteristic of actions *in rem* is that they are actions against the *res* and are meant to enforce a claim through the sale of the *res*. Therefore, any judgment thereby obtained can be enforced only on the *res* itself and not on other property, saving any extension which may be made by legislation. Such a limitation will naturally apply *expressis verbis* if the action were made only against, say, the ship; but it must be appreciated that the traditional formula used is for the action to be made against the Master 'on behalf of the ship *and of her owners and charterers*'. Should the inclusion of the words in italics, with or without the indication of the Shipowners' name, make any substantial difference to the nature of the action?

Admittedly, when a judgment is obtained against a person, the judgment is enforceable against all the assets of that person and, therefore, it should be made clear at least in the judgment itself that execution is limited to the particular ship. Should one require that this limitation appears in the summons itself? Such a requirement would certainly not be in accordance with established practice and procedure and it does not seem that any explicit limitation is necessary, when an action is made against the Master on behalf of the ship and her owners and charterers. The ambit of the Master's representation is necessarily limited to the ship and does not extend to other assets.[13]

It seems that the procedure before the English Courts is not identical to the procedure followed in our Courts. In actions *in rem* in England a Writ of Summons is first filed and an Application for the arrest of the ship is subsequently filed.[14] In our case, the normal procedure is to obtain an impediment of departure against the ship either before or after the filing of the Writ and possibly also the issue of a precautionary warrant of seizure of the ship. Subsequently an application for the judicial sale of the ship is made. It is open to the plaintiff to ask for such an order also in the original writ itself.[15] Such a procedure is, however, not normally followed.

It has repeatedly been held by our Courts that the jurisdiction of the Court was established by the mere fact of the ship being within

[13] Vide Marsden, The Law of Collisions at Sea, (1880) p. 32: 'The main object of arresting a vessel ... is to cause an appearance on the part of her owners ... and that the process of the Court can be enforced against a ship, without reference to the question whether her owners at the time of her arrest were or were not her owners when the collision occurred.'

[14] 'The Maxima', 18th June, 1878 (Aspinall's, Maritime Cases, Vol. 4, p. 21). The action was commenced on the 7th June, 1878 and the vessel was immediately afterwards put under arrest.

[15] S. 306(1) of the Code of Civil Procedure.

DEVOLUTION WITHIN THE UNITED KINGDOM

O. HOOD PHILLIPS

IT is a paradox that the United Kingdom, which on the one hand has recently joined the larger European Community,[1] is on the other hand in some danger of breaking up into its constituent units. The Report of the Royal Commission on the Constitution (the Kilbrandon Report[2]), and the recent government White Paper on proposals for devolution to Scotland and Wales,[3] merit examination by anyone who is interested in British public affairs.

Following Stone Age and Bronze Age man, Celtic peoples from the continent of Europe settled in what we now call the British Isles during the second half of the first millenium B.C. By the time the Romans began their armed occupation of the less mountainous parts of the larger island in the first century A.D., the Celtic farmers were organised in tribal kingdoms. The withdrawal of the Romans at the end of the fifth century, which left virtually no traceable remains of law or language, was followed by successive invasions of Angles, Saxons and Jutes, who settled first in the south and south-east of the country and then along the east coast. Then came the Danish conquest of England under Canute. By the time of the Norman conquest, England was a political entity and the most populous and powerful kingdom in the islands. The integration of the predominantly celtic kingdom of Scotland was complete by the fifteenth century. Celtic Wales continued to be a collection of unstable principalities until it was conquered in the thirteenth century by Edward I. In 1536 the English Parliament passed an Act annexing Wales to the realm of England.

The Union in 1707 between England (including Wales) and Scotland – which countries since 1603 had enjoyed a personal union of Crowns – was based on a treaty negotiated by commissioners on behalf of the two Parliaments and confirmed by mutual statutes of each Parliament, providing for one Parliament and government of Great Britain, but preserving Scots private law and judicial system. The similar Union between Great Britain and Ireland in 1800 was

[1] European Communities Act 1972.
[2] (1973) Cmnd. 5460; Memorandum of Dissent, Cmnd. 5460 – I.
[3] (1975) Cmnd. 6348.

not negotiated by treaty, but was enacted by the Parliaments of both Britain and Ireland, though there was an element of duress as the large Catholic majority in Ireland was not represented in its Parliament. The greater part of Ireland ceased to form part of the United Kingdom in 1922, and after a period of 'Dominion status' it became in 1949 an independent republic outside the Commonwealth. Northern Ireland, consisting of six of the counties of Ulster, remained within the United Kingdom, and for half a century, from 1920, considerable legislative and executive powers were devolved to it, so that it had its own subordinate Parliament and administration in Belfast.

The United Kingdom of Great Britain and Northern Ireland is a unitary state in terms of economics as well as government. It has a single currency and central bank. There is freedom of settlement and establishment, and of movement of trade, labour and capital within the United Kingdom, with minor exceptions in relation to Northern Ireland. Differences between the parts include the separate system of Scots law, especially private law and judicature, and the survival of the Welsh language among about one fifth of the people of Wales.

England is the largest of the four countries, having an area of 50,000 square miles. More densely populated than any other European country except the Netherlands, it has a population of nearly 46,000,000, constituting about 83 per cent. of the United Kingdom total, one-fifth of that total living in London and the South East. England has also a corresponding dominance in economic wealth. Scotland, with an area of 30,000 square miles, has a population of about 5,250,000, most of whom live in the central belt that includes Glasgow and Edinburgh. The area of Wales is 8,000 square miles and its population about 2,750,000, two-thirds of whom live in the industrial south around Cardiff. Northern Ireland has an area of 5,000 square miles and a population of about 1,500,000, more than a third living in the area of Belfast. The kings of England had assumed control of Ireland since the invasion of Henry II in the twelfth century; but the constitutional relationship between England (or Great Britain) and Ireland in the centuries before the Irish Union is very confusing. Generally, Ireland seems to have been regarded as a subordinate kingdom of the English (or British) Crown, though how far it was subordinate to the English (or British) Parliament was doubtful. One prime factor in their troubled relations since the early seventeenth century has been the matter of religion, for, under the early Stuarts, Ulster was 'planted' by many Scottish settlers who were Presbyterians and a lesser number of English settlers who were Anglicans. In the process of time Northern Ire-

land, as it now is, came to possess a Protestant majority of about two to one over the Catholics, and that majority became relatively more prosperous. The devolved institutions of Northern Ireland have at present been suspended, and the Province is being governed directly from Westminster, so that its problems are being considered by the British Government separately from the question of devolution in the rest of the United Kingdom. Northern Ireland therefore will not be considered further in this article, except to say that it was not the system of devolution to Belfast that failed: indeed that system in itself had considerable merits, and does not provide a warning signal against the idea of devolution elsewhere in the United Kingdom.

The concept of 'devolution' is used to mean the delegation of central government powers without the relinquishment of 'sovereignty'. Devolution, which may be legislative or administrative or both, in its more advanced forms involves the exercise of powers by persons or bodies who, although acting on authority delegated by Parliament, are not directly answerable to it or to the central government.[4] 'Decentralisation' is a method whereby some of the decision-making powers of the central government are exercised by officials of the central government located in various regions.[5] It should be distinguished from devolution on the one hand and from local government on the other. Decentralisation of certain governmental functions has taken place to an increasing extent since the last war, especially in England, which in the last ten or twelve years has been divided into eight Regions for the purposes of economic planning. Of these the South East Region, including Greater London, is by far the most populous. The degree of decentralisation in Scotland and Wales has been less because the local administrative offices of their Secretaries of State have fulfilled a similar purpose.

A Secretary (later, Secretary of State) for Scotland was created in 1885, and the present system of decentralisation centred on Edinburgh dates from 1939. The Secretary of State is a member of the Cabinet, and his functions include most of those that in England are the responsibility of the Home Office, the Department of Education and Science, the Department of the Environment, the Ministry of Agriculture, Fisheries and Food, and some of the functions of the Departments of Health and Social Security and of Industry. The Lord Advocate as a Minister has wide functions in the field of law. The office of Minister for Welsh Affairs was created in 1951 and

[4] Cmnd. 5460, page 165.
[5] Cmnd. 6348, pages 55-56.

was allocated to the Home Secretary, and in 1964 the first Secretary of State for Wales was appointed and he is in the Cabinet. The work of his Welsh Office covers such matters as housing and local government, some industrial development, town and country planning, highways, health, personal social services, and primary and secondary education, and the Secretary of State shares responsibility for agriculture. There is no separate legal system.

Before the first world war the Liberal Government seriously considered devolution – apart from Irish 'Home Rule' – as an item of policy. Thus Winston Churchill, Home Secretary, put to the Cabinet in 1911 a plan for elected legislative and administrative bodies for Ireland, Scotland and Wales and seven areas of England, though he saw that an English Parliament alongside the Imperial Parliament, as it was called, was impracticable. Asquith, the Prime Minister, speaking in the House of Commons on the Government of Ireland Bill, 1922, said that the Imperial Parliament needed to be relieved of many local responsibilities, and that similar Bills needed to be made for England, Scotland and Wales. After the first war the Commons approved a broad scheme for subordinate legislatures for England, Scotland and Wales, leaving open the question of subdividing England, but nothing came of it.

Nationalism in Scotland and Wales first became a serious electoral factor at the general election of 1966, when the Nationalist parties received the votes of 20 per cent. of the electorate in those countries. Neither the Labour nor the Conservative party really wanted devolution, but as a matter of political expediency they had to take Nationalist asperations seriously. The Conservative party set up a committee in 1968 to consider the matter. While the Kilbrandon Commission was at work between 1969 and 1973, Scottish nationalism was quiescent, but it revived on the discovery of North Sea oil, most of which is located nearer to Scotland than to England, and its land installations will be mainly in Scotland. The Liberal party has long favoured a federal system, though it is far from clear how one could have a federation in which the central legislature is subject to no legal limitations and is unable to limit itself, and one unit (England) has four fifths of the population, whose representatives would always be able to outvote those of all the other units in the federal legislature.

A Royal Commission on the Constitution was set up by the Labour Government in 1969 'to examine the present functions of the central legislature and government in relation to the several countries, nations and regions of the United Kingdom; and to consider ... whether any changes are desirable ... in the present constitutional and economic relationships ...' Although the terms of refer-

ence were wide enough to cover almost any aspect of the constitution, the Commission limited its review almost entirely to the question of national feelings and devolution. There were 13 members of the Commission, under the chairmanship first of Lord Crowther and then (on his death) of Lord Kilbrandon, a Scottish judge, formerly chairman of the Scottish Law Commission and later a Lord of Appeal. The terms of reference insisted on the preservation of the political and economic unity of the United Kingdom. 'Political unity' meant that the Queen in Parliament, representing all the people, must remain 'sovereign' over their affairs; and that the Government must bear the main responsibility to Parliament for protecting and furthering the interests of all. In particular, the Government must retain the powers and responsibilities relating to national security; international relations, including membership of the European Community; law and order; and the basic rights of citizens. 'Economic unity' meant that the Government must manage the nation's external economic relations, and must be able to manage demand in the economy as a whole (taxation, total public expenditure, and supply of money and credit).[6]

The Report found that there is a feeling that government is remote and insufficiently sensitive to the views and feelings of the people. In Scotland and Wales dissatisfaction with government has an additional dimension of national feeling. In Scotland the emphasis is largely an economic considerations. In Wales, while the economic factor is important, it is closely associated with the desire to preserve the Welsh language and culture. In neither country had the nationalist cause attracted support anything like sufficient to constitute a general vote for independence. The concept of 'separatism' is taken to mean the separation of Scotland and Wales from the rest of the United Kingdom, and their conversion into fully independent sovereign states with complete control over all their internal and external affairs, presumably remaining under the Crown as self-governing members of the Commonwealth.[7] As a matter of economics neither Scotland nor Wales is unsuitable for independence: both countries could be economically viable if they were prepared to accept some fall in their standard of living. The Commission found very little support for federalism in Scotland and Wales, and practically none at all in England. In a federal system 'sovereignty' is divided between the federal legislature and government and the legislatures and governments of the constituent units, federal functions usually including those in which it is

[6] Cmnd. 6348, pages 5-6.
[7] Cmnd. 5460, page 133.

necessary for the country to act as one in relation to the rest of the world, such as defence and foreign affairs. The basic terms of a federal constitution are 'entrenched' so that they cannot be amended at the sole discretion of the federation or of any province or combination of provinces.[8] Experience abroad, says the Report, shows that in modern conditions the federal idea of divided 'sovereignty' is becoming difficult to sustain. It presents great financial problems, and slows down desirable change. Further, there is no satisfactory way of fitting England into a federal system.

Eight members of the Commission favoured a scheme of legislative devolution for Scotland, which would transfer to a directly-elected Scottish Assembly a wide range of powers concerning most domestic functions. Six members favoured a similar legislative devolution for Wales. The Scottish and Welsh legislative Assemblies would consist of about 100 members, elected for a fixed term of 4 years by the single transferable vote system of proportional representation. Scottish and Welsh representation in the House of Commons would be in the same proportion to the population as that of England, so that the number of Scottish M.P.'s at Westminster would be reduced from 71 to about 57, and the number of Welsh M.P.'s from 36 to about 31. The Scottish and Welsh executives would be composed of Ministers drawn from their respective Assemblies, and would operate the traditional Cabinet system of government. Entry into the European Community does not stand in the way of substantial devolution, though it does place substantial limitations on the range of functions that can appropriately be devolved. Two members who signed the majority Report favoured executive devolution to Scotland, Wales and each of 8 English Regions. They would have elected Assemblies to execute and administer legislation and policies of the United Kingdom Parliament and government. For England, a majority were in favour of Regional Councils, which would be mainly advisory, but would also have a co-ordinating function in the local government field, including responsibility for formulating long-term plans. The Regional Councils would be composed of 4/5 local authority elected representatives and 1/5 nominated members chosen by the Minister of central government responsible for regional affairs. The English Regions would be the 8 Regions at present established for economic planning purposes, modified to make regional boundaries conform to those of the new Counties defined by the Local Government Act 1972. Devolution of legislative powers would not be appropriate for England as a whole or for individual Regions of England.

[8] *Ibid.*, pages 152-154.

Two members (including Lord Crowther-Hunt, who became constitutional adviser to Mr. Wilson) signed a Minority Report recommending a scheme of intermediate level governments for Scotland, Wales and 5 English Regions. The United Kingdom Parliament would remain responsible for the framework of legislation and major policy, but directly elected Assemblies for Scotland, Wales and the English Regions would be responsible for adjusting United Kingdom policies to the special needs of their areas and putting them into effect. The seven intermediate governments would be run on the local government pattern with a functional committee structure, and not on the Cabinet model as in the majority scheme for devolution. The intermediate level governments would not be limited to the specific functions or duties conferred on them by Parliament; they would have a general residual competence to act for the welfare and good government of the people in their areas. Each Assembly would consist of about 100 members, elected by the single transferable vote system of proportional representation for a fixed term of 4 years.

The Government White Paper (1975) points out that there are few parallels anywhere for dividing between two levels of government the powers and functions long exercised centrally in a unitary state, and that after devolution to Scotland and Wales each part of the United Kingdom will have a different form of government. To this we may add the system of local government on one hand and European Community secondary legislation on the other. Parliament will remain 'sovereign' in all matters, whether devolved or not, and will continue to include the present compliment of Scottish and Welsh members. The 1974 White Paper[9] said that the setting up of Scottish and Welsh Assemblies did not detract from the overriding interest of all the peoples of the United Kingdom in the determination of United Kingdom policies as a whole, and that for this reason the Government regarded it as 'essential' that Scotland and Wales should retain their existing number of M.P.'s. The real reason is more likely to be a vote-catching one.

The Government proposes that there shall be a single-chamber Scottish Assembly, initially with 142 members (2 for each of the 71 Parliamentary constituencies in Scotland). For later elections the Boundary Commission will divide Parliamentary constituencies into single-member Assembly constituencies. Everyone entitled to vote in Parliamentary elections, and also peers, will be able to vote in Assembly elections. The Assembly will be elected for a normal fixed term of 4 years. There will not be proportional representation.

[9] Cmnd. 5732.

Members of the Assembly may also be members of Parliament. The Assembly will elect from among its members a presiding officer like the Speaker. Executive powers in Scotland in the devolved fields (including the power to make delegated legislation) will be exercised by a Scottish Executive. The head of the Executive ('Chief Executive') will allocate responsibilities to members of the Executive. After an election the Secretary of State will invite a prospective Chief Executive to form an Executive which will command the support of the Assembly. The Chief Executive will submit the names of his proposed Executive to the Assembly, who will approve or reject them as a whole. Changes in the Executive (including dismissals) will be made formally by the Secretary of State. The Scottish Assembly will become responsible for legislation in devolved subjects. Primary legislation will be in the form of Scottish Assembly Acts, and secondary legislation in the form of Scottish statutory instruments. Bills passed by the Assembly will be submitted for assent by the Queen in Council through the Secretary of State.

Resources are distributed, not according to where they come from, but according to where they are needed, and this applies between geographical areas as well as among individuals. Reserve powers are therefore built into the proposals to enable the central Government to intervene, subject to the approval of Parliament, in actions by the devolved administrations which the Government judge seriously harmful. The presiding officer of the Assembly, on the advice of his counsel, will report to the Assembly on the *vires* of a Bill, i.e., whether it falls within the devolved powers, first when it is introduced and again before the final Assembly stage. An adverse report would not stop the Bill, but it would serve as a warning. When a Bill has reached its final stage in the Assembly it will be forwarded to the Secretary of State. The Government will then consider, with advice from the Law Officers, whether any part of the Bill is *ultra vires*. It will also consider whether the Bill is acceptable on general policy grounds. If the Bill contains *ultra vires* provisions, or is unacceptable on policy grounds, the Secretary of State will send it back with a statement of reasons. If a Bill referred back as *ultra vires* is re-submitted in terms still adjudged *ultra vires*, the Bill will not go forward for assent. If a Bill referred back on policy grounds is resubmitted in terms that the Government are still not prepared to accept, the Bill must be laid before Parliament with a notice of motion praying for its rejection. If Parliament affirms this motion (to reject the Bill) the Bill will not go forward for assent, but if

Parliament rejects that motion the Bill will go forward. The Government does not favour judicial review of Scottish Assembly Acts after enactment for various reasons, notably the argument that exclusion of judicial review 'would have the merits of simplicity and finality and would therefore reduce doubt and room for argument, which might otherwise hamper good government', although it admits that judicial review 'is a normal and natural accompaniment of the operation of a legislature whose powers are limited by law'. This is one of the most controversial proposals in the White Paper, and the Government may well be willing to give way on it. Executive acts of the Scottish administration, however, will be open to challenge in the courts in the same way as the central Government's executive acts: indeed, Scottish ministers and officials will have to keep within both the general law and the powers devolved to them by Parliament. The Scottish Executive will be able to make delegated legislation under enabling powers contained either in Assembly Acts or in United Kingdom Acts still in force in the devolved areas.

On grounds of general policy the Government will have three kinds of reserve powers: (1) to give directions, subject to affirmative resolution of Parliament; (2) to make an annulment Order following an affirmative resolution in Parliament, in relation to Scottish delegated legislation already made; (3) as a last resort, to resume responsibility for the devolved subject by Order, subject to affirmative resolution of Parliament.

There will be a system of Assembly Committees to advise the Scottish Executive and to investigate its activities. Committees will correspond to the main subjects devolved, e.g., education and health. They must be consulted by the Executive before new policies or Bills are introduced. Members of the Scottish Executive will hold office under the Crown, and their officials will therefore be civil servants; but the Government consider that (contrary to the recommendation of the Kilbrandon Report) the United Kingdom civil service should remain unified. Complaints against Departments can be made to the Scottish Parliamentary Commissioner ('Ombudsman'), who will report to the Assembly.

A block grant will be allocated by Parliament for the devolved Scottish administration, taking account of local needs and the desirability of uniform standards and contributions in all parts of the United Kingdom. Within that amount the Assembly will decide priorities. Accountability for expenditure will be to the Scottish Assembly, not to Parliament. Since national resources are distributed according to need, public expenditure for Scotland will not be based on revenues arising there. Control of oil revenues by those

parts of the United Kingdom off whose shores oil is found, say the Government, would mean the break-up of the United Kingdom. The same argument applies conversely to the large coal deposits recently found in England and to natural gas off the shores of England. Public expenditure on devolved services in Scotland was about £2,000 million in 1974-75. The Assembly will have a general power to levy a surcharge on local authority taxation, whether on rates or any new system that may be introduced by Parliament. This power will not need to be used unless there is a deficit or a higher level of expenditure. There will be Scottish counterparts of the Consolidated Fund, Comptroller and Auditor-General and Public Accounts Committee.

Devolution to Scotland will be of responsibility in various fields which the Government now carry: the functions and powers of local authorities will not be reduced. The more important subjects to be devolved, mostly with exceptions and limitations, are the following: Local Government (the Assembly will later have power to alter the structure and functions of local authorities); Personal Social Services; Education, Science and the Arts (except Universities); Housing; Planning and the Environment; Roads and Transport; Development and Industry (but not nationalised industries); and Natural Resources other than agriculture and sea-fisheries. The devolution of Law and the Legal System is subject to a number of important exceptions, in wider aspects of company law, industrial relations and consumer protection. Excepted also are State security, police and prosecutions, explosives, firearms and dangerous drugs. Responsibility for the Courts and related matters is still under consideration.

There will be a Welsh Assembly with substantial policy-making and executive, but not legislative, powers, and wide responsibility for supervising the administration. It will be a single-chamber Assembly, initially with 72 members (2 for each of the 36 Parliamentary constituencies), but later the Boundary Commission will divide Parliamentary constituencies into single-member Assembly constituencies. The Assembly will be elected for a normal fixed term of 4 years. The franchise, elections and presiding officer will be as for Scotland. The Assembly will decide whether to use the Welsh language. Executive powers in devolved matters in Wales will be vested in the Welsh Assembly as a corporate (and Crown) body. Most of its work will be done through Standing Committees dealing with particular devolved subjects, such as health and education. The Assembly may delegate its functions to committees. A committee will have an impartial chairman, and a leader ('Executive Member') who will take the initiative on policy and administration.

A Co-ordinating Committee ('Executive Committee') will allocate resources. The Assembly will appoint the chairman of the Executive Committee ('Chief Executive'). A block grant will be allocated by Parliament for the devolved administration in Wales, as for Scotland. Public expenditure on devolved services in Wales was about £850 million in 1974-75.

Parliament will continue to legislate for Wales in devolved subjects as well as in others. The Welsh Assembly may debate White Papers, its officials will be consulted about proposed legislation on devolved subjects, and the Assembly may debate Bills when published. Since Parliament cannot bind its successors, however, there can be no commitment for the future to alter Bills to suit Wales. In devolved matters the Welsh Assembly may pass delegated legislation under powers conferred by Act of Parliament. The United Kingdom retains reserve powers on grounds of policy in relation to the Welsh Assembly and Executive, similar to those in relation to Scotland. As the Welsh Assembly will be a Crown body, its officials will be civil servants and part of the United Kingdom civil service. There will be a Welsh Parliamentary Commissioner to receive complaints of maladministration, who will report to the Welsh Assembly. The subjects to be devolved to Wales, some with limitations and exceptions, include: Local Government; Health; Personal Social Services; Education, Science and the Arts (except Universities); Housing; Planning and Resources. Existing Water Authorities, some of which overlap England and Wales, will not be altered. This will be a great relief to cities like Birmingham, which derive their water from Wales.

A separate document relating to England is expected. The whole devolution issue has taken the English somewhat by surprise. One hears complaints about 'interference by Whitehall' from the North East, the North West and the Midlands, but it is doubtful whether there is any strong regional feeling. Divisions in the country run more on lines of socio-economic attitudes (formerly 'classes'), represented by the main political parties. Scottish and Welsh nationalism is seen by the English as a threat to the integrity of the United Kingdom. If an English national reaction could be aroused, it would probably be directed against the over-representation of Scotland and Wales in the House of Commons.

Reaction in Scotland to the Government's proposals for legislative and administrative devolution in certain fields, notably among the Scottish Nationalist Party, is that they do not go far enough. More control over industry and industrial development, and especially 'Scottish' oil, is demanded. Conservative M.P.'s and many Labour M.P.'s think the proposals go too far, though this view has

to be expressed with caution in order not to lose votes in that country. In Wales enthusiasm for devolution appears to be diminishing. There devolution, even if only administrative, is coming to be regarded as a topheavy structure to impose on the present system of local authorities. Greater control over the existing non-elected administrative bodies might well satisfy the Welsh people. A piquant situation is created by the Government's rejection of the recommendation that some form of proportional representation should be adopted for election to the national Assemblies, because it is not unlikely that under the traditional British electoral system of single-member constituencies and 'first past the post', the Scottish Nationalists will win a majority of seats in the Scottish Assembly and perhaps go on to press for independence for Scotland. Incidentally, it is possible under this system that after the next general election in the United Kingdom the Scottish Nationalists will hold the balance of power in the House of Commons.

POSTSCRIPT

The England and Wales Bill was introduced into the House of Commons in November 1976, and is now (February 1977) in the committee stage in that House. The Bill incorporates the Government's revised proposals contained in Cmnd. 6585 (August 1976). The main changes in the previous proposals outlined in this article are:

There is to be a referendum in Scotland and Wales separately before the appropriate part of the Act will come into force.

The *vires* of a Bill of the Scottish Assembly (if challenged by the UK Government) will be decided by the Judicial Committee of the Privy Council, not by the Secretary of State. The powers of the UK Government to object to Assembly Bills on policy grounds will be available only if the Government considers the Bill to have unacceptable repercussions on matters for which they remain responsible, and subject to affirmative resolution of both Houses. The *vires* of an Assembly Act may be reviewed by the courts, though there is no indication yet what courts will have jurisdiction in this matter.

The Scottish Chief Executive will be chosen by the Assembly, not by the Secretary of State, who will merely make the formal appointment. The reserve powers of the UK Government in executive matters are reduced. The Scottish Assembly will not have any revenue raising power. The whole of Scots Private Law will be devolved, as well as the administration of the courts; but not the basic structure of the court system or the appointment and tenure of the higher judiciary.

In Wales there will be a similar reduction of the UK reserve powers in executive matters.

A guillotine motion was defeated in the House of Commons on 22 February 1977, and so it is unlikely that a Devolution Bill in any form will be enacted during the present Parliamentary session.

LOWELL VS. CARUANA AND GOVERNMENTAL LIABILITY IN MALTA

JOHN M. VASSALLO

'Il-poteri tal-esekutiv għandhom jiġu eserċitati legalment, u kull poter li joħroġ minn statut għandu jiġi eżerċitat mill-awtorita preskritta fl-istatut u skond il-kliem u l-intenzjoni tal-leġislatur'. (per Caruana Curran J., Lowell vs. Caruana).[1]

'... f'din il-materja, m'għandux ikun hemm rigoriżmu statiku jew delimitazzjoni indebita tal-"judicial control"'. (per Harding J., Police vs. Gerald Caruana).[2]

The judgement of the Civil Court (1st Hall) in Lowell vs. Caruana, delivered on 14th August, 1972,[3] per the Hon. Mr. Justice Caruana Curran, has cleared the ground for an appreciation of judicial trends in the application, culminating in rejection, of the notion of *ius imperii* where governmental liability is at issue.[4] The judgement, basing itself upon a logic which repays careful examination for the kind of judicial approach which it articulates, insists that the doctrine of sovereign immunity for the Administration when it acts *iure imperii* cannot be considered as forming any longer a part of Maltese Law. The doctrine, at least in its more sweeping applications, has been stultifying the better part of governmental liability, namely that of keeping the Administration within the law, wherever and howsoever necessary. Partly as an effect and partly as a cause thereof, judicial control of administrative action in Malta has been inhibited from growing into a body of public law with direct usefulness for the law of governmental liability. It is my intention in the present article to discuss these and other kindred implications as they arise from this judgement.

[1] 14th August, 1972.
[2] 9th September, 1953.
[3] An Appeal was lodged in 1976 but has not been yet decided.
[4] Vide Gulia: Govemmental Liability in Malta. It must be noted that Lowell vs. Caruana has, to a great extent, superimposed itself upon Dr. Gulia's entirely original legal scholarship in this field.

The Planning Area Permits Board (P.A.P.B.) had issued, to plaintiffs in this case, a permit which should have remained valid 'for one calendar year from date of issue', according to the express terms of the grant of such permit. However, the P.A.P.B. purported to withdraw and to consider as 'cancelled' this permit before its year of validity was out. Plaintiffs sought to impugn the lawfulness of the Board's cancellation of the permit, for the purpose of recovering damages they had suffered as a result thereof. Defendants, claiming that the Board could lawfully do what it had done, submitted (that) '... li, fi kwalunkwe każ, huma aġixxew *iure imperii* u għalhekk m'humiex passibbli tad-danni'.[5]

It is useful to query, even though at this stage: how did the Court react to the issue of governmental liability, confronted as it was by an allegation on the one hand of excess of jurisdiction by an administrative body, and on the other hand by defendants' rebuttal that Government had acted *iure imperii*? Apparently unconcerned with the plea of *iure imperii* the Court defined the issue, calling for decision, in the following unambiguous terms:

> '... jekk cioè il-P.A.P.B. ... jistax jirtira permess minnu formalment maħruġ, qabel ma skada ż-żmien tal-validità ta' dak il-permess, bla ma jirrendi ruħu obbligat li jikkompensa lill-persuna li tkun akkwistat dak il-permess tad-danni li tkun sofriet b'dak l-aġir tal-Board ...'[6]

The point whether a liability to pay damages would arise, remained to be determined by the criterion of the lawfulness or otherwise of the administrative act causing such damages:

> '... m'għandux ikun hemm dubju li jekk l-aġir (tal-Board) tal-konvenuti fir-revoka tal-permess joħroġ barra mill-limiti tal-liġi, dan l-att jista' jagħti lok għal-likwidazzjoni ta' kumpens in linea ta' danni ...'[7]

The plea of *iure imperii* has so far been so clearly precluded from the Court's concern with the point of governmental liability, that one must think the Court considered the plea to be irrelevant to that point. In effect, the plea was examined only after the Court had actually established an excess of jurisdiction by the P.A.P.B., so that plaintiffs as from that moment would have been entitled, if damages should be proved, 'għall-ħlas tad-danni derivanti mill-illeċitu'. More specifically, it emerges that the Court has refused to allow the point of excess of jurisdiction to be bypassed with

[5] Lowell vs. Caruana.
[6] Ibid.
[7] Ibid.

the plea that 'fi kwalunkwe każ' Government had acted *iure imperii*.

The Court's review of the Board's exercise of its powers in issuing permits took the form of a thoroughgoing interpretation of the *ad hoc* legislation which specifically delimited the extent of those powers. The interpretation to be placed by the Court upon the relevant legal provisions would determine whether the impugned act was *ultra vires* the Board's powers:

> 'To a large extent judicial review of administrative action is a specialised branch of statutory interpretation'.[8]

Did the legislation *expressly* grant the power to withdraw and cancel a permit, already formally issued, while that permit was still operative according to the terms of its making? The actual wording of the law specified that a permit could either be granted or else be refused. Therefore:

> 'Meħud rigward għall-importanza tal-materja, cioè il-kummerċ edilizju, u il-pjanifikazzjoni ta' l-iżvilupp, il-Qorti għandha tifhem illi kieku il-leġislatur kellu l-intenzjoni li jagħti ... poter daqshekk drastiku, ma kienx sejjer jonqos li jesprimi dik l-intenzjoni bi kliem adegwati fl-istatut prinċipali stess (*ubi lex voluit dixit*) ...'[9]

If the Board had wanted to reserve the power to withdraw the permit it could and should have done this by making it a *condition* at the same time the permit itself was being issued.

The Court's construction of the law has not been merely verbal, but also functional, in the sense that a certain class of considerations ('il-kummerċ edilizju u l-pjanifikazjoni tal-iżvilupp') have influenced the extent of the appropriate control which the Court deemed it should exercise. If, as Griffith and Street opine, 'no functional consideration of administrative action can ignore statutory interpretation',[10] then statutory interpretation must at times be functional, where legislation conferring powers on the Administration is concerned. It was through a functional interpretation that, in Lowell vs. Caruana, the Court argued most trenchantly for establishing governmental liability. The Court seemed to be asking: What was the nature of plaintiffs' relationship with the P.A.P.B. as soon as they were granted their permit? Was the P.A.P.B.'s alleged power to cancel a permit, as they did here, to be considered as within the lawful scope of their relationship with plaintiffs; or

[8] De Smith: Constitutional and Administrative Law, page 545.
[9] Lowell vs. Caruana.
[10] Griffith and Street: Administrative Law, page 145.

instead was it to be considered as running counter in effect to that relationship? The following answer is certainly trenchant:

'Konċepibilment – u jingħad biss konċepibilment għax il-Qorti issibha diffiċli tifhem kif xi ħadd jista' jaċċetta li jidħol għan-negozju tal-bini b'rabta hekk vaga u dissolubili – il-Board seta' kieku ried, impona il-kondizzjoni li l-permess ikun ritirabili anke waqt is-sena, imma dan mgħamlux, u għalhekk ma setgħax jagħmlu wara li laħaq irrilaxxja l-permess. Almenu hekk tifhem il-Qorti għal dak li jirrigwarda l-applikazzjoni serja tal-liġi kif tirriżulta mill-kliem stess tagħha, u tar-*rule of law*, kif ukoll l-istabilità ta' l-operazzjonijiet kummerċjali u tar-rapporti bejn iċ-ċittadini u l-Gvern ...'.[11]

The reference, in the above passage, to the Rule of Law is fundamental within the context. The Rule of Law postulates Responsible Administration, in terms of which concept the Administration 'can only do that which it has power to do'.[12] Whether the Administration has power, in law, to do that which it has done is to be determined by the Courts. Therefore, the subjection of executive discretion to increasingly higher standards of judicial control will have the effect of widening the orbit of governmental responsibility, as I have intended Lowell vs. Caruana to show. The significance of this for the law of governmental liability in Malta may be precisely estimated if we hark back to the Court of Appeal's decision in Cassar Desain vs. Forbes (XXIX.1.43, 1935). Now in that decision it was underlined that, whatever the extent of immunity for the Administration in respect of Acts of State, the principle of accountability for any illegal act of the Administration would remain unchanged:

'... if in the final judgement for some reason or other it is held that there has been a contravention of the law, it cannot be considered as coming under and within the limits of the sovereign authority.'

And in Lowell vs. Caruana this point was as clearly underlined when the Court, for a better understanding of its approach, cited thus from Lord MacDermott's Hamlyn Lecture 'Protection from Power under English Law':

'As respects that which is truly administrative, the Executive is generally immune from the Courts, provided that *what has been done has been duly authorised by law* ...'

Lowell vs. Caruana has gone well beyond Cassar Desain vs.

[11] Lowell vs. Caruana.
[12] Griffith and Street: ibid. page 21.

Forbes in so far as it has incorporated, in the principle of accountability, the public law doctrine of excess of jurisdiction.

This notwithstanding, the two abovementioned decisions merge in their approach to the issue of Governmental liability. Out of more than half a century's Maltese decided cases purporting to deal with governmental liability, only Cassar Desain vs. Forbes and Lowell vs. Caruana[13] appear to have loudly invoked the rule of Government's legal accountability in order to force the administration to pay damages to John Citizen. The hydra-headed doctrine of immunity for those governmental acts which are *iure imperii*, in those cases where the doctrine has been espoused as an *a priori* answer to the problem of *ultra vires*, has blocked the way to an investigation of excess of jurisdiction; or worse still, the Courts have failed 'to distinguish between acts *iure imperii* and the execution of acts in terms of executive discretion in terms of law'.[14] In Lowell vs. Caruana, defendants' plea 'li huma aġixxew, *fi kwalunkwe każ, iure imperii*' itself typifies this failure to distinguish between the *ius imperii* and executive discretion in terms of law, although the Court rebutted: 'Il-veru terren tal-kwistjoni ... m'huwiex dak tal-*iure imperii* imma dak tal-possess o meno da parti tal-konvenuti ta' *executive discretion* biex jimxu kif fil-fatt imxew vis-à-vis is-soċjetà attriċi'.

When the Court actually examined the plea of *iure imperii* it unearthed, at long length for our jurisprudence, not merely the outdatedness of the doctrine ('it-teorija antikwata tal-iure imperii'), but also the rationale that had induced jurists and the highest Courts on the Continent to discard the doctrine even while we in Malta were eagerly imbibing it:

> '... għaliex kienet qiegħda timminaċċja li tirrendi l-Istat immuni għall-ġustizzja u għar-reklami l-aktar ekwi u fondati taċ-ċittadini danneġġjati ...'.[15]

Mr. Justice Caruana Curran's direct method of attacking the doctrine raises a significant contrast between Lowell vs. Caruana and

[13] Sed vide Xuereb vs. Micallef per A. Magri J., 3.10.53, in which case the above quoted proposition from Cassar Desain was unreservedly approved by the Court. Having premised that proposition Magri J. proceeded to state: 'Illi jekk il-konvenuti, in rappreżentanza tal-Gvern ... ħarġux millimiti ġusti tad-drittijiet tagħhom, kisrux il-Liġi ... huma ħwejjeġ li jiġu eżaminati fil-mertu tal-kawża; u għalhekk il-konvenuti ma jistgħux *a priori*, u b'mod preġudizjali, jippretendu li l-Gvern mhuwiex responsabbli talħsara reklamata mill-attur'.

[14] Vide Gulia: Governmental Liability, page 14, and the decisions therein referred to.

[15] Lowell vs. Caruana.

Cassar Desdain vs. Forbes. In the latter decision, the Court of Appeal, wholeheartedly citing and approving Dicey's strictures upon French *Droit Administratif*, stated in 1935 that the notion of acts *iure imperii* '*forms the basis* of what is known as *Droit Administratif* in France and *Diritto Amministrativo* in Italy ...'. Such a misconception of what was actually happening on the Continent, and indeed the Judges' Diceyan bias against the French and Italian Public Law systems as a whole, clearly disabled the Court from directly attacking the doctrine. Accordingly, so far as Cassar Desain vs. Forbes could go, we had only reached the proposition that the doctrine was *alien* to Maltese Public Law, because it was non-British and we followed British Public Law principles where our own Law had a lacuna.[16]

Now this argument, basing itself exclusively on British Public Law principles, can be shown not to have been conclusive of the matter. In relation to the conflicts that have arisen in Malta between British Public Law principles and the evolution of new theories that have no place in British Public Law, it has been argued:

> 'This theory of governmental responsibility is admittedly non-British in origin, but there is no reason to consider the position anomalous, for the Maltese Courts are perfectly free in developing those theories which they feel are most suitable for the proper administration of justice ...'.[17]

After Lowell vs. Caruana, it has instead become possible to argue that the anomaly of retaining the doctrine as a part of Maltese law arises, not necessarily because it is non-British, but certainly because enlightened judicial opinion feels that it is no longer suitable in the least for the proper administration of justice. The Court's argumentation itself corroborates this point: after restating in broad terms 'li d-dritt pubbliku amministrativ ta' Malta huwa ormai sostanzjalment adottat mil-liġi Ngliża', nevertheless the Court immediately followed this restatement with: 'imma jekk wieħed ikompli jeżamina dak li ġara per eżempju fi Franza, dwar l-atti tal-poter pubbliku klassifikati ... bħala *actes de gouvernement* insibu li l-eżenzjoni tal-Istat mir-responsabilità għad-danni illum tinsab ristretta għal dawk l-atti li kif jgħid l-istess Street (Governmental Liability, page 16) 'may loosely be compared with Acts of State in English Law"'. It was only through such direct pathfinding in Continental legal experience that it could be re-

[16] Vide Gulia: ibid. page 11.

[17] J.M. Ganado: 'British Public Law and the Civil Law in Malta', Current Legal Problems, 1950.

cognised, at long length, that while the distinction itself between *actes de gestion* and *actes de gouvernement* had been renounced by those systems which after all had been its progenitors, 'to hold otherwise would make the Administration virtually free from any control'.[18]

Now as part and parcel of the judgement the Court propagated the following argument: '... anki kieku qatt it-teorija tal-*ius imperii* jew *actes d'autorité* kellha tiġi kkunsidrata bħala kunċett li b'xi mod għadu jifforma parti mil-Liġi ta' Malta ...', then in that case a Court of Law would be bound logically to follow French practice as our most recent and enlightened guide in this field of law, rather than to hark back to the values inhering in the laws and the jurisprudence of half a century ago. Following French Law would inevitably mean that the Courts could extend sovereign immunity only, and restrictively, to such acts *iure imperii* as could be characterised as falling within the ambit of the only three classes of *actes de gouvernement* recognised by contemporary French practice. These three classes of acts clearly precluded a case of an act in terms of executive discretion in terms of law, such as had been impugned in Lowell vs. Caruana.

The fact that the abovementioned argument should have been incorporated in the judgement denotes, possibly, that our Courts might stop fighting shy of highly developed non-British systems of Public Law, and that they might usefully start considering what Maltese Public Law could appropriately assimilate from such systems, despite the fact that they are non-British systems.[19] The argument, above, referred to having ourselves guided by contemporary French practice in the application of the notion of *actes de gouvernement*. Analogously it has been indicated for example that 'the Continental interpretation of excess of power which is relatively so limited in English Public Law, is much wider and would open out many doors which are now locked and fully bolted'.[20] Admittedly, in Lowell vs. Caruana itself it has been stated 'li d-dritt amministrativ Malti, kif aġġornat fl-aħjar ġurisprudenza reċenti, huwa d-dritt amministrativ Ingliż ...'. But the qualification 'kif aġġornat fl-aħjar ġurisprudenza reċenti' really should mean, I submit, that Maltese Administrative Law is (or more precisely has remained) substantially English Administrative Law because, for one reason, the trend of our more recent decided cases seems to refuse to look beyond British Public Law and into possibly more use-

[18] Lowell vs. Caruana.
[19] Vide Gulia: Governmental Liability, page 17.
[20] Vide Gulia: ibid.

ful Continental legal developments. That British Public Law is the law of Malta where the latter has a lacuna,[21] should not also mean that we must perennially continue to be limited by British Public Law principles; if it does mean that, then it calls for revision as a rule of customary law and interpretation. There is no reason to prohibit the Courts from developing Maltese Public Law in this direction, if only, because it suited better the proper administration of justice, but also because we have no doctrine of judicial precedent in Malta, as is notoriously known in this field especially of governmental liability.[22]

In this connection, it would be revealing to recall, in the case Police vs. Gerald Caruana decided per Harding J. in 1953, that the Court did not fight shy of adducing the French principle of *détournement de pouvoir*, when it was considering the possible grounds for exercising judicial control;

> 'B'hekk il-Council ma eċċeda bl-ebda mod il-poteri tiegħu, *malizzjożament jew bi żball*, b'mod li seta' jiġi kreat dak li l-ġuristi franċiżi isejħu *détournement de pouvoir* ...'.

In the same judgement, significantly, while exploring the limitations, developed 'fil-ġurisprudenza lokali', upon judicial control, the Court made the following reservation: '... salvi żviluppi oħra tagħha 'l quddiem, għaliex ċertament il-ġurisprudenza m'għandiex tkun statika'. Clearly, the description 'statika' is a warning against 'rigoriżmu statiku jew delimitazzjoni indebita tal-*judicial control* ...'. It required a sufficiently comprehensive judicial awareness of the best contemporary legal development to be able, like Mr. Justice Harding in 1953, to adduce pertinently a French Public Law concept which is less constricted than the traditional English principle of abuse of discretion. Yet as far as a comparison between the French and the English principles is concerned, De Smith has indicated that the outstanding House of Lords' decision in Padfield vs. Minister of Agriculture (1968) subjected a wide executive discretion to such judicial standards that 'the case shows unambiguously that English Administrative Law does recognise the principle that the French call *détournement de pouvoir*, or abuse of administrative power ...'.[23] Significantly enough, Padfield vs. Minister of Agriculture is characterised by De Smith as '... the most outstanding recent example of *judicial activism* in this field of the law ...'.[24] One wonders, respectfully, that it

[21] Cassar Desain vs. Forbes.
[22] Vide Gulia: Governmental Liability, page 1.
[23] S.A. de Smith: Constitutional and Administrative Law, page 572.
[24] Ibid. 23, page 572.

should require judicial activism to recognise a perfectly salutary principle of legal control.

It can be shown that if in Lowell vs. Caruana a Continental legal treatment, so to speak, of the question had prevailed, 'il-veru terren tal-kwistjoni' would still have remained 'il-pussess o meno ... ta' *executive discretion*', and certainly not the doctrine of *iure imperii*; that is, if one did not assume that Lowell vs. Caruana had necessarily and inevitably to be decided on the basis of British Public Law exclusively. This can be shown by referring to a case decided by the Italian Corte di Cassazione in 1903, De Nittis – Comune di Foggia (we must be grateful to Dr. Gulia for incorporating this judgement in his 'Governmental Liability'). The following excerpt from the judgement in question should make the point on its own:

'... per stabilire la insindacabilità dell'atto amministrativo sia mestieri esaminare se l'autorità da cui emana avesse podestà discrezionale all'uopo e se ne abbia usato dentro i limiti in cui le è legalmente attribuito. Qualora manchi la podestà per difetto di attribuzione o per violazione dei limiti legali, la *ragione della insindacabilità vien meno; nè approda ad altro diverso risultato la vieta infeconda classificazione degli atti compiuti* iure imperii o iure gestionis, *la quale dovrebbe essere lasciata in disparte, per maggiore utilità e chiarezza delle discussioni;*

Attesochè ponendo a base dell'azione che il regolamento edilizio comunale determinasse la facoltà della amministrazione nella materia che è oggetto di questa controversia e le restringesse entro confini varcati dal provvedimento che vietò all'attrice la edificazione delle fabbriche progettate, fosse stata impugnata la legittimità del provvedimento medesimo, perchè esorbitante dalla misura della podestà discrezionale competente al comune in questa materia;

Attesochè, pertanto, *se l'assunto fosse in fatto e in diritto ben fondato, ne verrebbe la possibilità che il diritto dell'attrice fosse stato leso da un atto illegittimo dell'autorità comunale ...*'.

This Italian decision shows unambiguously that the doctrine of judicial control of administrative action is far from being exclusively the creation of British Public Law, but that it appears instead by the turn of the century already to have distinctly matured as a doctrine within the Italian system. In effect it appears to have matured to an extent which prevented its being confused with, or hampered by, the doctrine of *iure imperii*. The State seemed far, very far, from having it as good as Dicey thought it was; so that one may confidently affirm that if the Judges in Cassar Desain vs. Forbes had to be offered a choice between the

true Italian position in 1903, and our own quandary pre-Lowell vs. Caruana (and indeed after it), those judges would opt for the former

While recognising that judicial review of administrative action could appropriately be invoked 'for a wide range of purposes by a person claiming to be aggrieved' (vide De Smith, Constitutional and Administrative Law, page 546), one would still be bound to consider that the very subtle and abundant nuances which cannot be prescribed with any precision by the slow, cumbersome, unwieldy procedure of judicial precedent'[25] necessitate a separate *ad hoc* law of administrative liability. The absence of such a law was duly noted in Lowell vs. Caruana:

> '... wieħed ma jridx jinsa li, ħażin jew tajjeb, qegħdin fil-kamp tal-*judge-made law*, peress li f'Malta la l-Kostituzzjoni u lanqas liġi oħra speċjali ma tirregola organikament is-suġġett importantissimu ta' l-azzjonabilità tal-Istat fil-konfront maċ-ċittadin'.

I submit that it is precisely when we come to consider the enactment by Parliament of such a law that we should also actively be reconsidering the extent to which our legislators could usefully continue to follow British Public Law in this matter, and on the other hand the extent to which the French innovations, for example, could be learnt from. It is an important exercise because Lowell vs. Caruana trenchantly reminds us of the great amount that we have taken on from British Public Law generally: thus, it was stated by the Court that in the absence of special tribunals like the French Conseil d'Etat Maltese Law vests the power of judicial review in the ordinary courts which can therefore keep the Administration in check. Further, 'il-limiti tal-poteri ġudizzjarji ... għandhom ukoll jiġu mfittxa fil-liġi Ngliża in kwantu din ġiet adottata bħala parti mil-liġi lokali ...'. But would the fact that we chose not to continue to follow British Public Law but other laws in enacting a new law of governmental liability, mean that we had renounced the 'ordinary' jurisdiction of the 'ordinary' courts? Is it this consequence which is implied when O.Hood Phillips writes: 'The [Crown Proceedings] Act adopts the Anglo-American principle of treating the state ... for the purpose of litigation as nearly as possible in the same way as a private citizen, instead of borrowing the Continental idea of a separate system of administrative law' (Constitutional and Administrative Law, page 550).

That the said consequence is not implied by that writer in the phrase 'a separate system of administrative law', may be verified if one asks: why should we not distinguish clearly between the existence, jurisdictionally, of separate courts as in France, and

[25] Gulia: Governmental Liability, page 21.

the existence of a non-private (therefore public) and 'separate' substantive law of administrative liability? Is not the existence of separate tribunals after all a jurisdictional question? While considering the lessons that the French innovations could provide 'for English Law in the future', Griffith and Street have stated that to advocate the enactment by Parliament of a new code governing suits against the Administration, 'is not to concede that the adjudication of these suits need be removed from the ordinary courts'.[26] Therefore it should be possible to retain in our system the principle of adjudication by the ordinary courts and at the same time, with perfect compatibility, to emancipate ourselves, as far as the substantive law is concerned, from having only British Public Law to follow where Maltese Law has a lacuna. To learn from non-British experiments will accordingly not mean that we would be abdicating from the concept which we hold of a government whose acts, if they are impugned, will be reviewed by the ordinary courts. To modify 'l-imsemmija limiti tal-*powers of judicial review* in this sense would mean, not to transfer those powers into different hands, but to develop the law which those powers shall be implementing.

In Lowell vs. Caruana the Court invoked the doctrine of excess of jurisdiction, with clearly important consequences for the issue of governmental liability. Yet, beyond this doctrine which is unavoidably useful because it is a public law doctrine, to what extent can it be said that British Public Law principles have directly and usefully contributed to developing in Malta a law of administrative liability? Griffith and Street state that there is 'no separate English law of administrative liability',[27] by which they mean, as they make clear, that this part of English Law has to a very large extent subjected the Crown, although 'with serious reservations',[28] to private law. Thus English Law has no truly Public (therefore 'separate') law of administrative liability, and the same writers state that 'English judges are plainly desirous of evolving fair principles of administrative liability, but are circumscribed by their adherence to private law concepts'.[29] One may submit, having regard to all this, that it is not logically possible to attempt to distinguish, as the Court of Appeal did in Cassar Desain vs. Forbes, between the 'general' and the 'constitutional' or public law of England: there was, and is, but one English law of ad-

[26] Griffith and Street: Administrative Law, page 248.
[27] Ibid.
[28] Ibid. page 247.
[29] Ibid. page 248.

ministrative liability, and that law is not set apart, saving important reservations (as for example in contract the Crown's 'potentially unrestricted competence to enter into contracts',[30] and the Crown's legal position as employer), from the private law. Certainly that decision of our Courts remains outstanding for its restatement of the English Public Law principle that the Administration must act within the law. But what happens when the Administration is called to account not for the breach of a rule of public law but for a breach of obligations in the private law domain? In this particular regard British Public Law could not directly be of use to us beyond the point of handing down to us the said principle of Responsible Administration; there were no public law principles governing administrative contract or tortious liability which we could take on. All that the Court of Appeal could revert to were our written codes:

> 'Indeed – and this is the one fact and rule governing the whole question under judgement – *our written codes do not* discriminate between the Crown (as the Government is expressly termed in various provisions) and its subjects in regard to the operation and the administration of the law; and *ubi lex non distinguit nec nos distinguere debemus ...*'.[31]

It would appear from this that we too in Malta, who of course had no 'public' law rules in this particular area to start with, have followed the English example and have therefore subjected the State to the private law. It should be said straightaway that this argument, that once our civil laws do not distinguish between the State and private citizens therefore the State is equally liable in civil damages, has been adopted expressly in just one other decision, in Xuereb vs. Micallef (3/10/53) by Alberto Magri J., though I submit the argument has further been adopted impliedly in Camilleri vs. Gatt decided per Giovanni Pullicino J. (XVIII.II.171) and in Apap Bologna vs. Borg Olivier noe decided per Alberto Magri J. (XL.II.903). Xuereb vs. Micallef directly reminds us of the 'one fact and rule governing the whole question' in Cassar Desain vs. Forbes (ibid.):

> 'Illi skond l-art. 1073 (Kod. Ċiv.), kull min jagħmel użu ta' jedd tiegħu fil-qies li jmissu ma jweġlbx għall-ħsara li tiġri b'dana l-użu, u kull wieħed iwieġeb għall-ħsara li tiġri bi ħtija tiegħu, (art. 1074 Kod. Ċiv.). Il-lokuzzjoni tal-liġi hija ġenerika, u ma tagħmel *ebda eċċezzjoni, lanqas għall-Gvern.* Għalhekk anki l-

[30] S.A. de Smith: Constitutional and Administrative Law, page 589.
[31] XXIX.I.43.

Gvern obbligat jagħmel tajjeb għad-danni fil-każ li huwa, fl-eżerċizzju tad-drittijiet tiegħu, joħroġ barra mill-ġusti limiti u jikkaġuna preġudizzju lit-terzi ...'

By way of a weighty rebuttal against any suggestion that the State had acted *iure imperii*, the Court stated: '... il-konvenuti ma jistgħux *a priori*, u b'mod preġudizzjali, jippretendu li l-Gvern mhuwiex responsabbli tal-ħsara reklamata mill-attur'. Magri J., pointing out that '... del resto, ir-rispett għad-dritt tal-proprietà jimponi ruħu anki lill-Gvern (arg. art. 357 Kod. Ċiv.) ...' (cf. now the Constitution), was prepared to hold that even where the State had acted in the public interest, it would still be liable if it thereby caused damage to private property.

In Camilleri vs. Gatt, Pullicino J. appears to have adopted the argument not expressly, but as an 'inarticulate major premise'. How else could it be explained that he unhesitatingly invoked the purely private law notion of quasi-contract (s. 1055 Civil Code) not merely in regard to the government, but in relation to a governmental act which 'falls within the traditional characteristics of *iure imperii*'?[32] Exactly the same may be asked about Apap Bologna vs. Borg Olivier noe (XL.II.903) in which Magri J. thoroughgoingly applied, in the process of determining administrative liability, the Civil Code provisions relating to contributory negligence (s. 1094 Civil Code), *culpa* (s. 1075), the obligation to give a thing (s. 1169), and *force majeure* (s. 1176); and this without a reference to the doctrine of *iure imperii* throughout the judgement.

The judgements in Camilleri vs. Gatt (XVIII.II.171), Xuereb vs. Micallef (XXXVII.II.753), and Apap Bologna vs. Borg Olivier noe (XL.II.903) clearly represent a consistent facet of our 'judge-made' law of governmental liability. But I would disagree with Dr.Gulia's suggestion that Judges Magri and Pullicino were 'administering justice, possibly in spite of the law ...';[33] their intention to administer justice was certainly redoubtable, but they were doing this, I propose, not in spite of the law, but in virtue of the law and because it appeared to these judges that their approach was doubtless the correct legal approach. The said judgements fall in line, expressly or impliedly, with the proposition, in Cassar Desain vs. Forbes (XXIX.I.43), that 'our written codes do not discriminate between the Crown ... and its subjects in regard to the operation

[32] Gulia: Governmental Liability, page 9. A telling point in Camilleri vs. Gatt is the following: 'Atteso che il principio suddetto è sostenuto quasi unanimamente dalla dottrina e dalla giurisprudenza di Francia e di Italia ...'. Pullicino J. was a very enlightened judge.

[33] Gulia: Governmental Liability, page 20.

and the administration of the law; and *ubi lex non distinguit nec nos distinguere debemus ...*'; although of course Cassar Desain vs. Forbes has had wider implications than any of the said judgements, not merely in attempting to attack directly the doctrine of *iure imperii* but in underscoring the accountability of government in the public law sense, so that, as I proposed earlier on, Lowell vs. Caruana carries on where Cassar Desain vs. Forbes left off.

Indeed although the relevance to Lowell vs. Caruana of referring to the judgements above may not be apparent, in so far as the latter have applied the civil law as the basis for decision, yet I would justify their relevance by proposing that they too, like Lowell vs. Caruana, insist upon the same inexorable point in the field of governmental liability: whatever the extent of the doctrine of *iure imperii*, the first point necessarily to be investigated before all else should be whether there has been a 'contravention of the law',[34] be it a contravention of a rule of public law or of private law, whether the Administration has exceeded or abused its powers as laid down in an act of Parliament or whether it has made itself liable in terms of the civil law, in the same way that any ordinary citizen would make himself liable. All this certainly attests a cogental judicial effort to establish convincing legal criteria for the purpose of determining governmental liability, in spite of and whatever the part played by the doctrine of *iure imperii*.

[34] Cassar Desain vs. Forbes.

DEĊIŻJONIJIET TAL-QORTI TA' L-APPELL ĊIVILI U KUMMERĊJALI, 1975*

Seduta tat-8 ta' Jannar 1975

(Sedi Inferjuri).

No. 1. Laurence Bilocca vs Francis Borg

Kawża dwar danni kaġunati f'kolliżjoni.

Il-Qorti tal-Maġistrati laqgħet it-talbiet u l-Qorti ta' l-Appell ikkonfermat bl-ispejjeż.

Il-konvenut kien ħiereġ b'charabanc mid-"drive" ta' l-isptar Monte Carmeli għall-Rabat Road.

No. 2. Salvu Schembri vs Carmelo Cini

Kawża dwar danni kaġunati f'kolliżjoni.

Il-Qorti tal-Maġistrati ċaħdet it-talbiet u l-Qorti ta' l-Appell ikkonfermat bl-ispejjeż.

Seduta tat-13 ta' Jannar 1975

(Awla Kummerċjali).

No. 3. Joseph Diacono pro et ne et vs Hilda Degiorgio Lowe et (Ara No. 4/72)

Il-konvenuta Degiorgio kellha l-użufrutt lilha imħolli b'testment ta' fond f'Archbishop Street li hija kriet għal skopi kummerċjali lill-konvenut Duncan ne.

L-atturi, nudi proprjetarji ta' dak il-fond, talbu li jiġi deċiż li dik il-lokazzjoni kienet 'ultra vires' u li tiġi annullata.

Il-Qorti tal-Kummerċ laqgħet it-talbiet bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appelli tal-konvenuti, bl-ispejjeż kontra l-appellanti.

Art. 365 u 380 Kod. Ċiv.

Ġie stabbilit li f'dan il-każ id-destinazzjoni impressa lill-ħaġa mill-proprjetarju kienet dik ta' dar ta' abitazzjoni u li, għalhekk, bil-kirja ta' din id-dar "for commercial purposes", ġiet mibdula d-

*Din ir-rakkolta hija miġbura mill-Onor. Imħallef G.O. Refalo B.A., LL.D.

destinazzjoni tal-ħaġa. Il-valutazzjoni tal-entità konkreta tal-preġjudizzju lin-nudi proprjetarji ma tantx jista' jkollha rilevanza determinanti għall-kwistjoni.

Il-fatt li fil-mori tal-kawża l-konvenuti biddlu l-iskrittura tal-lokazzjoni u ħassru l-kliem "for commercial purposes" u sostitwewhom bil-kliem "for use as offices" ma jbiddlux il-pożizzjoni in kwantu ma setawx iħassru dak li effettivament kien ġa sar.

(Dwar dritt ta' l-abitazzjoni ara App. 17. 11. 69. "Cla. Gauci vs Michelina Sammut et")

No. 4. Joseph Falzon vs Ant. Debono ne

L-attur kien silef lill-konvenut ne xi oġġetti li jservu għar-repos u talab li l-konvenut jiġi kkundannat jirrestitwihomlu u fin-nuqqas, li jiġi kkundannat iħallas il-prezz tagħhom.

Il-Qorti tal-Kummerċ laqgħet it-talbiet.

Il-Qorti ta' l-Appell irrespingiet l-appell tal-konvenut ne.

"Il-prinċipju 'audi alteram partem' ma jimpurtax illi f'ġudizju huwa imprexindibilment neċessarju u assolutament essenzjali li l-provi tal-konvenut effettivament jinstemgħu, imma biss li tingħata lilu d-debita opportunità li huwa jipproduċihom."

L-art. 198 Proc. Ċiv. jagħti lill-Qorti d-dritt li taqta' kawża fuq l-attijiet li jkunu hemm għad li l-konvenut jew l-avukat tiegħu jonqsu li jidhru.

Seduta tal-20 ta' Jannar 1975

(Awla Ċivili).

No. 5. Lucia mart Ronald Burges vs Ronald Burges

L-attriċi talbet mingħand żewġha l-alimenti għaliha u għat-tfiet uliedha. Fil-kors tal-kawża il-konvenut ried ibiddel l-iskola fejn kienu jattendu uliedu, minn skola privata ried jibgħathom skola tal-Gvern, u l-attriċi opponiet ruħha.

Il-Prim'Awla iddikjarat li fil-pendenza tal-kawża il-missier ma setax ibiddel dik l-iskola; bl-ispejjez għall-konvenut.

Sussegwentement il-Prim'Awla laqgħet it-talbiet u iffissat l-alimenti f'£M10.50,0 fil-ġimgħa bl-ispejjeż.

Il-konvenut appella miż-żewġ sentenzi.

Il-Qorti ta' l-Appell ċaħdet l-appell u kkonfermat bl-ispejjeż.

No. 6. Joseph Criminale vs Simon Heideman

L-attur talab li l-konvenut jiġi kkundannat iħallas lilu: (1) £M147 valur ta' oġġetti li nstabu nieqsa mill-post mikri mill-attur lill-konvenut, fit-terminazzjoni tal-lokazzjoni, u (2) somma li tiġi lik-

widata għad-danni kaġunati fil-fond.

Il-Prim'Awla ċaħdet l-ewwel talba bl-ispejjeż, u iddeferiet il-kawża dwar it-tieni talba.

Fuq appell tal-attur irriformat fis-sens li kkundannat lill-konvenut iħallas il-valur ta' "water heater" u rrinvjat lill-ewwel Qorti biex tillikwida l-valur ta' dak il-"heater", u għall-kontinwazzjoni; l-ispejjeż kollha jitħallsu 1/12 mill-konvenut u 11/12 mill-attur.

Kwistjoni ta' provi.

(Awla Kummerċjali).

No. 7. Emilio Agius vs Joseph Agius et

L-attur talab li fit-termini tal-konvenju l-konvenuti jiġu kundannati jaddivienu għall-att notarili ta' trasferiment ta' art favur l-attur, f'terminu qasir, u fin-nuqqas jiġi nominat Nutar u kuraturi għall-pubblikazzjoni ta' l-att.

Fil-kors tal-kawża il-konvenuti kienu iddisponew mill-fond.

Il-Qorti tal-Kummerċ asteniet ruħha milli tieħu konjizzjoni talmeritu billi dan kien eżawrit, u rriżervat kwalunkwe azzjoni oħra li l-attur seta' jkollu, bl-ispejjeż għall-konvenuti.

Il-Qorti ta' l-Appell irrespinġiet l-Appell tal-konvenuti u kkonfermat bl-ispejjeż.

Il-konvenju kien jiskadi fit-28 ta' Ġunju, 1973. Fis-27 ta' Ġunju l-attur b'ittra uffiċjali interpella lill-konvenuti biex jersqu għall-att. Dik l-ittra uffiċjali ma ġietx notifikata u għalhekk fit-28 ta' Ġunju, 1973, l-attur b'rikors talab li n-notifika ssir fit-termini tal-art. 186(3) Kod. Proc. Fil-fatt in-notifika saret fit-28 ta' Ġunju, 1973, billi kopja tal-ittra uffiċjali twaħħlet mal-bieb ta' dar il-konvenuti u fl-għassa tal-pulizija tal-post fejn kienu joqgħodu l-konvenuti.

Il-konvenuti ppretendew li dik in-notifika kienet nulla, għax ma ġietx pubblikata fil-Gazzetta tal-Gvern. (Art. 186(3), 893, 894, 174(1), 191 Kap. 15, u Art. 1407 u 2235 Kod. Civ.)

No. 8. Albert V. Salamone ne vs Kontrollur Propjeta Industrijali

Appell mid-deċiżjoni tal-Kontrollur li ċaħad l-applikazzjoni tarrikkorrent ne għar-reġistrazzjoni ta' disinn.

Il-Qorti ta' l-Appell irriteniet li dak id-disinn kien "new" fissens tal-art. 65, 66 Kap. 48.

Għalhekk laqgħet l-appell u rrevokat, bl-ispejjeż.

"Jekk disinn hux ġdid jew le, hi kwistjoni ta' fatt li għandha tiġi deċiża mill-għajn" (App. Kumm. 14.1.1972 Fr. Abela ne vs. L. Sammut Briffa ne et.

Seduta tal-24 ta' Jannar 1975

(Awla Ċivili).

No. 9. Carmelo Buhagiar vs Giuseppe Meli

Il-Qorti kienet innominat Periti, Arkitett u Avukat biex jassistih biex jirrelet aw dwar it-talba ta' l-attur u l-eċċezzjonijiet, u l-periti ppreżentaw ir-relazzjoni. Il-konvenut b'rikors talab l-isfilz tar-rapport peritali u li l-Qorti żżomm aċċess, u l-Prim'Awla ċaħdet it-talbiet.

Il-konvenut appella b'rikors u ċitazzjoni minn dak id-degriet.

Il-Qorti ta' l-Appell ċaħdet l-appell bl-ispejjeż u rrinvjat l-atti lill-ewwel Qorti.

"Hi ta' okkorrenza ġjornaliera f'dawn il-Qrati li l-periti, fejn jidhrilhom li hu l-każ, u salv il-kritika tal-partijiet, jagħmlu wkoll dawk l-osservazzjonijiet ta' natura legali li jidhrilhom opportuni u xierqa għall-każ."

Kwantu għat-talba li jinżamm aċċess il-Qorti osservat li din kienet ħaġa fid-diskrezzjoni tal-ewwel Qorti, li fiha l-Qorti ta' l-Appell ma tindaħalx jekk mhux għal xi motivi gravi.

No. 10. Carmelo Buhagiar vs William Borg

Waqt li l-konvenut kien għaddej b'karrozza minn trieq dejqa, u tiżloq, laqat karettun li t-tifel ta' l-attur kien qiegħed joħroġ minn bieb, u t-tifel sofra menomazzjoni tas-swaba' ta' idu x-xellugija.

L-attur talab li l-konvenut jiġi dikjarat responsabbli u l-likwidazzjoni u ħlas tad-danni sofferti minn ibnu.

Il-Prim'Awla wara li nnominat perit ċaħdet it-talbiet bl-ispejjeż billi rriteniet lill-iben l-attur bħala responsabbli ta' l-inċident.

Il-Qorti ta' l-Appell laqgħet l-appell ta' l-attur u rriformat, billi rriteniet responsabbli lill-konvenut u lil bin l-attur bin-nofs kull wieħed; u ddikjarat lill-konvenut responsabbli limitatament għan-nofs, u rrinvjat l-atti lill-ewwel Qorti għal-likwidazzjoni u kundanna tad-danni. L-ispejjeż s'issa kollha bin-nofs.

Il-Qorti ttrattat il-kwistjoni ta' l-iskid.

No. 11. Dr. J.B. Pace M.D. vs Maria Galea et

Kawża quddiem il-Bord tal-Kera f'Għawdex.

L-intimati appellaw minn degriet li ma ppermettiex lill-intimati jagħmlu domandi lir-rikorrent.

Il-Qorti ta' l-Appell ċaħdet l-appell u kkonfermat id-degriet bl-ispejjeż.

Il-Qorti ta' l-Appell ma tindaħalx fid-diskrezzjoni eżerċitata skond il-liġi mill-Qorti ta' l-ewwel istanza, f'dak li hu regolament

tal-provi, ħlief f'każijiet eċċezzjonali ta' raġuni gravi li jiġġustifikaw tali inġerenza.

No. 12. Carmelo sive Charles Mallia vs Ivan John Fonk

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M397.18 – jew ammont verjuri, bilanċ ta' prezz ta' xogħol ta' injam li l-attur hadem fuq inkariku tal-konvenut.

Il-Prim'Awla wara li nnominat perit laqgħet it-talba għal £M228.90 spejjeż, 2/5 għall-attur u 3/5 għall-konvenut. Ix-xogħol ta' l-attur kien difettuż u għalhekk saret riduzzjoni.

Fuq appell tal-konvenut il-Qorti ta' l-Appell laqgħet l-appell u rrevokat u lliberat lill-konvenut mill-osservanza tal-ġudizzju, bl-ispejjeż taż-żewġ istanzi għall-attur.

"Bħala regola l-konvenut għandu dritt jopponi għat-talba ta' l-attur l-'exceptio non rite adimpleti contractus' meta ma jkunx hemm adempiment assolut u totali, imma jkun hemm adempiment parzjali u difettuż."

"Fid-dottrina saret distinzjoni rigward il-mod tal-ħlas kompetenti, lill-appaltatur, skond il-mod kif ikun ġie lilu kommissjonat ix-xogħol. Jekk il-prezz ġie fissat għal kull unità, l-appaltatur ikollu dritt jitħallas tax-xogħol magħmul; jekk il-prezz ikun wieħed għax-xogħol kollu, allura jekk ix-xogħol ma jkunx kompletat u sewwa, l-appaltatur ma jkollux dritt għal ebda parti mill-ħlas.

F'dan il-każ, id-difetti ma setawx jiġu konsiderati lievi u kienu jaffettwaw il-kwaži ġeneralità tax-xogħol intrapriż mill-attur. (Ara Koll. Sent. Vol. XXX.11.433; Vol. VLII.11.1003; u App. Civ. 7.3. 1958 Fco. Desira vs Markiż A. Barbaro di San Giorgio).

No. 13. Mary Grech vs Kumm. tal-Pulizija Edward Bencini

Ir-rikorrenta talbet ir-ripreża tal-fond mikri lill-intimat għax kellha bżonnu għall-familja tagħha u offriet "alternative accomodation".

Il-Bord tal-Kera laqa' t-talba purkè għall-intimat jibqa' "available" il-fond offert, li attwalment kien in enfitewsi temporanea favur l-intimat, purkè dak il-fond wara li tispiċċa l-enfitewsi jibqa' a dispożizzjoni ta' l-intimat b'lokazzjoni għal mhux inqas minn erba' snin; ir-rikorrent kien sid tal-fond offert.

Il-Qorti ta' l-Appell, fuq appell tal-intimat, ikkonfermat, b'dan li l-kirja tal-fond offert kellha tkun għal tnax-il sena, spejjeż bla taxxa.

Seduta tal-31 ta' Jannar 1975
(Awla Ċivili).

No. 14. Alexis Vella vs Tony Cuschieri

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M190.07,5 bilanċ ta' prezz ta' materjal lilu mibjugħ u konsennjat.

Il-Prim'Awla ddikjarat ruħha inkompetenti għax il-konvenut kien negozjant u kien xtara dak il-materjal għan-negozju tiegħu w ordnat li l-atti jiġu rimessi lill-Qorti ta' l-Appell.

Il-Qorti ta' l-Appell iddikjarat kompetenti l-Qorti tal-Kummerċ u bagħtet l-atti lil dik il-Qorti.

No. 15. Paul Dimech vs Carmelo Dalli

Il-konvenut kellu fom adjaċenti għad-dar tal-attur. L-attur ippretenda li l-konvenut kien qiegħed jikkaġunalu ħsara, molestja u sikkatura, u talab li l-konvenut jiġi kundannat jagħmel ix-xogħlijiet meħtieġa biex jitneħħa l-inkonvenjent f'terminu.

Il-Prim'Awla laqgħet it-talbiet u kkundannat lill-konvenut li jirripara iċ-ċumnija tal-fond u li jagħlaq permanentement it-tamboġġ, u ordnat li l-permessi li jinħarġu mill-Pulizija favur il-konvenut ma jiġux rinnovati jekk mhux taħt il-kondizzjonijiet hemm imsemmija, bl-ispejjeż għal konvenut.

Fuq appell tal-konvenut il-Qorti ta' l-Appell irrevokat il-parti dwar il-permessi tal-Pulizija, u kkonfermat għall-bqija. L-ispejjeż ta' l-appell 1/10 mill-attur u 9/'0 mill-konvenut.

Fil-kors ta' l-appell il-konvenut kien għamel diversi xogħlijiet ordnati mill-ewwel Qorti.

No. 16. Louis Agius vs Edward Micallef

L-attur ħa b'kera mingħand il-konvenut fond b'kera bil-kondizzjoni li jixtri xi mobbli bil-prezz ta' £M900, u li kellu jagħti lill-konvenut xi mobbli stmati £M60.

L-attur issa talab li jiġi deċiż: (1) li d-£M900 minnu mħallsa lill-konvenut u l-mobbli mogħtija lilu kien rigal; (2) li l-konvenut jiġi kundannat iħallas lill-attur l-eċċess fuq il-valur reali talmobbli; (3) li l-konvenut jiġi kundannat jirritorna lill-attur il-mobbli li kien taħ.

Il-Prim'Awla ddikjarat li dik il-parti tad-£M900 li teċċedi l-valur reali tal-għamara mogħtija mill-konvenut lill-attur u l-għamara mogħtija mill-attur lill-konvenut kienu rigal b'kontravvenzjoni ta' l-art. 7 Ord. XVI/1944.

Il-Qorti ta' l-Appell laqgħet l-appell tal-konvenut u rrevokat,

spejjeż kollha bla taxxa, dritt tar-Reġistru għaż-żewġ istanzi għall-attur.

L-art. 7 tal-Ord. XVI tal-1944 ġie impurtat fil-liġi tagħna mil-liġi Ingliża, cioè Sec. 8(1) "The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920". Wara li ċċitat diversi awturi ingliżi, u ġurisprudenza tal-Qrati Ingliżi, l-Qorti irriteniet li fl-istat attwali tal-liġi tagħna l-inkwilin ma jkunx milqut mill-projbizzjoni li jirċevi rigal meta jċedi d-dritt ta' l-inkwilinat tiegħu jew meta jirrinunzja għalih u jirrilaxxa l-fond. (F'dan il-każ il-partijiet kienu nkwilini li biddlu l-fondi bil-kunsens tas-sidien).

Fuq dan il-punt fil-ġurisprudenza tagħna insibu diversi sentenzi: fejn ir-rigal jew kumpens ingħata lil sid il-kera u intalbet ir-rifużjoni, d-deċiżjonijiet kienu konkordi fil-kundanna għar-rifużjoni; fejn il-ħlas sar lill-inkwilin uxxenti u sid il-kera ġie fil-pożizzjoni li jikkonċedi l-lokazzjoni lil min għamel il-ħlas, id-deċiżjonijiet ma kienux dejjem konformi.

Ara: App. Ċiv. 21.1.1966 Borg vs Testa; App. Ċiv. 31.3.69 Dr. Ricc. Farrugia vs Eminyan: P.A. 15.5.1974 Baldacchino vs Consiglio; P.A. 1.12.64 Gerada vs Apap: App. Ċiv. 10.10.59 Aug. Testaferrata Abela vs G. D'Ugo; App. Ċiv. 18.10.63 G. Sciberras vs S. Bezzina, u P.A. 28.11.61 Cassar vs Titley.

No. 17. Giovanni Mizzi vs Joseph Coleiro ne

Il-Prim'Awla laqgħet l-eċċezzjoni tal-inkompetenza "ratione materiae" u rrinvjat l-atti lill-Qorti ta' l-Appell peress li l-bini, oġġett tal-kawża, kien jappartjeni lis-soċjetà konvenuta li kienet kummerċjanti.

Il-Qorti ta' l-Appell iddikjarat kompetenti l-Qorti tal-Kummerċ u rrinvjat l-atti lil dik l-Qorti.

Seduta tas-7 ta' Frar 1975

(Awla Kummerċjali).

No. 18. Giuseppe Vella vs Maurice Ripard

L-attur talab li l-enfitewsi ta' garage magħmula favur il-konvenut tiġi xjolta, għax il-konvenut kien moruż fil-ħlas taċ-ċens ta' żewġ skadenzi, u d-devoluzzjoni tal-fond favur l-attur.

Il-Qorti tal-Kummerċ ċaħdet it-talba bl-ispejjeż. Mill-provi irriżulta li l-konvenut kien bagħat "cheque" għall-ħlas taċ-ċens u l-attur attribwixxa dak il-ħlas għall-ispejjeż ta' kawża li kellu jieħu mingħand il-konvenut.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-attur bl-ispejjeż.

Skond l-art. 1211(1) Kod. Ċiv. id-debitur li jkollu iżjed minn

dejn wieħed, għandu jedd li fil-waqt tal-ħlas jiddikjara liema huwa d-dejn li jrid iħallas.

No. 19. Giuseppe Vella vs Maurice Ripard

B'sentenza preċedenti l-konvenut kien ġie kundannat li jagħlaq bieb li hu kien fetaħ bejn il-post tiegħu u l-kamra ta' l-attur. Għalhekk l-attur issa ippretenda li l-konvenut jiġi kundannat iħallas l-ispejjeż li l-attur għamel biex issegrega dik il-kamra, u s-somma għall-ikkupazzjoni ta' dik il-kamra mill-konvenut. Skond il-provi l-attur kien jippretendi £M93.

Il-Qorti tal-Kummerċ laqgħet it-talba l imitatament għal £M33, spejjeż 1/3 il-konvenut u 2/3 l-attur.

L-attur appella, u l-Qorti tal-Appell ċaħdet l-appell tiegħu bl-ispejjeż.

Kwistjoni ta' provi.

Seduta tad-19 ta' Frar 1975

(Sedi Inferjuri).

No. 20. Carmel Farrugia vs Edward Scerri

Kawża dwar kolliżjoni.

Il-Qorti tal-Maġistrati laqgħet it-talbiet, iddikjarat lill-konvenut responsabbli tal-kolliżjoni, u kkundannatu jħallas £M32.75, danni lill-attur, bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell bl-ispejjeż.

No. 21. James Micallef vs Joseph Micallef

B'sentenza tal-Prim'Awla tal-1970 il-konvenut kien ġie kundannat ineħħi l-kostruzzjonijiet li kien għamel f'passaġġ, u dak fi żmien xahrejn u, f'każ li jonqos, l-attur ġie awtorizzat jagħmel dak ix-xogħol hu a spejjeż tal-konvenut.

L-attur issa talab il-kundanna tal-konvenut għall-ħlas ta' £M30 inkorsi mill-attur fl-esekuzzjoni ta' dak ix-xogħol.

Il-Qorti tal-Maġistrati ddikjarat ruħha inkompetenti li tieħu konjizzjoni tat-talba, u lliberat lill-konvenut mill-osservanza tal-ġjudizzju bl-ispejjeż għall-attur.

Il-Qorti ta' l-Appell laqgħet l-appell tal-attur, ċaħdet l-ewwel eċċezzjoni tal-konvenut, u rrinvjat lill-ewwel l-atti Qorti bl-ispejjeż taż-żewġ istanzi għall-konvenut.

Ir-riferenza għas-sentenza tal-Prim'Awla kienet biss biex tispjega minn fejn oriġina l-kreditu tal-attur. F'din il-kawża si tratta mhux ta' esekuzzjoni tas-sentenza tal-Prim'Awla "ut sic", imma

ta' dak li l-attur ippretenda li ħaqqu fl-esekuzzjoni tad-dritt lilu rikonoxxut b'dik is-sentenza.

No. 22. Paul Agius vs Francis Abela et

L-attur talab ix-xoljiment ta' tpartit ta' "cars" sekonda man għax il-"car" assenjata lilu kellha l-"gearbox" difettuż.

Il-Qorti tal-Maġistrati ċaħdet it-talba bl-ispejjeż, għax il-vizzju ma kienx okkult.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-attur u kkonfermat bl-ispejjeż.

Biex tiġi eżerċitata l-azzjoni redibitorja jeħtieġ li l-vizzju jkun latenti (Ara art. 1475 Kod. Ċiv.). F'dan il-każ l-attur seta' induna b'dak id-difett. Ma kenitx meħtieġa in-nomina ta' periti.

Seduta tal-21 ta' Frar 1975

(Awla Ċivili).

No. 23. Domenico Brincat vs Carmelo Micallef

L-attur talab li (1) l-konvenut jiġi dikjarat responsabbli għad-danni li l-attur sofra meta it-truck misjuq mill-konvenut inqaleb, (2) il-likwidazzjoni tad-danni, u (3) l-kundanna għall-ħlas tad-danni.

Il-Prim'Awla laqgħet it-talbiet u kkundannat lill-konvenut iħallas £M608.15,0 (għal debilitazzjoni permanenti fi grad żgħir £M500, £M3.15,0 spejjeż ta' tabib, telf ta' "overtime" għal 3 snin £M60, telf ta' dħul ta' tips fi 3 snin £M45. L-attur kien impjegat bħala postin, u billi korra sar sorter).

Fuq appell tal-konvenut il-Qorti ta' l-Appell irriformat billi irriduċiet l-ammont dovut għal £M608.15,0 spejjeż 1/6 l-attur u 5/6 il-konvenut.

L-attur korra billi inqaleb it-truck li fuqu kien riekeb u hu ġie taħtu, għalkemm ma kienx "pinned" taħtu. L-attur sofra leżjoni f'irkobtu u sofra diżabilita permanenti ta' 15%. Il-Qorti ta' l-Appell in konsiderazzjoni ta' l-età ta' l-attur (59) irriduċiet id-danni għal £M400 flok £M500.

Fil-kors tal-appell il-konvenut kien talab li jressaq xhud impjegat ta' Roger Camilleri li kien rafa' bil-"crane" t-truck tal-konvenut wara li nqaleb, li ma kienx xehed quddiem l-ewwel Qorti peress li l-konvenut ma kienx jaf ismu. Il-Qorti ta' l-Appell ċaħdet dik it-talba għax l-attur seta' jkun jaf ismu, kieku ressaq bħala xhud lil R. Camilleri, u osservat li l-Qorti ma għandhiex tinkoraġixxi li l-provi jiġu allargati fit-tieni istanza.

No. 24. Emmanuele Borg vs John Scicluna

Ir-rikorrent talab ir-ripreża ta' fond mikri lill-intimat, għax kellu bżonnu għal ibnu u offra "alternative accommodation".

Il-Bord tal-kera ċaħad it-talba, spejjeż bla taxxa.

Il-Qorti ta' l-Appell ċaħdet l-appell tar-rikorrent bl-ispejjeż.

"Min joffri 'alternative accommodation' f'każ ta' ripreża ta' pussess għandu jqiegħed lill-intimat f'pożizzjoni li jkollu 'security of tenure' għal żmien raġonevoli". F'dan il-każ il-fondoffert kien in enfitewsi u kien fadallu erba' snin biex jispiċċa ċ-ċens. Inoltre, dak il-fond kien milqut minn pjan regolatur u kien jiġi demolit.

No. 25. Joseph Micallef vs Lino Portelli

Ir-rikorrent talab ir-ripreża ta' garage mikri lill-intimat, għax kellu bżonnu.

Il-Bord tal-Kera ċaħad it-talba, spejjeż bla taxxa, għax ma rriżultax li r-rikorrent kellu bżonn tal-garage, għax riedu biex ipoġġi karozza ta' soċjetà li tagħha huwa kien direttur.

Il-Qorti ta' l-Appell laqgħet l-appell tar-rikorrent u rrevokat, u rrinvjat l-atti lill-Bord, u bl-ispejjeż.

Il-fatt li l-karozza ma kienetx tar-rikorrent imma ta' soċjetà anonima li tagħha kien direttur u azzjonista, ma jagħmilx differenza, la darba kien ir-rikorrent li kien jagħmel użu minnha. Il-proprjeta "ut sic" ma kienetx fattur determinanti.

Seduta tal-24 ta' Frar 1975

(Awla Ċivili).

No. 26. John Galea et vs Consiglio Seychell

L-atturi talbu l-kundanna tal-konvenut għall-ħlas ta' £M250 bilanċ ta' somma akbar għal xogħol ta' bini u ġarr ta' materjal.

Il-Prim'Awla laqgħet l-eċċezzjoni ta' nkompetenza u ddikjarat ruħha nkompetenti "ratione materiae" u ordnat li l-atti jiġu trasmessi lill-Qorti ta' l-Appell.

Il-Qorti ta' l-Appell iddikjarat kompetenti l-Qorti tal-Kummerċ u baghtet l-atti lil dik il-Qorti.

Minn verbal irriżulta li l-konvenut kien negozjant u l-kawża tirrigwarda materja formanti oġġett tan-negozju tiegħu.

Seduta tat-28 ta' Frar 1975

(Awla Kummerċjali).

No. 27. Ferdinand Galea vs Cecil Pace et ne et

L-attur talab id-dikjarazzjoni li l-Bank konvenut falla.

Fil-kors tal-kawża, il-Qorti tal-Kummerċ ċaħdet it-talba tal-konvenut għall-isfilz tax-xhieda ta' Dr. C. Mifsud Bonnici, u għannomina ta' accountant f'dak l-istadju.

Il-konvenut Pace nomine appella b'rikors minn dak il-provvediment.

Il-Qorti ta' l-Appell ordnat li l-appellanti jinħarġu barra millkawża għaliex ma kellhomx "locus standi in judicio", u peress li l-appell kien tagħhom biss ma setax jibqa' jseħħ; spejjeż bla taxxa.

Skond l-art. 4 ta' l-Att XXXVI tal-1974 emendanti l-art. 18 ta' l-Att V tal-1970, ir-rappreżentanza legali u ġudizzjarja tal-Bank kienet vestita fil-kuratur nominat mill-Ministru tal-Finanzi, bl-esklużjoni ta' kull persuna oħra.

No. 28. Ferdinand Galea vs Cecil Pace et ne et

L-istess kawża msemmija fin-numru preċedenti.

Il-konvenuti Pace appellaw mill-provvediment, b'nota u petizzjoni.

Il-Qorti ta' l-Appell iddikjarat l-appell null u rrinvjat l-atti lill-ewwel Qorti bl-ispejjeż għall-appellanti.

Il-provvediment appellat kien degriet interlokutorju li jipprovdi dwar il-ġbir ta' provi, u għalhekk kien appellabbli b'rikors.

(Awla Ċivili).

No. 29. John Pace vs Alfred Abela

L-attur impunja ftehim ta' tranżazzjoni u ppretenda li dak il-ftehim kien invalidu għax ma saru b'att pubbliku, avolja jirrigwardja immobbli, u għax sar mill-attur taħt żball sostanzjali.

Il-Prim'Awla ċaħdet it-talba in kwantu bażata fuq il-kawżali ta' nuqqas ta' forma; spejjeż riżervati.

Wara l-Prim'Awla ċaħdet it-talba in kwantu bażata fuq il-vizzju ta' kunsens. Spejjeż għall-attur.

L-attur appella miż-żewġ sentenzi.

Il-Qorti ta' l-Appell laqgħet l-appell biss in kwantu bażat fuq id-difett ta' forma u rrevokat l-ewwel sentenza u kkonfermat it-tieni, laqgħet it-talba u ddikjarat it-tranżazzjoni nulla, spejjeż kollha mingħajr taxxa.

Il-kawża tranżatta kienet kawża ta' spoll; l-attur kien bena ħajt ta' konfini, u Abela ppretenda li dak il-ħajt ġie mibni fuq ħajt tiegħu, u hekk kien spoljat minn parti mill-art; għalhekk iktar minn sempliċi azzjoni ta' spoll dik il-kawża kienet azzjoni petitorja biex Abela jieħu lura l-art li ppretenda li Pace ħadlu. Skond l-art. 1813 Kod. Ċiv. kien rikjest l-att pubbliku meta t-tranżazzjoni tirrigwarda immobbli.

No. 30. Pamela Camilleri vs Saviour Camilleri

L-attriċi talbet li binthom tiġi fdata lilha, u li jinħareġ mandat "in factum" kontra l-konvenut biex jikkonsenj alha lil bintha ta' 13-il xahar.

L-attriċi kienet Ingliża, il-kontendenti iżżewġu Malta, u wara li kellhom xi jgħidu l-attriċi rritornat lejn l-Ingilterra.

Il-Prim'Awla ddeċidiet li jekk l-attriċi tmur l-Ingilterra, it-tifla kellha tibqa' għand il-missier għal tlett xhur, u disa' xhur għand ommha; jekk l-attriċi tibqa' Malta, it-tarbija kellha tmur għand ommha għal ħamest ijiem fil-ġimgħa u jumejn għand missierha; u dan sakemm it-tarbija tagħlaq tlett snin.

Il-Qorti ta' l-Appell laqgħet l-appell tal-konvenut irrevokat u "rebus sic stantibus" ċaħdet it-talba. L-ispejjeż bla taxxa, dritt tar-Reġistru bin-nofs.

It-tarbija kienet ikkurata tajjeb minn missierha u l-Qorti deherilha li f'dak l-istadju t-tarbija ma kellhiex tiġi maħruġa barra mill-ġurisdizzjoni tal-Qorti.

No. 31. Direttur ta' l-Edukazzjoni vs Anthony Busuttil ne

Il-konvenut kien ġie mibgħut jagħmel kors ta' studju l-Ingilterra, bil-kondizzjoni li kellu jaħdem mal-Gvern għal ħames snin wara li jirritorna Malta. Fil-fatt il-konvenut ħadem għal sena bissu mar igħix l-Ingilterra.

L-attur talab li l-konvenut jiġi kkundannat iħallas £M3258 minfuqha mill-Gvern f'dak il-kors ta' studju.

Il-Prim'Awla laqgħet it-talba bl-ispejjeż.

Fuq appell tal-konvenut il-Qorti ta' l-Appell iddikjarat lill-konvenut responsabbli għad-danni rizultanti mill-inadempjenza tiegħu, u rrinvjat l-atti lill-ewwel Qorti għad-determinazzjoni speċifika u likwidazzjoni tad-danni. Spejjeż ta' l-appell bla taxxa, dritt tar-Reġistru għall-appellat ne.

Fil-prim istanza kien sar verbal fejn il-kawża tħalliet għal provi kollha tal-kontendenti, li kellu jiġi komunikat lid-difensur tal-konvenut. Il-fatt li dak il-verbal ma ġiex hekk komunikat ma tassolvix lill-appellant, għax id-difensur messu ra għal xiex sar id-differiment.

No. 32. Joseph Darmanin et vs Anglu Bonnici

Il-konvenut kien laqat b'car lil G.D., omm u mart l-atturi rispettivament u kkagunalha l-mewt.

L-atturi talbu li l-konvenut jiġi dikjarat responsabbli għad-diżgrazzja u li jiġi kkundannat għad-danni, somma li tiġi likwidata.

Il-Prim'Awla l-ewwel iddikjarat il-konvenut unikament responsabbli għall-inċident, u wara kkundannatu jħallas £M2250 għad-danni.

G.D. kellha 55 sena, kienet mara tad-dar. L-atturi ppretendew li tilfu £M10 kull erba' ġimgħat li hi kienet iddaħħal għal pensjoni min-National Insurance; u l-Qorti akkordat £M2 li għal 10 snin iġibu £M240; u £M4 fil-ġimgħa ħlas ta' mara biex tagħmel ix-xogħol tad-dar, u ċioè £M1920 għal 10 snin; u £M240 spejjeż oħra b'kollox £M2500 li rriduciet għal £M2250.

Il-konvenut appella miż-żewġ sentenzi.

Il-Qorti ta' l-Appell ikkonfermat l-ewwel sentenza u rriformat it-tieni billi rriduċiet id-danni għal £M1250.

Il-Qorti tenut kont ta' l-età, mard u ċirkostanzi oħra irriduċiet il-"multiplier" minn 10 għal 7 snin; eskludiet il-kontribuzzjoni ta' £M2 tan-National Insurance, għax il-mejta għall-ħajja kienet tonfoq l-£M10 li tirċevi; irriduċiet għal £M3 fil-ġimgħa ħlas ta' mara għall-faċendi, u ċioè £M3×50×7 = £M1050, ammettiet "ex aequo et bono" £M250 għal spejjeż funerarji u spejjeż oħra u rriduċiet £M50. B'kollox £M1250.

No. 33. Bartolomeo Xuereb vs Giuseppe Gauci

Kawża dwar spoll. L-attur talab il-kundanna tal-konvenut biex jagħlaq bieb li fetaħ għal fuq l-art ta' l-attur.

Il-Prim'Awla ċaħdet it-talba spejjeż bla taxxa, dritt tar-Reġistru għall-attur.

Il-Qorti ta' l-Appell laqgħet l-appell tal-attur, irrevokat, u laqgħet it-talba, bl-ispejjeż taż-żewġ istanzi.

Ġie ppruvat li l-attur kellu l-pussess tal-bitħa li għal fuqha infetaħ il-bieb mill-konvenut.

No. 34. Carmela Zahra vs Direttur tax-Xogħlijiet Pubbliċi

L-attriċi ppretendiet li hi ftehmet mal-Gvern li kellha tiddemolixxi xi dar biex jgħaddi d-drenaġġ minn hemm u l-Gvern kellu jagħtiha £M800 għar-rikostruzzjoni tad-dar.

Wara li ddemoliet id-dar, l-attriċi talbet il-kundanna tal-konvenut għall-ħlas tat-£M800.

Il-Prim'Awla fil-kontumaċja tal-konvenut ċaħdet it-talba bl-

ispejjeż, peress li l-ftehim li kien dwar trasferiment ta' immobbli ma saru bil-miktub.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attriċi, l-ispejjeż taż-żewġ istanzi bla taxxa.

Il-ftehim kien li parti mid-dar ta' l-attriċi ssir trieq, u għalhekk kien jinvolvi trasferiment, u għalhekk dak il-ftehim kien jirrikjedi l-kitba, li kien rekwiżit formali rikjest mill-liġi "ad validitatem". F'dan il-każ l-eċċezzjoni ġiet sollevata mill-Qorti "ex ufficio".

No. 35. Maria Portelli et vs Marcel Grima

L-atturi ttrasferew fond lill-konvenut, u in korrispettiv dan obbliga ruħu li jħallas kull sena u in perpetwu nofs lira għal quddies, u fl-att ġie dikjarat li dak il-korrispettiv kien jiswa inqas minn £M100.

L-atturi issa talbu r-rexxissjoni ta' dak l-att imħabba leżjoni "ultra dimidium".

Il-Qorti ta' Għawdex laqgħet l-eċċezzjoni u ddikjarat li dak l-att ma kienx bejgħ, u għalhekk ma kienx rexxindibbli mħabba leżjoni, u ċaħdet it-talbiet, spejjeż bla taxxa.

Il-Qorti ta' l-Appell laqgħet l-appell ta' l-atturi, irrevokat, ċaħdet l-eċċezzjoni, u rrinvjat l-atti lill-ewwel Qorti għal kontinwazzjoni, spejjeż kollha bla taxxa, dritt tar-Reġistru għall-appellat.

"Fil-vendita l-prezz, għalkemm għandu jkun jikkonsisti fi flus (art. 1402 Kod. Ċiv.) mhemmx bżonn li jkun jikkonsisti f'kapital li l-kompratur iħallas immedjatament, imma jista' wkoll jieħu l-forma ta' renta perpetwa jew vitalizzju".

No. 36. Dr. Paul Mallia ne vs Vinċenza Camilleri pro et ne

L-attriċi Anna Bonnici otteniet mill-Qorti ta' New York li binha minuri jiġi fdat lilha, u ż-żwieġ tagħha ġie maħlul. L-attur talab (1) li b'applikazzjoni tal-art. 829-831 Proc. Ċiv. il-Qorti tordna l-esekuzzjoni f'Malta ta' dik is-sentenza, u (2) li l-konvenuta tiġi ordnata tikkonsenjalha l-minuri John Bonnici.

Il-Prim'Awla ċaħdet it-talbiet bl-ispejjeż għax dehrilha li ma kienx fl-interess tal-minuri li jintbagħad l-Amerika.

Fuq appell tal-attriċi, il-Qorti ta' l-Appell ċaħdet l-appell in kwantu għall-ewwel talba, però laqgħet l-appell dwar it-tieni, għax irriteniet li kien fl-interess tal-minuri u imponiet terminu lill-konvenuti biex jikkonsenjaw lit-tifel ħalli jittieħed għand ommu l-Amerika taħt il-kondizzjonijiet (a) li l-omm iġġib it-tifel Malta għand missieru darba fis-sena, (b) li jekk il-konvenut jirnexxilu jidħol fil-U.S.A. l-omm tippermettilu jara lil binhom fir-residenza tagħha. Spejjeż kollha bla taxxa, dritt tar-Reġistru bin-nofs.

Il-Qorti osservat li s-sentenza dwar id-divorzju ma setax tiġi reġistrata u esegwita f'Malta, u għalhekk lanqas seta' jiġi esegwit l-ordni dwar il-kustodja tal-minuri, għax dan kien anċillari għad-degriet tad-divorzju (Ara Low vs Low, Vol. XIII, p. 244; App. Ċiv. Dr. Edw. Fenech Adami ne vs Warrick J.F. Beattie 18.10.1963; App. Krim. 8.10.1960 Vivian De Gray ne vs Joan S.Palmer, Vol. XLIV. IV.944; Prim'Awla 22.2.1961 Edwards utrinque). Sentenza tad-divorzju fl-esteru lanqas setgħet tittieħed bħala sentenza ta' separazzjoni. (N.B. illum il-liġi tbiddlet – Marriage Act 1975)

Dwar il-kustodja tat-tifel, il-Qorti għandha tħares lejn l-interess tat-tifel, u tagħmel dak li l-aktar jaqbel lilu.

Seduta tas-7 ta' Marzu 1975

(Awla Kummerċjali).

No. 37. Adrian Strickland ne vs Carmel Debono

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M229.07,0 prezz ta' aperturi tal-ħadid lilu mibjugħa u konsenjati.

Il-Qorti tal-Kummerċ laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell bl-ispejjeż.

Kwistjoni ta' provi.

Seduta tat-12 ta' Marzu 1975

(Sedi Inferjuri).

No. 38. Thomas V. Hughes vs Anthony Cuschieri

Kawża dwar kolliżjoni.

Il-Qorti tal-Maġistrati ddikjarat li l-kolliżjoni ġrat bi ħtija tal-konvenut, u kkundannatu jħallas £M36.25,0 li ġew likwidati, bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

"Sarebbe caso tutto cio che non è dolo, cio che non è colpa: ogniqualvolta non si può far risalire ad una persona la responsabilità di un fatto, si avrebbe il caso'. (Simoncello – Istituzioni di Diritto Privato Italiano 1921)

No. 39. Joseph Camilleri vs Cettina Zahra et

Kawża dwar kolliżjoni.

Il-Qorti tal-Maġistrati ċaħdet it-talba fil-konfront tal-konvenuta u kkundannat lill-imsejħa fil-kawża tħallas £M10 lill-attur għad-danni; bl-ispejjeż ta' l-attur, tal-konvenuta u tal-perizja mill-attur tal-kjamata in kawza minnha stess.

L-attur appella mill-kap ta' l-ispejjeż.

Il-Qorti ta' l-Appell iddikjarat l-appell irritu u null bl-ispejjeż, billi s-sentenza kienet inappellabbli għax tivverti fuq ammont li ma jeċċedix £M10, u ma kien ġie deċiż ebda punt ta' dritt.

Jekk ma jkunx appellabbli l-meritu mhux appellabbli l-kap ta' l-ispejjeż. (Vol. XXX.1.936; u XXXIX.1.461)

No. 40. Angelo Zahra vs John Galea

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M30 bilanċ ta' paga għal xogħol ta' bini skond ftehim.

Il-Qorti tal-Maġistrati ddikjarat ruħha nkompetenti għax il-partijiet ma qablux jekk il-kont totali kellu jkun £M120 jew £M90, bl-ispejjeż għall-attur.

Il-Qorti ta' l-Appell laqgħet l-appell ta' l-attur mill-kap ta' l-ispejjeż u ordnat li l-ispejjeż ta' l-ewwel istanza jkunu riżervati għad-deċiżjoni tal-Qorti Superjuri kompetenti. L-ispejjeż tal-appell għall-konvenut appellat.

No. 41. Edward Baldacchino vs Alfred Farrugia

L-attur talab li l-konvenut jiġi kundannat iqiegħed bieb flok dak li kien hemm qabel, u li hu neħħa biex wessa.

Il-Qorti tal-Maġistrati laqgħet l-eċċezzjoni tar-"res judicata" u ċaħdet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur u kkonfermat bl-ispejjeż.

Seduta tal-14 ta' Marzu 1975

(Awla Kummerċjali).

No. 42. Paul Busuttil ne vs Albert W. Salomone ne

L-attur kien oppona ruħu għat-talba tal-konvenut għar-reġistrazzjoni f'Malta tat-Trade Mark "Wine Fild". L-attur issa talab (1) li jiġi deċiż li l-oppożizzjoni tal-attur kienet valida, (2) li tiġi rifjutata t-talba tal-konvenut għar-reġistrazzjoni tat-Trade Mark.

Il-Qorti tal-Kummerċ ċaħdet it-talbiet tal-attur bl-ispejjeż għax ma kienx hemm possibiltà li ż-żewġ Trade Marks jiġu konfużi.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-attur u kkonfermat bl-ispejjeż.

Il-"label" trid tkun "distinctive". Il-"label" għandha titħares fil-kumpless tagħha, u għandha tiġi paragunata ma' l-oħra. Il-kwistjonijiet ta' kuluri u/jew ħoss tal-kelmiet rispettivi jeżalaw mill-kwistjoni.

No. 43. Vincent Taliana et ne vs Carmelo Mangion

L-atturi kienu inkarigaw lill-konvenut jibnilhom mezzanin. L-atturi issa talbu: (1) li jiġi dikjarat li d-difetti eżistenti fis-soqfa kienu dovuti għall-kostruzzjoni ħażina; (2) li l-konvenut jiġi dikjarat responsabbli għal dawk id-difetti; u (3) li l-konvenut jiġi kundannat jirripara skond is-sengħa dawk id-difetti.

Il-Qorti tal-Kummerċ laqgħet it-talbiet, l-ispejjeż 1/10 għall-attur.

L-attur appella billi ppretenda li s-soqfa mhux jiġu riparati imma jiġu demoliti u mibnija mill-ġdid.

Il-Qorti ta' l-Appell ċaħdet l-appell u kkonfermat u f'każ ta' nuqqas ta' esekuzzjoni tax-xogħol mill-appellat fit-terminu lilu mogħti, awtoriżżat lill-appellant jagħmel hu dawk ix-xogħolijiet a spejjeż tal-appellat. Spejjeż bla taxxa.

Il-Qorti ma tistax tmur oltre d-domanda.

Talba għar-riparazzjoni tas-saqaf, ma tistax tiftiehem bħala talba għas-sostituzzjoni u rikostruzzjoni totali ta' l-istess saqaf.

No. 44. Wilfred Tabone ne vs Godfrey Abela

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M70 prezz ta' "washing machine" lilu mibjugħ u konsenjat.

Il-Qorti tal-Kummerċ laqgħet l-eċċezzjoni ta' nkompetenza peress li l-bejgħ in kwistjoni kien sar għall-użu personali tal-konvenut u mhux bi skop tan-negozju, u rrinvjat l-atti lill-Qorti ta' l-Appell.

Il-Qorti ta' l-Appell iddikjarat kompetenti il-Prim'Awla u bagħtet l-atti lil dik il-Qorti.

(Awla Ċivili).

No. 45. Anthony Galea vs Pio Muscat

Kawża dwar kolliżjoni bejn i l-karozzi misjuqa mill-kontendenti.

Il-Prim'Awla laqgħet it-talbiet billi sabet lill-konvenut responsabbli, u kkundannatu jħallas lill-attur £M88.72,5 għad-danni likwidati.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Il-konvenut kien ħareġ minn "side road" fuq it-triq prinċipali, ħabta u sabta, u b'hekk ippreżenta lill-attur li kien għaddej mit-triq prinċipali b'emerġenza subitanea.

Ma tistax tiġi attribwita bħala ħtija, u lanqas negliġenza kontributorja lill-attur jekk f'dik l-emerġenza subitanea li s-sewqan im-

prudenti tal-konvenut ippreżentah biha, l-azzjoni eva̱żiva li hu ttanta ma mexxitx.

No. 46. Francis Spiteri ne vs Emmanuele Cassar

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M401.60 bilanċ ta' prezz ta' fornitur.

Il-Prim'Awla laqgħet l-eċċezzjoni tal-konvenut li x-xogħol kien difettuż, u ddikjarat l-azzjoni ta' l-attur intempestiva u lliberat lill-konvenut mill-osservanza tal-ġudizzju, bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur u kkonfermat bl-ispejjeż.

Skond l-appalt ix-xogħol kellu jkun "tajjeb u mill-aħjar". Irriżulta li x-xogħol kien fih diversi difetti. L-ispiża biex tirranġa dawk id-difetti kienet tammonta għal £M67.90.

Meta d-difett ikun ta' ċerta gravità il-konvenut għandu d-dritt kollu li jopponi l-"exceptio non rite adempleti contractus" għaddomanda li ssirlu intempestivament għall-ħlas (App. 24.1.1975 C. Mallia vs J. Fonk). L-azzjoni hi desunta mhux tant mill-kliem, più o meno eżatt, tal-att istitutiv tal-ġudizzju, imma mill-iskop li għalih huwa intiż il-ġudizzju (App. Kumm. 2.5.1950 German vs Azzopardi) hekk ukoll l-indoli tal-eċċezzjoni ma tiddependix millkliem użati, imma mill-portata tagħhom.

No. 47. Albert Huber vs Lionel N.P. Halliday

L-attur xtara "plot" mingħand il-konvenut fuq assikurazzjoni li ma kien hemm ebda somma dovuta fuq dik l-art. Wara ġie mitlub iħallas £M300 għall-komunikazzjoni tas-servizzi bejn l-art u l-"mains" prinċipali.

L-attur issa talab li jiġi deċiż li dawk it-£M300 kienu dovuti mill-konvenut.

Il-Prim'Awla ċaħdet bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur u kkonfermat bl-ispejjeż tal-appell bla taxxa, dritt tar-Reġistru għall-appellant.

Meta hemm kuntratt miktub ovvjament huwa dan li għandu jirregola r-relazzjonijiet bejn il-partijiet.

Seduta tal-21 ta' Marzu 1975

(Awla Kummerċjali).

No. 48. Joseph Attard vs Paul Rapinett

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M78 bilanċ tal-prezz ta' merkanzija lilu mibjugħa u konsenjata.

Il-Qorti tal-Kummerċ iddikjarat ruħha nkompetenti. Il-konvenut kien impjegat governattiv u xtara xi oġġetti għal bżonnijiet tiegħu tad-dar.

Il-Qorti ta' l-Appell iddikjarat kompetenti l-Prim'Awla u rrinvjat l-atti lil dik il-Qorti.

(Awla Ċivili).

No. 49. Paolo Borg vs Calcedonio Borg

L-attur talab il-kundanna ta' ibnu biex jirrestitwilu tlett libretti "bearer" għal £M18.00,0 li kien fdalu bħala prokuratur tiegħu.

Il-Prim'Awla laqgħet it-talbiet ta' l-attur, bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Każ ta' valutazzjoni ta' provi u kredibilità ta' xhieda.

No. 50. Stella Aquilina vs Carmelo Aquilina

L-attriċi talbet li l-konvenut żewġha, jiġi kundannat iħallas l-alimenti.

Il-Prim'Awla laqgħet it-talba u kkundannat lill-konvenut iħallas lil martu £M2.75,0 fil-ġimgħa.

Fuq appell tal-attriċi, l-Qorti ta' l-Appell irriformat billi awmentat l-alimenti għal £M4 fil-ġimgħa, bl-ispejjeż.

No. 51. Joseph Preca et ne vs Joseph M. Attard ne

L-atturi talbu li l-konvenut jiġi kundannat jirrifondi £M689.3,8 dazju illegalment pretiż mill-konvenut u lilu mħallas b'riżerva.

Il-Prim'Awla laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Il-Preluna kienet impurtat "cash registers" bl-eżenzjoni middazju, u wara reġgħet riesportat tlieta minnhom biex iġġib tlieta oħra ikbar.

Il-fatt li l-atturi kienu kkonsenjaw dawn il-"cash registers" lill-aġent biex jirriesportahom ma kienx jikkostitwixxi "disposition" fis-sens ta' l-art. 9 tal-Ord. "Aids to Industries 1959".

Seduta tal-24 ta' Marzu 1975

(Awla Kummerċjali).

No. 52. Antonio Cilia vs Antonio Miceli Farrugia et ne

L-attur kien xtara mingħand il-konvenuti żewġ ċilindri bl-arja

kompressa; fil-fatt wieħed minn dawn iċ-ċilindri kien mimli blossiġenu, u meta ġie wżat fil-barriera tal-attur, ikkaġuna splużjoni.

L-attur talab li l-konvenuti jiġu dikjarati responsabbli tad-danni li hu sofra, u l-likwidazzjoni u kundanna għall-ħlas tad-danni.

Il-Qorti tal-Kummerċ laqgħet l-ewwel talba u ddikjarat lill-konvenut responsabbli tad-danni li sofra l-attur.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenuti u kkonfermat bl-ispejjeż.

L-appellant sostna li s-sentenza kienet nulla peress li l-ewwel Qorti ma ħadetx konjizzjoni tar-relazzjoni addizzjonali tal-periti ġudizzjarji fuq il-motiv li dak ir-rapport ma ġiex imħallas. Fil-fatt irriżulta li l-periti ħalfu r-relazzjoni meta ppreżentawha għalkemm ma thallsux. Għalkemm l-art. 670 Proc. jawtorizza lill-Qorti tiddeċidi l-kawża mingħajr il-perizja meta ma jkunx sar il-ħlas, però skond l-użu kostanti fil-Qrati tagħna, dak l-artiklu ma jsibx iżjed applikazzjoni meta l-periti jagħżlu li jaħilfu r-relazzjoni preventivament.

Skond l-art. 793 Proc. Ċiv. meta quddiem Qorti ta' grad ta' Appell tiġi sollevata eċċezzjoni ta' nullità ta' sentenza appellata, din l-eċċezzjoni, ħlief jekk tkun bażata fuq nuqqas ta' ġurisdizzjoni, jew fuq nuqqas ta' ċitazzjoni, jew fuq illeġittimità talpersuna, ma tiġix milqugħa, jekk fis-sustanza tagħha s-sentenza tinsab li hi ġusta.

F'dan il-każ l-appellant meta talab li jittratta dwar dik ir-relazzjoni, kien irrinunzja taċitament għall-eċċezzjoni, u inoltre kien hemm l-ostaklu ta' l-art. 793.

Trattandosi ta' materja teknika, fil-mankanza ta' xi opinjoni kontrarja għal dik li waslu l-periti ġudizzjarji, bl-opra ta' periti tekniċi addizzjonali, l-Qorti għandha tasal għal konklużjoni raġġjunata mill-periti nominati. Hija m'għandhiex tibbaża d-deċiżjoni tagħha fuq meri konġetturi u ipotesijiet jew possibiltajiet astratti.

No. 53. Marion Pace vs Carmelo Tabone et

L-attriċi talbet: (1) ir-revoka ta' mandat ta' qbid riferibilment għall-oġġetti maqbuda li jappartjenu lilha; u (2) li l-oġġetti maqbuda propjetà ta' żewġha jiġu assenjati lilha in kawtela tal-krediti tagħha għad-dota u dotarju.

Il-Qorti tal-Kummerċ ċaħdet l-eċċezzjoni ta' nkompetenza "ratione materiae" dwar l-ewwel talba, u laqgħet l-istess eċċezzjoni dwar it-tieni talba; u baghtet l-atti kollha lill-Qorti ta' l-Appell.

Il-Qorti ta' l-Appell ikkonfermat li l-kompetenti dwar it-tieni talba kienet il-Prim'Awla, u rrinvjat l-atti lill-Qorti tal-Kummerċ għad-deċiżjoni ta' l-ewwel talba.

No. 54. Michele Vella vs Vincent Camilleri et ne

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M2060 prezz ta' żewġ "lifts".

Il-Qorti tal-Kummerċ laqgħet it-talba, spejjeż 1/5 l-attur u 4/5 il-konvenut.

Fuq appell tal-konvenuti l-Qorti ta' l-Appell irriformat fis-sens li l-imgħax fuq is-sorte kellu jiddekorri mid-data taċ-ċertifikat dwar l-effiċjenza tal-"lifts". Spejjeż kollha bla taxxa, dritt tar-Reġistru għall-attur.

No. 55. Joseph Bugeja vs Ronald M. Demajo ne

L-attur talab il-ħlas ta' £M500 bilanċ ta' prezz ta' "shares" trasferiti lill-konvenut.

Il-Qorti tal-Kummerċ laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Il-kawża kienet tivverti dwar interpretazzjoni ta' klawsola ta' rinunzja fi skrittura.

(Awla Ċivili).

No. 56. Francesca Camilleri vs Angelo Montebello

L-attriċi talbet li l-konvenut jiġi kkundannat jagħmel l-opramorta fuq bejt ta' "garage" adjaċenti mal-bitħa tad-dar tal-attriċi.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attriċi u kkonfermat; spejjeż kollha bla taxxa, dritt tar-Reġistru għall-attriċi.

Kien hemm dubbju jekk il-bejt kienx jiġi wżat abitwalment. Għalkemm ma jkunx hemm taraġ għall-bejt it-talba tista' tiġi akkolta.

Kwistjoni ta' valutazzjoni ta' xhieda.

No. 57. Francis Apap vs Michael Galea

L-attur talab li l-konvenut jiġi kkundannat jagħlaq it-twieqi li fetaħ għal fuq il-fond ta' l-attur, f'terminu, u li jekk jonqos l-attur jiġi awtorizzat li jagħlaqhom huwa a spejjeż tal-konvenut, u li l-konvenut jiġi inibit li jibqa' jonxor fit-tieqa għal fuq il-bitħa ta' l-attur.

Il-Prim'Awla laqgħet it-talbiet bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Is-servitù bid-destinazzjoni ta' missier il-familja ma toħroġx mill-intenzjoni imma mill-fatt; dak li hu importanti mhux x'kien indikat fil-pjanta li l-proprjatarju ta' żewġ fondi ried jagħmel, imma

x'kien l-istat ta' fatt tal-fond meta l-fondi ma baqgħux ta' sid wieħed.

'Muro esterno' imsemmi fl-artiklu 463 Kod. Ċiv. huwa ħajt tat-trieq, jew kwalunkwe ħajt li ma jiddividix direttament il-fond minn fond ieħor.

Hadd mill-ġirien ma jista' mingħajr il-kunsens ta' l-ieħor jagħmel twieqi j ew aperturi oħra fil-ħajt diviżorju (Art. 462 Kod. Ċiv.), bejn ħajt diviżorju komuni u ħajt diviżorju mhux komuni; u ġie deċiż li l-aperturi ta' twieqi f'ħajt diviżorju hi kostituzzjoni ta' servitù (Koll. XII. p. 548 u XXI. 1. 517).

Il-proprjetarju ta' bitħa għandu l-proprjeta ta' l-ispazju ta' arja soprastanti (Art. 360 Kod. Ċiv.) u għalhekk il-proprjetarju tal-fond soprastanti, ma jistax jonxor mit-twieqi għal fuq il-bitħa ta' ħaddieħor, mingħajr il-kunsens ta' dan.

Seduta tas-7 ta' April 1975

(Awla Ċivili).

No. 58. Giovanna Mifsud et vs Emmanuele Bonnici

L-atturi talbu l-kundanna tal-konvenut għall-ħlas ta' £M153.50, bilanċ ta' kera ta' ħanut.

Il-Prim'Awla ddikjarat ruħha nkompetenti 'ratione materiae' u rrinvjat lill-Qorti ta' l-Appell.

Il-Qorti ta' l-Appell iddikjarat kompetenti il-Qorti tal-Kummerċ.

Seduta tad-9 ta' April 1975

(Sedi Inferjuri).

No. 59. Nazzareno Farrugia vs Philip Mizzi

L-attur talab li jiġi ddikjarat null u mhux validu ftehim bejnu u l-konvenut, biex l-attur jisgombra minn fond, għax kien hemm vizzju ta' errur tal-liġi.

Il-Qorti tal-Maġistrati ċaħdet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-attur u ikkonfermat bl-ispejjeż. U osservat:

"Ikun hemm errur ta' dritt, intiż bħala kawża li tiddivja l-volontà u ovvjament mhux bħala motiv ta' inosservanza ta' normi ġuridiċi, meta l-volontà tiddetermina ruħha f'data direzzjoni minħabba l-injoranza jew il-falsa interpretazzjoni ta' norma ġuridika, imma fil-kamp ċivili dan l-errur huwa invokabbli bħala produttiv tan-nullità tal-konvenzjoni biss jekk jirrivesti l-karattru li trid il-liġi fl-art. 1018 tal-Kod. Ċiv., u ċioè li jkun determinanti fis-sens li jkun il-kawża unika jew prinċipali tal-konvenzjoni.

No. 60. Francis Coleiro vs Anthony Stellini

Il-konvenut kellu jibni kamra fuq il-bejt ta' fond biex jirrendih "suitable alternative accomodation" għall-attur, u l-konvenut bena dik il-kamra.

L-attur issa talab li jiġi deċiż li dik il-kamra ma kenitx tajba għall-abitazzjoni skond il-liġi sanitarja, u li għalhekk il-konvenut ma kkonfemax ruħu mas-sentenza preċedenti.

Il-Prim'Awla lliberat il-konvenut mill-osservanza tal-ġudizzju billi rriteniet li kien hemm ġudikat.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur u kkonfermat bl-ispejjeż. Osservat:

"L-identità tal-ħaġa domandata u l-identità tal-'causa petendi' jikkonfondu ruħhom f'identità waħda, dik ċioè tal-kwistjoni dedotta u deċiża".

(L-attur qabel din il-kawża kien għamel oħra, biex jiġi deċiż li ix-xogħol ordnat ma sarx, u fejn sar, ma sarx kif kellu jsir).

No. 61. Giuseppe Cutajar et vs Angiolina Fenech et

Il-kontendenti kienu proprjetarji ta' fond. L-atturi ppretendew li kien sar ftehim li l-konvenuti jassennawlhom il-fond, u li kienu ġa ħallsuhom ta' sehemhom, u talbu li l-konvenuti jiġu ikkundannati jersqu għall-att pubbliku.

Il-Prim'Awla laqgħet it-talbiet ta' l-atturi.

Il-Qorti ta' l-Appell laqgħet l-appell ta' wieħed mill-konvenuti, irrevokat u ċaħdet it-talba in kwantu diretta kontra l-appellant, bl-ispejjeż taż-żewġ istanzi.

Kwistjoni ta' interpretazzjoni ta' provi.

No. 62. Joseph F. Spiteri vs Gerolamo Calleja

Għal dett snin l-attur ma setax jidħol fir-raba tiegħu għax il-konvenut kien għalaqlu l-passaġġ, u kien ġie deċiż li l-konvenut ikkommetta spoll.

L-attur talab li l-konvenut jiġi dikjarat responsabbli tad-danni, u l-likwidazzjoni u kundanna għall-ħlas tad-danni.

Il-Prim'Awla ddikjarat il-konvenut responsabbli għad-danni.

Fuq appell tal-konvenut il-Qorti ta' l-Appell irriformat billi ddikjarat lill-konvenut responsabbli għad-danni pretiżi limitatament għar-rakkolta tal-1969 u danni oħra konsegwenzjali fis-siġar u pjanti. Spejjeż ta' l-appell bin-nofs.

Irriżulta li l-attur kellu dritt jitlob il-ftuħ ta' passaġġ għal dik ir-raba minn naħa oħra, u b'ħekk huwa kien jevita id-danni kollha.

No. 63. Helen Burke vs Anthony Burke

L-attriċi talbet il-kundanna tal-konvenut żewġha għall-ħlas tal-alimenti għaliha u għal bintha.

Il-konvenut eċċepixxa li fil-kuntratt ta' separazzjoni l-attriċi kienet irrinunzjat għall-alimenti.

Fuq talba tal-attriċi l-Qorti ordnat lill-konvenut iħallas lil martu £M4 fil-ġimgħa bħala alimenti provviżorji.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut minn dan id-degriet, bl-ispejjeż.

"Għall-finijiet ta' l-għoti ta' alimenti provviżorji l-Qorti wisq ovvjament ma hijiex imsejħa biex tiddefinixxi l-meritu tal-kawża li għandu jitħalla impreġjudikat. Dak li hija għandha tara huwa biss jekk *fl-ipotesi li l-kawża jkollha eżitu favorevoli għall-attriċi*, il-konvenut huwa evidentement wieħed minn dawk li, purkè jkollhom minn fejn, għandhom l-obbligu legali li jħallsu l-mantenimen t. Huwa f'dan is-sens li għandu jiġi nterpretat l-art. 32 Kod. Ċiv."

F'kawża bejn miżżewġin għall-alimenti biss, jistgħu jingħataw l-alimenti provviżorji (App. Ċiv., 18.1.1974 in re Doris Grech vs Anthony Grech).

No. 64. Bernarda Grima vs Joseph Zammit

L-attriċi ppretendiet li bintha Maria Rosa twieldet minn relazzjonijiet illeċiti tagħha mal-konvenut u għalhekk talbet (1) li l-konvenut jiġi ddikjarat missier naturali tat-tarbija, u (2) li jiġi kkundannat iħallas pensjoni alimentarja għall-minuri.

Il-Qorti ta' Għawdex laqgħet it-talbiet u kkundannat lill-konvenut iħallas 50ċ kuljum għall-manteniment tal-minuri.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Fil-kors ta' l-appell, fuq talba tal-appellant, u bil-kunsens tal-kontendenti ġie esegwit "blood test" u ma kien irriżulta xejn kontra l-possibiltà tal-paternità.

Osservat:

"Hu naturali, li nonostante ċertu konflitt li fi grad jew ieħor javvera ruħu pratikament f'kull każ li jkun kontestat u partikolarment f'każ tax-xorta tal-preżenti, il-Qorti trid tagħmel minn kollox biex tipprova tasal għall-iskopriment tal-verità u jekk f'dan l-eżerċizzju tasal, dejjem naturalment in bażi għall-provi prodotti, għal konvinċiment morali tagħha li l-versjoni tal-istanti hija fil-kompless aktar attendibbli minn dik avversarja għal dak li jirrigwarda l-

kwistjoni li tifforma l-meritu tal-kawża, ma għandhiex tirrifuġġi, sempliċiment għax hemm versjoni kontrarja milli takkolji t-talba".

Seduta tal-14 ta' April 1975

(Awla Ċivili).

No. 65. Joseph Gatt vs Joseph Galea

Il-konvenut waqt li kien qed isuq karozza ta' l-attur ikkaġunalha ħsara. L-attur talab li l-konvenut jiġu kkundannat iħallas £M85 danni kif miftiehem.

Il-Prim'Awla laqgħet it-talba għal £M70 u l-ispejjeż.

Fuq appell tal-konvenut il-Qorti ta' l-Appell ikkonfermat il-meritu u rriformat il-kap ta' l-ispejjeż.

Kwistjoni ta' provi.

No. 66. Zammit Endrich vs Direttur Tax-Xogħolijiet Pubbliċi

Il-konvenut kien ottjena mandat ta' qbid kontra l-attur għall-kontribuzzjoni tat-trieq għall-bini ta' l-attur, u dan kien iddepożita £M173.

L-attur ippretenda li l-kontribuzzjoni kienet dovuta mill-konvenut Galea li lilu l-attur kien ittrasferixxa l-fond u talab li jiġi awtorizzat jirtira dak id-depożitu.

Il-Prim'Awla ddikjarat li dik il-kontribuzzjoni kienet dovuta mill-konvenut Galea.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut Galea u kkonfermat.

Kwistjoni ta' interpretazzjoni ta' kuntratt. "Contra testimonium scriptum, testimonium non scriptum non aufertur". Mhus ammess li provi orali jfissru dak li fih innifsu huwa diġa ċar. (Vol. XXXI. 1. 441; App. 26. 5. 1941 Attard vs Mamo).

No. 67. Giuseppe Mangion vs Francis X. Aquilina

Ir-rikorrent talab ir-ripreża ta' kantina mikrija lill-intimat għax dan ikkaġuna ħsara fil-fond, u biddel id-destinazzjoni.

Il-Bord tal-Kera laqa' t-talba għax l-intimat għamel użu divers mill-fond, billi ma użahx, bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-intimat u kkonfermat bl-ispejjeż.

Biex tara jekk hemmx tibdil fid-destinazzjoni ta' fond minħabba li dan ikun miżmum magħluq m'hemmx kriterju fiss, u dan jiġi determinat f'kull każ in ispecie, meħuda in konsiderazzjoni ċ-ċirkostanzi partikolari tal-każ.

Seduta tat-18 ta' April 1975

(Awla Kummerċjali).

No. 68. Saver Frendo vs Carmelo Borg

L-atturi talbu l-kundanna tal-konvenut għall-ħlas ta' £M70, bilanċ ta' ħlas ta' xogħol ta' kostruzzjoni.

Il-Qorti tal-Kummerċ iddikjarat ruħha nkompetenti "ratione materiae". Il-konvenut kien impjegat u kien irranġa id-dar fejn joqgħod.

Il-Qorti ta' l-Appell iddikjarat kompetenti l-Prim'Awla tal-Qorti Ċivili u bagħtet l-atti lil dik il-Qorti.

No. 69. Ralph Tabone ne vs Philip O. Gatt et ne

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M225.10, prezz ta' merċi lilu mibjugħa u konsenjata.

Il-Qorti tal-Kummerċ laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Kwistjoni ta' provi.

(Awla Ċivili).

No. 70. Louis Abdilla vs Joseph Spiteri

L-attur talab li (1) jiġi ddikjarat li l-konvenut kien qed jokkupa "flat" bla titolu, u (2) il-konvenut jiġi kkundannat jiżgombra f'terminu.

Il-Prim'Awla laqgħet it-talbiet u tat xahrejn żmien lill-konvenut biex jiżgombra.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Kwistjoni ta' provi.

No. 71. Joseph Cauchi vs Carmelo Sant

Ir-rikorrent talab ir-ripreża tal-fond mikri lill-intimat u offra "alternative accomodation".

Il-Bord tal-kera ċaħad it-talba, spejjeż bla taxxa.

Il-Qorti ta' l-Appell ċaħdet l-appell tar-rikorrent u kkonfermat, spejjeż bla taxxa.

Kwistjoni ta' "hardship". F'dan il-każ il-fond offert kien aħjar minn dak mikri lill-intimat; però kellu fondi oħra mibnija fuqu, u mart il-konvenut kienet tbati b'nevrastenija, u l-ħsejjes kienu jagħtuha fastidju, għalhekk dak il-fond ma kienx adattat.

"L-eżami tal-'alternative accomodation' m'għandux ikun oġġettiv,

imma għandhom jitqiesu l-bżonnijiet u ċ-ċirkostanzi partikolari tal-kerrej u tal-familja tiegħu.

Seduta tal-25 ta' April 1975

(Awla Kummerċjali).

No. 72. A.I.C. Maurice Captur vs Salvatore Spiteri

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M450 drittijiet professjonali tiegħu.

Il-Qorti tal-Kummerċ ċaħdet l-eċċezzjoni tal-preskrizzjoni u laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

"Huwa neċessarju li ssir distinzjoni bejn *interruzzjoni* tal-preskrizzjoni bir-rikonoxximent tad-dejn jew b'att interruttiv ieħor, u bejn *rinunzja* għal preskrizzjoni."

"L-art. 1143 Kod. Ċiv. rettament interpretat għandu jiġi intiż li jikkontempla mhux kull rikonoxximent ta' dejn magħmul minn wieħed mid-debituri solidali, imma rikonoxximent magħmul fil-kors tal-perjodu preskrittiv (oriġinali jew prorogat b'rikonoxximent jew b'kull att ieħor legalment interruttiv). Rikonoxximent li debitur solidali jagħmel qabel l-estinzjoni tad-dejn bid-dekors tal-perjodu preskrittiv iżomm il-kreditu ħaj favur il-kreditur kontra d-debitur l-ieħor, imma rikonoxximent magħmul minnu *wara* l-għeluq ta' dak il-perjodu li m'huwiex ħlief rinunzja, ma jistax jippreġudika ħlief li jagħmel dik ir-rinunzja u din ma tikkomunikax ruħha lid-debitur jew debituri oħra solidali.

(Awla Ċivili).

No. 73. George Azzopardi vs Francis Baldacchino et

L-attur talab li jiġi ddikjarat li l-art okkupata mill-konvenut kienet tal-attur u l-konvenut jiġi kkundannat jirrilaxxaha f'terminu.

Il-Prim'Awla laqgħet it-talbiet, però għal parti minn dik l-art li fuqha sar bini mill-konvenut peress li dak kien "in buona fede", iddikjarat dik il-parti propjetà tal-konvenut b'dan li l-konvenut kellu jħallas il-valur ġust tagħha lill-attur.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut, li kien limitat għal parti li kellu jiżgombra, u kkonfermat spejjeż bla taxxa, dritt tar-Reġistru għall-konvenut.

L-art. 608 Kod. Ċiv. derivata mill-art. 463 tal-Kodiċi Sardo (li ġie imbagħad ripetut anki fil-Kod. Taljan tal-1865) tikkonsakra favur l-edilizja prinċipju ta' natura eċċezzjonali li min jikkostruixxi fuq

l-art mhux tiegħu jista' jottjeni, purkè jikkonkorrû dati kondizzjonijiet li l-art tiġi fil-proprjetà tiegħu.

Il-Qorti ta' l-Appell irriteniet li l-appellant ma kienx "in buona fede" meta okkupa din il-parti ta' l-art.

(Awla Ċivili).

No. 74. Edwin Vella vs Dr. Joseph Brincat ne

L-attur talab illi l-konvenut jiġi kkundannat iħallas £M100 li kien silfu brevi manu.

Il-Prim'Awla laqgħet it-talba.

Fuq appell tal-konvenut il-Qorti ta' l-Appell annullat is-sentenza u rrinvjat l-atti lill-ewwel Qorti.

F'dan il-każ l-avukat ta' l-attur ma kienx iffirma l-lista taxxhieda, u għalhekk l-attur ma setax jixhed, u ordnat l-isfilz taxxhieda ta' l-attur.

No. 75. Maria Debono et vs Filippo Debono et

Ara Sentenza Appell 13. 71.1970.

Il-Qorti ta' Għawdex ċaħdet l-eċċezzjoni t a' novazzjoni u tarratifika.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenuti bl-ispejjeż u rrinvjat l-atti lill-ewwel Qorti.

Biex tiġi estinta enfitewsi korrenti hemm bżonn, kif hemm bżonn għal kostituzzjoni tagħha, tal-att pubbliku, u dan mhux bħala mezz probatorju iżda bħala element essenzjali tal-konvenzjoni.

Meta jonqos rekwiżit ta' forma meħtieġ "ad validitatem" wieħed ma jistax jitkellem la fuq novazzjoni li tippresupponi l-estinzjoni ta' l-obbligazzjoni oriġinali (li f'dan il-każ kienet tirrikjedi dik il-forma) u lanqas ratifika li in bażi tal-art. 1274 Kod. Ċiv. kellha ssir f'dan il-każ b'att pubbliku.

No. 76. Androcles Scicluna vs John Caruana

F'kawża oħra kontra Scicluna, l-attur kien talab li jiġi kkundannat jiżgombra minn fond; dik il-kawża ġiet tranżatta fis-sens li Scicluna kellu jippermetti lill-atturi jirtiraw l-oġġett mill-fond.

Wara saret kawża oħra "Caruana sv Scicluna" fejn billi l-konvenut kien ikkonsenjalhom parti biss mill-oġġetti talbu li Scicluna jiġi kkundannat jikkonsenja l-oġġetti l-oħra, u in difett iħallas il-valur tagħhom. Fix-xhieda ta' l-attur il-valur tal-oġġetti ġie dikjarat £M247; u l-Qorti laqgħet it-talbiet fil-kontumaċja tal-konvenut.

Issa Scicluna talab li jiġi deċiż li dik ix-xhieda u valutazzjoni kienu foloż.

Il-Prim'Awla ċaħdet it-talba.

Il-Qorti ta' l-Appell irrespinġiet l-appell ta' l-attur bl-ispejjeż:

"Kif ġie rilevat fis-sentenza ta' din il-Qorti tas-26 ta' Ġunju 1931, fl-ismijiet 'Padre S. Tabone vs Clo. Mamo (Vol. XXVIII. 1. 658) ċitazzjoni tad-deċiżjoni Prim'Awla Pullicino vs Pirotta (Vol. VI. 692) 'non importa falsità di prove, per i fini della ritrattazione in base al disposto in commento la esistenza di altre prove in potere di chi la domanda, colle quali quelle su cui la sentenza che si vuol ritrattare è stata basata potrebbero essere contradette, per la ragione che l'istante, essendo stato parte in quel giudizio, poteva nel decorso dello stesso contradire con prove quelle della parte avversa prodotte, senza che la volontaria contumacia dello stesso (qualora fosse giustificata) potesse dargli un titolo per intentare la ritrattazione della causa sul pretesto che la falsità delle prove sia stata scoperta dopo la sentenza'."

Diversament il-prinċipju ta' l-istabbilità tal-ġudikat kien jista' jiġi eluż.

Seduta tat-30 ta' April 1975

(Sedi Inferjuri).

No. 77. Alfred Petroni ne vs Angiolina Attard

L-attur talab il-kundanna tal-konvenuta għall-ħlas ta' £M9.96,6, prezz ta' "spare parts" u "servicing" ta' "washing machine".

Il-Qorti tal-Maġistrati ċaħdet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell iddikjarat l-appell null; għax valur ma jeċċediex £M10 u għalhekk is-sentenza kienet inappellabbli.

No. 78. Eleonora Mizzi vs Paul Suda

L-attriċi talbet il-kundanna tal-konvenut għar-restituzzjoni ta' żewġ gandelabri fdati f'idejh.

Il-Qorti tal-Maġistrati ċaħdet it-talba bl-ispejjeż billi rriteniet li kienu ġew mibjugħa lill-konvenut.

Il-Qorti ta' l-Appell ċaħdet l-appell, spejjeż bla taxxa.

Kwistjoni ta' provi.

No. 79. Alf. Formosa ne vs AIC. W. Caruana Montalto

L-attur talab il-kundanna tal-konvenut biex jirrestitwilu l-oġġetti li tagħhom hi ħalsitu, bis-saħħa ta' l-assigurazzjoni.

Il-Qorti tal-Maġistrati rrespinġiet l-eċċezzjoni ta' nkompetenza tal-konvenut.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat. F'dan il-każ il-klawsola arbitrali kienet bla effett, għax il-meritu ma kienx jidderiva mill-polizza, imma se mai, mill-liġi.

No. 80. Salvu Falzon vs Emmanuele Vella

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M7.55 prezz ta' banana.

Il-Qorti tal-Maġistrati laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Kwistjoni ta' provi.

No. 81. Giuseppe Schembri vs Salvu Azzopardi

L-attur talab il-kundanna tal-konvenut għall-ħlas tad-danni minnu sofferti f'kolliżjoni.

Il-Qorti tal-Maġistrati laqgħet it-talba u kkundannat lill-konvenut iħallas lill-attur £M26.50, danni.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Kwistjoni ta' provi.

No. 82. Paul Richardson ne vs John Galea

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M34.60 danni f'kolliżjoni.

Il-Qorti tal-Maġistrati ċaħdet l-eċċezzjoni tal-preskrizzjoni u ċaħdet it-talba, għax l-attur ma ppruvax it-tort tal-konvenut.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż;

Kwistjoni ta' provi.

Seduta tat-2 ta' Mejju 1975

(Awla Kummerċjali).

No. 83. Charles Micallef vs John De Purple ne

Fil-kors tal-kawża, li kienet relativa għal dett bastimenti, ċertu Marriot li kien ġie kanoniżżat kreditur tal-konvenut fl-Ingilterra, talab li jintervjeni in statu et terminis u l-Qorti akkordat dik it-talba.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-attur minn dak id-degriet bl-ispejjeż.

Seduta tal-5 ta' Mejju 1975

(Qorti Kostituzzjonali).

No. 84. Harold Scorey vs Joseph Avellino

Ir-rikorrent kien ġie liċenzjat mill-impieg tiegħu mar-Rediffusion u b'rikors fil-Prim'Awla talab li jiġi ordnat lill-intimat jirtira l-ittra tal-liċenzjament, għax kienu qegħdin jiġu vjolati l-art. 48, 38, 37 u 40(2) tal-Kostituzzjoni.

Fil-kors tal-kawża r-rikorrent talab li jressaq xhud lil C.A.M. u l-intimat oppona ruħu, u l-Qorti b'degriet ċaħdet l-oppożizzjoni u ordnat li x-xhud jinstema.

Inoltre b'verbal ir-rikorrent iddikjara li kien fi ħsiebu jressaq diversi xhieda, u l-intimat oppona ruħu, u l-Prim'Awla ċaħdet l-oppożizzjoni w ordnat li x-xhieda jinstemgħu għax rilevanti.

L-intimat appella minn dawk iż-żewġ degrieti, u l-Qorti Kostituzzjonali ċaħdet l-appell u kkonfermat.

F'materja ta' rilevanza jew superfluwita skond il-ġurisprudenza patrija, Qorti tat-tieni grad bħala regola ma tiddisturbax ir-regolament tal-Qorti ta' l-ewwel grad, jekk mhux għal motivi gravi (Vol. XXVII. 1. 344 u XXXVIII. 1. 230). Il-Qorti ta' l-ewwel grad għad għandha tissorvelja li ma jsirux domandi irrilevanti.

No. 85. Joseph Spiteri vs Joseph Avellino ne

Kawża identika għal dik t a' qabel.

Il-Qorti Kostituzzjonali ċaħdet l-appell ta' l-intimat nomine minn degriet li kien jammetti s-smiegħ ta' xi xhieda. Il-Qorti osservat li fiċ-ċirkostanzi ma setatx teskludi r-rilevanza tax-xhieda fil-kontest kollu tal-azzjoni, u f'materja simili, skond il-ġurisprudenza bħala regola, ma tiddisturbax ir-regolament tal-Qorti ta' l-ewwel grad, jekk mhux għall-motivi gravi; bl-ispejjeż.

(Awla Ċivili).

No. 86. Harold Scorey vs Joseph Avellino

L-istess kawża ta' qabel. L-intimat oltre l-appell quddiem il-Qorti Kostituzzjonali, ippreżenta wkoll l-istess appell quddiem il-Qorti ta' l-Appell.

Il-Qorti ta' l-Appell iddikjarat dan l-appell irritu u null, bl-ispejjeż, peress li l-Qorti kompetenti kienet dik Kostituzzjonali.

No. 87. Joseph Spiteri vs Joe Avellino ne

L-istess kawża ta' qabel. L-intimat ippreżenta l-istess appell

quddiem il-Qorti ta' l-Appell.

Din iddikjarat l-appell irritu u null bl-ispejjeż.

No. 88. Giuseppe Schembri vs Antonio Briffa et

Ir-rikorrent talab fil-Bord dwar il-Kontroll tal-Kiri tar-Raba, li l-pretensjoni tal-intimat, li avżawh b'ittra uffiċjali li makenux ser iġeddulu l-qbiela tar-raba, tiġi miċħuda bl-ispejjeż.

Il-Bord laqa' it-talba, u ordna t-tiġdid tal-qbiela.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-intimati u kkonfermat, spejjeż ta' l-appell bla taxxa.

Kwistjoni ta' "hardship".

No. 89. Giuseppe Mifsud vs Antonio Briffa et

Appell mid-deċiżjoni tal-Bord dwar il-Kontroll ta' kiri ta' raba, identika għal dik preċedenti.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-intimati.

Kwistjoni ta' "hardship".

Seduta tal-21 ta' Mejju 1975

(Sedi Inferjuri).

No. 90. Giovanni Spiteri vs Giuseppe Spiteri

L-attur talab li l-konvenut jiġi kkundannat jiżgombra minn razzett minnu okkupat bla titolu.

Il-Qorti tal-Maġistrati laqgħet it-talba, bl-ispejjeż.

Il-Qorti ta' l-Appell irriġettat l-appell tal-konvenut u kkonfermat bl-ispejjeż.

No. 91. Maria Rosa Agius vs Giuseppe Camilleri et

L-atturi talbu li l-konvenuti jiġu kkundannati jiżgumbraw minn ħanut, billi l-lokazzjoni spiċċat.

Il-Qorti tal-Maġistrati laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell iddikjarat l-appell null bl-ispejjeż peress li l-ħanut kien jinkera £M4 fix-xahar.

Dan il-ħanut ma kienx mikri bħala "bare premises" imma bl-avvjament, liċenzi u bħala "business concern" u għalhekk kienu kompetenti l-Qrati ordinarji u mhux il-Bord tal-Kera.

No. 92. Evelyn Spiteri vs Raymond Fonk

Kawża dwar kolliżjoni.

Il-Qorti tal-Maġistrati ċaħdet it-talba tal-attriċi bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-attriċi u kkonfermat bl-ispejjeż.

L-attriċi kienet fil-"car" ipparkjata fi Prince of Wales Road, Sliema, u x'ħin fetħet il-bieba ħabtet ma' "car" li kienet tiela' minn fuq il-lemin tagħha.

No. 93. Salvu Saliba vs Vincenzo Taliana et

L-attur talab li jiġi ddikjarat li t-taraġ kollu tal-fond kien mikri lill-inkwilini kollha li jabitaw f'dak il-fond.

Il-Qorti tal-Maġistrati ċaħdet it-talba ta' l-attur bl-ispejjeż, peress li ma ġiex pruvat li l-attur kellu dritt jitla' fuq il-bejt u jgħaddi mit-taraġ.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur u kkonfermat bl-ispejjeż.

Kwistjoni ta' provi.

Seduta tat-23 ta' Mejju 1975
(Awla Ċivili).

No. 94. Yvonne Fenech ne vs F.X. Aquilina

L-attriċi talbet li tiġi awtoriżżata tesegwixxi sentenza tal-20.4.65 li biha l-attriċi ġiet kanoniżżata kreditriċi tal-konvenut f' £M2 fil-ġimgħa bħala alimenti ta' uliedhom.

Il-konvenut eċċepixxa li l-attriċi ma indikatx l-ammont preċiż li tiegħu kienet titlob l-esekuzzjoni.

Il-Prim'Awla ċaħdet l-eċċezzjoni, u laqgħet it-talba bl-ispejjeż.

Fuq appell tal-konvenut il-Qorti ta' l-Appell: (1) irrespinġiet l-eċċezzjoni tal-preskrizzjoni sollevata mill-appellant, (2) irriformat u awtorizzat lill-attriċi tesegwixxi s-sentenza limitatament għall-alimenti ta' £M2 fil-ġimgħa mid-data tas-sentenza sa tlett snin qabel il-preżentata ta' din iċ-ċitazzjoni fis-26.1.1974, salv naturalment, l-ammont ġà minnha riċevut, mingħajr preġudizzju ta' kull dritt ieħor lilha spettanti għall-esekuzzjoni għaż-żmien suċċessiv għal dak imsemmi; spejjeż kollha bla taxxa, dritt tar-reġistru għall-appellant.

It-talba għall-alimenti skaduti mid-data tas-sentenza sa tlett snin qabel bdiet din il-kawża, kienet legalment neċessarja in vista ta' l-art. 256 Proċ. Ċiv.; però dik it-talba kienet superfluwa għal perijodu ta' wara.

Għall-finijiet ta' din it-talba ma kienx meħtieġ li jiġi speċifikat l-ammont globali mitlub.

Ma kienx hemm lok f'dan il-każ tal-preskrizzjoni kwinkwennali, għaliex din kienet ġiet interrotta b'sentenza tal-1970.

L-alimenti arretrati kienu dovuti anki jekk l-alimentand ma jkunx issellef, jew motiv ġust għan-nuqqas tal-eżazzjoni tal-istess alimenti tempestivament. (App. 8.1.1965 Marianna Gauci vs Nazzareno Gauci ne)

No. 95. Francesco Scifo Diamantino et vs Emmanuel Buontempo et

L-atturi kienu ikkonċedew lil missier il-konvenuti fond in enfitewsi għal 20 sena. Il-konvenuti kienu jippretendu li missierhom kera il-fond lill-konvenut Emmanuel.

L-atturi talbu: (1) li dik il-lokazzjoni kienet nulla fil-konfront tagħhom; (2) li l-konvenuti jiġu kkundannati jirrilaxxjaw il-fond f'terminu.

Il-Prim'Awla laqgħet it-talbiet bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenuti bl-ispejjeż.

Fil-kors tal-appell il-konvenuti biddlu d-difiża, fis-sens li lil Emmanuel kienet ġiet mikrija biss parti mill-fond, u l-Qorti ikkunsidrat dik il-lokazzjoni ta' parti biss, preġudizzjevoli għall-atturi.

No. 96. Anthony Agius vs Harold Bartoli

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M30.9 prezz ta' tieqa tal-ħadid li kien għamillu.

Il-Prim'Awla (1) laqgħet it-talba għas-somma dedotta biss awtorizzat lill-konvenut iżomm £M6 minnha sakemm l-attur jagħmel riparazzjonijiet fit-tieqa, (2) iddikjarat li l-attur kellu jirripara dik it-tieqa, (3) u tat il-fakoltà li ma jagħmilx dawk ir-riparazzjonijiet u jieħu biss £M24.45, spejjeż 1/5 għall-attur u 4/5 għall-konvenut.

Fuq appell tal-konvenut il-Qorti ta' l-Appell irrevokat u lliberat lill-konvenut mill-osservanza tal-ġudizzju, stante intempestivita. Spejjeż bla taxxa, dritt tar-Reġistru għall-attur.

Ix-xogħol kien difettuż. Ara App. 24.1.1975 Carmelo Calleja vs Ivan John Fonk.

No. 97. Pauline Borg vs Joseph Buhagiar

Ir-rikorrenti talbu ir-ripreża tal-fond mikri lill-intimat għax dan biddel id-destinazzjoni tal-fond. Dan kien mikri bħala "garage" għal "car", u kien qed jiġi użat bħala "store".

Il-Bord tal-Kera laqa' t-talba.

Il-Qorti ta' l-Appell laqgħet l-appell ta' l-intimat u rrevokat u ċaħdet it-talba, spejjeż bla taxxa, dritt tar-Reġistru għall-appellati.

Il-Qorti rriteniet li r-rikorrenti ma ppruvawx li l-fond ġie mikri bħala 'garage' għal garaxxjar ta' karozza. Is-sempliċi deskrizzjoni ta' fond bħala 'garage' fil-pariata komuni lokali mhix dejjem

konkluživa biex tistabbilixxi li l-fond ġie mikri esklużivament biex fih jinżammu karozzi. (App. Rosina Gulia vs Emm. Cassar 18 ta' Mejju 1970)

Seduta tas-26 ta' Mejju 1975

(Awla Ċivili).

No. 98. Michael Zammit vs Charles Barbara et

L-attur talab il-kundanna tal-konvenuti għall-ħlas ta' £M100 għal sentejn kera ta' fond.

Il-Prim'Awla ddikjarat ruħha inkompetenti "ratione materiae" peress li l-konvenut kien kummerċjant u l-fond kien ġie mikri lilu għan-negozju tiegħu, u rrinvjat l-atti lill-Qorti ta' l-Appell.

Il-Qorti ta' l-Appell iddikjarat kompetenti l-Qorti tal-Kummerċ.

No. 99. Stephen Mangion A.&C.E. vs Charles Micallef

L-atturi talbu l-kundanna tal-konvenut għall-ħlas tas-somma li tiġi likwidata għad-drittijiet professjonali dovuti lilhom.

Il-Prim'Awla ddikjarat ruħha inkompetenti "ratione materiae", peress li l-konvenut kien kummerċjant u l-kawża kienet tirrigwarda n-negozju tiegħu.

Il-Qorti ta' l-Appell iddikjarat kompetenti l-Qorti tal-Kummerċ.

Seduta tat-30 ta' Mejju 1975

(Awla Kummerċjali).

No. 100. Pio Vassallo vs Maġġur Joseph Gatt

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M568.17,5 bilanċ ta' somma akbar dovuta għal xogħol ta' bini u materjal.

Il-Qorti tal-Kummerċ laqgħet it-talba limitatament għal £M485,09,5; spejjeż 1/7 mill-attur u 6/7 mill-konvenut.

Tant l-attur kemm il-konvenut appellaw.

Il-Qorti ta' l-Appell irriformat fis-sens li l-interessi fuq l-ammont dovut kellhom jibdew jgħaddu mill-ewwel sentenza għax l-ammont ma kienx likwidu. L-ispejjeż taż-żewġ appelli għall-attur, dawk ta' l-ewwel istanza bin-nofs.

(Awla Ċivili).

No. 101. Loreto Seychell vs Giuseppe Barbara

L-attur kien tilef għajnu l-leminija, għax ġie milqut minn ċomb ta' tir sparat mill-konvenut waqt li kien idur għall-kaċċa, u talab

li (1) il-konvenut jiġi dikjarat responsabbli ta' l-inċident, (2) li l-konvenut jiġi kkundannat iħallsu d-danni minnu sofferti, u konsistenti f'telf ta' xogħol, spejjeż ta' mediċini, tobba u sptar, u telf ta' qliegħ futur.

Il-Prim'Awla laqgħet it-talbiet u kkundannat lill-konvenut iħallas £M2190.34,5, kwantu għall-£M2000 għal telf ta' qliegħ fil-futur u l-bilanċ ta' spejjeż ta' żewġ vjaġġi u sptar fl-Ingilterra u rriżervat lill-attur li jitħallas l-ispejjeż ta' l-operazzjoni meta jaqla' l-għajn danneġġjata.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat.

No. 102. Carmelo Fenech et vs Paul Saliba

L-attur talbu li jiġi dikjarat li l-konvenut kien qed jokkupa l-fond bla titolu, u dan peress li kienet skadiet l-enfitewsi għal 17-il sena lilu konċessa, u li l-konvenut jiġi kkundannat jiżgombra f'terminu.

Il-Prim'Awla laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell irrespingiet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

No. 103. Luigi Tonna vs Giuseppe Mifsud

Il-konvenuta okkupat fond tal-attur u għamlet xi benefikat fih, li hi kissret qabel ma ġiet kostretta titlaq minn hemm. L-attur issa talab il-kundanna tal-konvenuta għall-ħlas ta' somma li tiġi likwidata għal kumpens għal okkupazzjoni u għal ħsarat li kkaġunat fih.

Il-Prim'Awla kkundannat lill-konvenuta tħallas £M94. Spejjeż 1/3 l-attur u 2/3 għall-konvenuta.

Fuq appell tal-konvenuta, l-Qorti ta' l-Appell irriformat billi irriduċiet is-somma għal £M84. Spejjeż kollha 1/3 attur u 2/3 konvenuta.

No. 104. Caterina Schembri vs Gawdenzja Cachia et

L-attrici kienet baġħtet prokura lill-konvenuta ommha biex din tixtri dar f'isem l-attriċi u f'isem oħt l-attriċi. Fil-fatt l-attriċi xtrat l-użufrutt tad-dar "vita sua naturale durante" f'isimha, u xtrat in-nuda proprjetà f'isem uliedha.

L-attriċi issa talbet li jiġi deċiż (1) li l-akkwist da parte tal-konvenuta ta' l-użufrutt, sar b'mod abużiv u mingħajr il-kunsens ta' l-attriċi, (2) li l-kostituzzjoni ta' dak l-użufrutt jiġi ddikjarat null u bla effett.

Il-Prim'Awla ċaħdet it-talbiet bl-ispejjeż.

Il-Qorti ta' l-Appell fuq appell tal-attriċi rriformat billi laqgħet l-ewwel talba u kkonfermat fejn ċaħdet it-tieni talba.

La darba l-konvenuta aċċettat il-mandat lilha fdat kien dmir tagħha li takkwista għan-nom tal-mandati tagħha il-proprjetà sħiħa tal-fond.

Una volta li l-operazzjoni kellha ssir in virtu tal-mandat, huwa indifferenti min ħareġ il-flus, u din tibqa' materja ta' konteġġi bejn il-mandanti u l-mandatarja.

Meta mandatarju jaġixxi bħala tali, ċioè f'isem il-mandant, u fl-esekuzzjoni tal-mandat jeċċedi l-poteri lilu konferiti, huwa ma jobbligax lill-mandant ħlief jekk dan espressament jew taċitament jirratifika l-operat tal-mandatarju. (art. 1982 Kod. Ċiv.)

Meta mandatarju jaġixxi f'ismu proprju il-mandant m'għandux azzjoni kontra dawk li magħhom il-mandatarju jkun ikkontratta (art. 1973(1) Kod. Ċiv.). Għalhekk l-attriċi ma setax titlob l-annullament.

L-attriċi jista' jkollha azzjoni għad-danni kontra l-mandatarja (art. 1975 Kod. Ċiv.); u jista' jkollha azzjoni għar-restituzzjoni lilha tal-oġġett kontra l-mandatarja (Vol. XXXVIII. 1. 606).

Seduta tas-6 ta' Ġunju 1975

(Awla Kummerċjali).

No. 105. Lilian Magro pro et ne et vs Joseph Cauchi

L-attriċi talbet il-kundanna tal-konvenut għall-ħlas ta' £M5332 prezz ta' ġwież u oġġetti oħra lilu mibjugħa u kkonsennati.

Il-Qorti ta' Għawdex, Superjuri Kummerċjali, ċaħdet il-preskrizzjoni ta' ħames snin, u b'sentenza sussegwenti laqgħet it-talba.

Il-konvenut appella miż-żewġ sentenzi.

Il-Qorti ta' l-Appell ċaħdet l-appell u kkonfermat bl-ispejjeż.

Kwistjoni ta' kredibilità.

Meta l-kawża kienet tħalliet għas-sentenza mill-Qorti ta' l-Appell il-konvenut appellant ippreżenta nota ta' eċċezzjonijiet ulterjuri. Dan ma setax isir. Wara l-appellant ippreżenta rikors u talab li jiġi awtoriżżat jippreżenta n-nota tal-eċċezzjonijiet ulterjuri, u l-Qorti rriġettat it-talba. Ara App. Ċiv. 26 ta' Ġunju 1970 Borg vs Dr. Bonello.

(Awla Ċivili).

No. 106. Dr. R. Farrugia vs Mae Waterhouse

L-attur ippreżenta ċitazzjoni u l-konvenut baqa' kontumaċi, u fuq talba tal-attur il-kawża ġiet diferita "sine die". Wara fuq talba

ta' l-attur il-kawża reġgħet ġiet rijappuntata peress li l-kawża dehret fuq il-lista tal-kawżi li kien ilhom iktar minn sena "sine die".

Il-Prim'Awla ddikjarat il-kawża deżerta peress li l-attur ma ħax ħsieb ir-rijappuntament tal-kawża.

L-attur appella u talab ir-revoka ta' dik is-sentenza.

Il-Qorti ta' l-Appell irrevokat u rrinvjat l-atti lill-ewwel Qorti, u ordnat li l-ispejjeż ma jiġux ntaxxati bejn il-partijiet.

L-art. 964 Proċ. Ċiv. jikkontempla tlett kategoriji ta' diferimenti "sine die" li jistgħu jwasslu għad-deżerzjoni fin-nuqqas li jittieħdu l-passi hemm imsemmija fi żmien xahar wara li l-lista tkun ilha ppublikata għal tlett xhur. Dan l-artikolu hu ta' natura penali u għalhekk għandu jiġi interpretat restrittivament. F'dan il-każ id-diferiment "sine die" ma jidhirx maqbud minn xi proċedura partikolari għar-rijappuntament komminata taħt piena ta' deżerzjoni. Illiġi trid li jsir rikors fit-terminu legali mingħajr ma timponi li n-notifika tiegħu għandha bilfors tiġi esegwita fl-istess terminu.

No. 107. Giuseppe Camilleri ne et vs Antonia Borg et

Ir-rikorrenti talbu r-ripreża tal-fond mikri lill-intimati peress li dawn issullokaw il-fond mingħajr il-kunsens tar-rikorrenti.

Il-Bord tal-Kera laqa' it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-intimat bl-ispejjeż.

Kwistjoni t a' provi.

Seduta tat-13 ta' Ġunju 1975

(Awla Ċivili).

No. 108. Joseph Galdes vs Michael Gellel

Kawża dwar kolliżjoni.

Il-Prim'Awla ddikjarat lill-konvenut responsabbli u kkundannatu jħallas lill-attur £M116 għall-prezz ta' "spare parts" u tiswija u £M18 prezz ta' kiri ta' karozza.

Il-Qorti ta' l-Appell irrespingiet l-appell tal-konvenut u kkonfermat.

L-attur kien għaddej minn St. Joseph Road Hamrun, u għamel sinjal li kien se jdur lejn Schembri Street. Il-konvenut kien ġej warajh bi "speed" qawwi, u waqt li l-"car" ta' l-attur kienet qiegħda ddur, il-konvenut daħal fiha.

No. 109. Alfred Bajada vs Tony Degiorgio

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M124 għal xogħol minnu magħmul.

Il-Prim'Awla ddikjarat ruħha nkompetenti "ratione materiae" peress li l-konvenut kien kummerċjant, u l-kreditu kien għall-att ta' kummerċ da parti tal-konvenut.

Il-Qorti ta' l-Appell iddikjarat kompetenti l-Qorti tal-Kummerċ.

No. 110. Vincenzo Mallia et vs Emmanuele Sciberras

L-atturi biegħu terran lill-konvenut. F'dan it-terran kien hemm bieb li kien jagħti għat-taraġ li kien jieħu għal fuq il-bejt. L-atturi ppretendew li dak it-taraġ u l-arja tat-terran ma kienux inklużi fil-bejgħ.

Il-Prim'Awla ċaħdet it-talba bl-ispejjeż, għax fl-att tat-trasferiment dawk l-arja u taraġ ma ġewx eskluži u dawk kienu jiffurmaw parti ntegrali tal-fond.

L-atturi appellaw. Il-Qorti ta' l-Appell iddikjarat l-appell ta' Giuseppe Mallia irritu u null għax in-nota ta' l-appell ma saritx ukoll f'ismu, u ċaħdet l-appell ta' l-attur l-ieħor.

Il-Qorti ta' l-Appell ċaħdet ukoll it-talba tal-atturi biex iressqu xhud li ma kienx ġie dikjarat.

No. 111. Giuseppe Cassar vs Filomena Camilleri et

L-atturi kienu qasmu u ħallew razzett u xi raba in komun bejniethom. L-attur ippretenda li biċċa raba li kienet markata fil-pjanta bħala komuni kienet ġiet assenjata lilu.

Il-Prim'Awla laqgħet it-talba, spejjeż 1/3 għall-attur u 2/3 għall-konvenut.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenuti u kkonfermat bl-ispejjeż.

Kwistjoni ta' provi.

No. 112. Anthony Zahra vs Francis Galea

Irrikorrent talab l-iżgumbrament tal-intimat stante morożità.

Il-Bord tal-Kera ċaħad it-talba bl-ispejjeż, billi irritiena li ma kienx hemm morożità fis-sens tal-liġi.

Il-Qorti ta' l-Appell ċaħdet l-appell tar-rikorrent u kkonfermat bl-ispejjeż. Kwistjoni ta' kredibilità. Ara Teresa Zammit Tabona vs Edw. Valletta App. Ċiv. 12.12.69. Jekk issir offerta valida talħlas tal-kera, u s-sid inġustament jirrifjuta li jaċċettaha, ma hemmx morożità, avolja ma jsirx id-depożitu (Vol. XXXV. 1. 198).

Seduta tal-20 ta' Ġunju 1975

(Awla Ċivili).

No. 114. Carmelo Vella vs Alfred Fenech

Kawża dwar kolliżjoni.

Il-Prim'Awla ddeċidiet li l-konvenut ikkontribwixxa għall-kolliżjoni fi kwart, u għalhekk ikkundannatu jħallas £M48.75. Spejjeż 3/4 għall-attur u 1/4 għall-konvenut.

Il-Qorti ta' l-Appell irrespinġiet l-appell ta' l-attur u kkonfermat bl-ispejjeż.

Il-kolliżjoni ġrat f'Tal-Barrani Road. Bin l-attur u ieħor ħarġu simultaneament mit-trieq sekondarja għat-trieq prinċipali u qagħdu "abreast" biex itellqu, u ġew milquta mill-"bowser" misjuq mill-konvenut li kien għaddej mit-trieq prinċipali. Bin l-attur u l-ieħor kellhom ir-responsabbiltà prinċipali, u l-konvenut ikkontribwixxa għax kien għaddej bi "speed" eċċessiv.

No. 115. Roger Camilleri ne vs Chev. R. Degiorgio B.E.&A.

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M450 għall-użu ta' "crane" u "equipment" ieħor.

Il-Prim'Awla laqgħet it-talba u ddikjarat li l-attur kellu jagħti xi "cables" lill-konvenut; spejjeż bla taxxa, dritt tar-Reġistru għall-attur.

Fuq appell tal-konvenut il-Qorti ta' l-Appell irriformat billi irriduċiet l-ammont dovut mill-konvenut għal £M50 u rrevokat l-ordni dwar il-"cables".

Kwistjoni ta' xhieda.

No. 116. N. Spiteri Sacco ne vs Angelo Cutajar

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M180.6, bilanċ minn somma akbar prezz ta' ħam u xogħol magħmul fuq inkariku tal-konvenut.

Il-Prim'Awla lliberat lill-konvenut mill-osservanza tal-ġudizzju, bl-ispejjeż.

L-attur appella u l-konvenut appella inċidentalment.

Il-Qorti ta' l-Appell ċaħdet iż-żewġ appelli bl-ispejjeż.

Seduta tat-23 ta' Ġunju 1975

(Awla Ċivili).

No. 117. Michael Portelli vs Charles Camilleri

L-attur talab il-ħlas ta' danni kaġunati fil-"car" tiegħu f'kolliżjoni.

Il-Prim'Awla rriteniet li l-attur kien responsabbli fi 2/5 u l-konvenut fi 3/5, illikwidat id-danni sofferti mill-kontendenti, u kkundannat lill-konvenut iħallas lill-attur £M42.67,5.

Fuq appell tal-attur il-Qorti ta' l-Appell irriformat billi ddikjarat lill-konvenut responsabbli għal kollox, u għalhekk ikkundannatu jħallas lill-attur £M122.12,6. Spejjeż kollha għall-konvenut.

Il-konvenut kien qabeż "charabanc" wieqfa qrib kantuniera u b'hekk ħoloq "sudden emergency" għaliex malli l-attur dar il-kantuniera sab ix-"charabanc" fuqu.

Id-dottrina "of last opportunity" m'għadiex tifforma parti miliġi. (Ara App. Ċiv. Zahra vs Daley 24.6.1960 Vol. XXXIV. 1. 185 u Montebello vs Gatt 19.8.1966 u Prim'Awla Borg vs Mallia 31.3. 1966)

Il-Qorti rribadiet il-prinċipju li fl-"agony of collision" ebda "driver" li jiġi konfrontat b'dilemma m'għandu jiġi ritenut responsabbli jekk, fi kriżi mhux maħluqa minnu flok manuvra jintenta oħra (Ara App. Ċiv. Schembri vs Zammit 15 ta' Marzu 1963 Vol. XLVII. 1. 207).

Seduta tal-25 ta' Ġunju 1975

(Sedi Inferjuri).

No. 118. Joseph Amato vs David Ebejer ne

L-attur talab li l-konvenut jiġi kkundannat jiżgombra minn fond minnu okkupat b'titolu prekarju.

Il-Qorti tal-Maġistrati laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

L-attur kien kera l-fond kollu, u ppermetta lis-sid tibqa' tabita f'żewġt ikmamar. Wara li mietet is-sid, l-attur talab biex jieħu dawk iż-żewġ kmamar.

Kwistjoni ta' provi.

No. 119. Joseph Agius vs Ernest Vella

Kawża dwar kolliżjoni.

Il-Qorti tal-Magistrati ċaħdet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell bl-ispejjeż.

L-attur issorpassa karozza oħra, u ħabat ma' "car" li kienet ġejja mid-direzzjoni opposta.

No. 120. Joseph Magro vs Carmelo Magro

Kolliżjoni.

Il-Qorti tal-Magistrati laqgħet it-talba u kkundannat lill-konvenut

iħallas £M24.20, għad-danni, spejjeż bin-nifs.

Il-konvenut appella u l-attur appella inċidentalment.

Il-Qorti ta' l-Appell irriformat billi rriteniet lill-konvenut responsabbli f'terz biss u kkundannatu jħallas £M16 u ċaħdet l-appell tal-attur.

L-attur ried jaqsam Mannarino Road, fil-waqt li l-konvenut kien għaddej fid-dritt minn dik it-trieq.

No. 121. Carmelo Scerri vs Louis Pace Axiaq

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M31.25, prezz ta' merkanzija lilu mibjugħa u konsenjata.

Il-Qorti tal-Maġistrati ċaħdet l-eċċezzjoni tal-preskrizzjoni ta' 18-il xahar (2253(b)) sollevata mill-konvenut.

Il-Qorti ta' l-Appell ċaħdet l-appell u kkonfermat bl-ispejjeż.

F'dan il-każ imbiegħet kwantita inġenti u għalhekk mhux bl-imnut, u dik il-preskrizzjoni ma kienetx applikabbli (G. Borg vs Avv. Dr. G. Bonello App. Ċiv. 26.6.1970; XIII. 294; XXI. 1. 406).

No. 122. Perit R. Buttigieg vs Direttur tax-Xogħolijiet Pubbliċi

L-attur talab il-ħlas ta' £M5.13,5 dovuta lilu bħala parti mis-salarju.

Il-Qorti tal-Maġistrati laqgħet it-talba attriċi, bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

L-impjegat ċivili jista' jagixxi kontra l-Gvern għall-ħlas ta' arretrati ta' salarju dovut lilu.

Fil-ġurnata in kwistjoni l-attur u sħabu ma kienux "on strike".

Seduta tas-27 ta' Ġunju 1975

(Awla Kummerċjali).

No. 123. Alberto Salomone ne vs Kontrollur Proprjeta Industrijali

Appell mid-deċiżjoni tal-Kontrollur li kien ċaħad ir-reġistrazzjoni ta' "trade mark", tal-kelma "Moucler" għax kien isem ta' Belt fl-Istati Uniti.

Il-Qorti ta' l-Appell laqgħet l-appell u rrevokat, spejjeż bla taxxa.

Il-kliem "geographical name" m'għandux jitqies bħala ekwivalenti għall-isem ta' xi post x'imkien fid-dinja. Il-"primary significance" tal-kelma mhiex ġeografika. L-artikoli li għalihom kienet destinata it-"trade mark" ma kellhomx konnessjoni ma' din il-lokalita. (L-ispelling tal-kelma kien differenti).

(Awla Ċivili).

No. 124. John Scerri vs Domenico Farrugia

L-attur talab li l-konvenut jiġi kkundannat jittrasferilu l-liċenzja ta' "charabanc" li kien bieghlu, peress li l-attur kien ħallas il-prezz kollu.

Il-Prim'Awla ddikjarat ruħha nkompetenti "rationae materiae" għax il-konvenut kien kummerċjant, u rrinvjat l-atti lill-Qorti ta' l-Appell.

Il-Qorti ta' l-Appell iddikjarat kompetenti l-Qorti tal-Kummerċ u bagħtet l-atti lil dik il-Qorti.

No. 125. Caterina Mifsud et vs Gaetana Aquilina

Ir-rikorrenti talbu r-ripreża ta' fond mikri lill-intimata, għax bid-dlet id-destinazzjoni tal-fond (ħanut ta' mastrudaxxa).

Il-Bord tal-Kera laqa' it-talba, spejjeż bla taxxa.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-intimata spejjeż bla taxxa, dritt tar-Reġistru għall-appellanti.

Kwistjoni ta' kredibilità.

No. 126. Saver Galea vs Ganni Galea

Ir-rikorrent talab quddiem il-Bord dwar il-kontroll tal-kiri tar-raba, ir-ritrattazzjoni tal-kawża fejn hu kien ġie kkundannat jiżgombra minn raba, fuq provi ġodda.

Il-Bord ċaħad it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tar-rikorrent bl-ispejjeż u kkonfermat.

Dan ma kienx każ fejn kien ġie vjolat il-prinċipju "audi alteram partem" kif kien jippretendi r-rikorrent.

Seduta tat-30 ta' Ġunju 1975

(Awla Kummerċjali).

No. 127. Adrian Strickland ne vs Anthony Sammut

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M188.50, prezz ta' aperturi ta' ħadid lilu mibjugħa u konsenjati. Il-Qorti tal-Kummerċ laqgħet l-eċċezzjoni tal-preskrizzjoni ta' tmintax-il xahar, u ċaħdet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell laqgħet l-appell ta' l-attur u rrevokat, bl-ispejjeż taż-żewġ istanzi għall-konvenut u rrinvjat l-atti lill-ewwel Qorti.

L-art. 2201 Kod. Ċiv. għandu jiġi moqri unitament mal-art. 2253 u

għandu jiġi nterpretat bħala li ma jidderogax għad-dispożizzjoni speċifikata u partikolari għall-bejgħ bl-imnut espressament kontemplat fih.

Fl-art. 2253(b) il-kriterju adoperat mhux korretat mal-persuni, kummerċjant jew le, involuti fix-xiri, imma huwa jekk il-bejgħ sarx bl-imnut jew bl-ingrossa (App. 26.5.1967 Emm. Micallef vs Fr. Mercieca; XXXI. 11. 235).

Il-Qrati stabbilew li l-kriterju distintiv fondamentali tal-bejgħ bl-ingrossa u ta' dak bl-imnut fil-fatt jinsab fil-kwantitattiv mibjugħ (App. Ċiv. 22.6.70 G. Borg vs Dr. G. Bonello ne).

F'dan il-każ il-bejgħ kien bl-ingrossa. In-natura ta' bejgħ bl-ingrossa ma tikkonvertiex ruħha f'bejgħ bl-imnut minħabba l-fatt li l-konsenja ta' l-oġġetti ma ssirx f'daqqa. Wieħed irid jara n-negozju globali.

No. 128. Giacomo Strano vs Zahra Anthony ne

L-attur talab il-kundanna tal-konvenut għall-ħlas tas-salarju dovut lilu bħala motorista tal-vapur "M.V. Mariner".

Il-Qorti tal-Kummerċ laqgħet l-eċċezzjoni ta' nuqqas ta' ġurisdizzjoni, u għalhekk iddikjarat ruħha nkompetenti, spejjeż għall-attur.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-attur u kkonfermat, spejjeż bla taxxa, dritt tar-Reġistru għall-appellant.

Iż-żewġ kontendenti kienu taljani u hekk ukoll kienet il-bandiera tal-vapur. Il-konvenut ma kienx Malta meta sar il-mandat ta' impediment tas-safar tal-vapur.

Skond l-inċiżi "e" u "f" art. 743 Proċ. Ċiv., biex il-Qrati lokali jkollhom ġurisdizzjoni jinħtieġ li l-persuna obbligata tinsab f'dawn il-Gżejjer.

L-Ord. 111 tal-1892 (Vice Admiralty Court, Transfer of Jurisdiction Ordinance) ġiet revokata bl-art. 376(3) tal-Att XI tal-1973, salv però dak provdut fl-art. 370(1) tal-istess Att.

Kieku l-azzjoni tal-attur kienet "in rem" il-Qorti tal-Kummerċ kien ikollha ġurisdizzjoni. Però din l-azzjoni kienet kontra l-proprjetarju tal-vapur u mhux kontra l-vapur, u għalhekk kienet "in personam".

No. 129. Maġġur J.B. Arrigo et ne vs Salvatore Azzopardi

L-atturi talbu l-kundanna tal-konvenut għall-ħlas ta' £M56 bilanċ tal-prezz ta' għalf.

Il-Qorti tal-Kummerċ illiberat il-konvenut u laqgħet l-istess fil-konfront tal-kjamat fil-kawża (li qabel kien "salesman" ma' l-atturi).

Il-Qorti ta' l-Appell laqgħet l-appell tal-kjamat fil-kawża, irrevokat u ċaħdet it-talbiet bl-ispejjeż għall-atturi.

Ġie ritenut li l-attur ma ppruvax it-talba tiegħu. Fil-kors tal-appell l-attur talab li jressaq xhud, però l-Qorti ma tatx il-permess; il-kjamat fil-kawża kien oppona ruħu għal dan ix-xhud, li kieku riedu l-atturi setgħu ġiebuh fl-ewwel istanza.

No. 130 Maġġur J.B. Arrigo et ne vs Simon Azzopardi

Kawża identika għal dik preċedenti.

(Awla Ċivili)

No. 131. Caterina Grech vs Paola Camilleri

L-attriċi ppretendiet li hija inkwilina ta' raba tal-Gvern li kien f'idejn oħtha l-konvenuta. Il-Gvern kien ħa dak ir-raba u kien ta lil oħtha l-konvenuta £M733.19,9 għall-benefikati.

L-attriċi issa talbet li jiġi dikjarat li hija kienet inkwilina ta' dak ir-raba, u li oħtha tiġi kkundannata ittiha sehemha mill-flus imħallsa għall-benefikati.

Il-Prim'Awla ċaħdet it-talba għaliex irriteniet li r-raba kien ikun maħdum mill-konvenuta. Spejjeż bla taxxa.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-attriċi u kkonfermat, spejjeż bla taxxa, dritt tar-Reġistru għall-appellanti.

Kwistjoni ta' kredibilità.

No. 132. Peter Paul Muscat vs Giuseppe Muscat

Ir-rikorrent talab ir-ripreża tal-fond mikri lill-intimat għall-villeġġjatura, għax riedu għalih.

Il-Bord tal-Kera laqa' it-talba, spejjeż bla taxxa.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-intimat, spejjeż bla taxxa, dritt tar-Reġistru għall-appellanti.

(Ara Appell 30.6.1967 Muscat vs Muscat.
Appell 8.1.1968 Rev. Caruana vs. Emm. Caruana.
Appell 25.11.1968 Clo. Gatt vs Grazia Spiteri.
Appell 17.5.1971 Emm. Schembri vs Jos. Cefai)

No. 133 Victoria Gauci vs Concetta Abela

Appell minn deċiżjoni tal-Bord tal-Kera.

Il-Qorti ta' l-Appell innominat perit biex jeżamina l-fond offert dwar l-istat attwali u aktar mill-"punto di vista" tal-grad ta' periklu effettiv; u osservat li bħala prinċipju m'għandhomx jiġu nominati periti f'kawża simili, però dan kien każ eċċezzjonali.

No. 134. Carmela Fiteni vs Charles Cachia ne

Ir-rikorrenta talbet ir-ripreża tal-ħanut mikri lill-intimat, għax dan ma kienx qiegħed iħallas il-kera u għax għamel użu divers minnu.

Il-Bord tal-Kera ċaħad it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tar-rikorrent spejjeż bla taxxa.

Dan ma kienx każ ta' lokazzjoni ordinarja, imma ta' waħda kompenetrata f'donazzjoni irrevokabbli, u għalhekk ir-regoli dwar ir-ripreża tal-pussess ma kienux applikabbli.

No. 135 Paolo Sammut vs Victor E. Borg

Ir-rikorrent talab ir-ripreża tal-fond u offra "alternative accomodation."

Il-Bord tal-Kera laqa' it-talba, spejjeż bla taxxa.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-intimat u kkonfermat bl-ispejjeż.

(Awla Kummerċjali)

No. 136 Francis Camilleri vs Philip Gatt et

L-attur partat mal-konvenut "Ford Escort" ma' "Alpha Romeo" u "van" bla liċenzja u "rear axle" ta' "truck".

L-attur talab: (1) li l-konvenuti jiġu kkundannati jagħmlu t-"transfer" tal-"Alpha Romeo" u "van", (2) in difett it-tpartit jiġi xjolt, (3) li l-konvenuti jiġu dikjarati responsabbli tad-danni talli m'għamlux it-trasferiment, (4) jiġu kkundannati jħallsu għall-kera ta' karozza oħra għall-użu tiegħu bir-rata ta' £M1.50 kuljum.

Il-Qorti tal-Kummerċ ċaħdet it-talbiet billi rriteniet il-ftehim dwar it-"transfer" tal-"cars" kien null għax ma sarx bil-miktub.

Il-Qorti ta' l-Appell laqgħet l-appell ta' l-attur u ddikjarat li stante l-avvenut trasferiment ma kienx hemm lok li tieħu konjizzjoni tal-ewwel u t-tieni talba, u rrevokat, u laqgħet it-talbiet l-oħra u kkundannat lill-konvenuti jħallsu lill-attur £M75 in linea ta' danni, spejjeż kollha għall-konvenuti.

"Il-liġi trid il-forma miktuba għall-bejgħ, tpartit jew aljenazzjoni oħra "inter vivos" ta' karozzi (Art. 57(3) Kap. 68 u Reg. 25 G.N. 24/48 kif emendat bil-G. N. 668/1955). Il-formalità ta' l-iskrittura mhiex rikjesta għall-fini tal-boll biss u mhux sempliċement "ad probationem" imma "ad substantiam".

Seduta tat-2 ta' Lulju 1975
(Awla Ċivili)

No. 137 Francis Coleiro vs Anthony Stellini

B'sentenza tal-Qorti ta' l-Appell l-attur kien ġie kkundannat jiżgombra minn fond, u lilu ġie mogħti fond ieħor fejn kellhom isiru xi xogħlijiet, bħala "alternative accomodation".

L-attur issa talab li jiġi dikjarat li dak il-fond ma huwiex "available" għalih peress li mħabba l-pjan regolatur dak il-fond kien ser jiġi mwaqqa'.

Il-Prim'Awla ċaħdet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur u kkonfermat. (Ara Sent. App. 16.12.1974 u 11.4.75).

Meta l-attur kellu jiżgombra, l-"alternative accomodation" kienet "available". Il-fatt li wara dak il-fond ġie affettat minn pjan regolatur ma hux importanti, għax dak jista' jiġri lid-djar kollha. Meta l-konvenut kien offra dak il-fond hu ma kienx "in mala fede".

No. 138. Dr. Paul Mallia ne vs Vincenza Camilleri

Il-konvenuti talbu bi petizzjoni r-ritrattazzjoni tal-kawża deċiża mill-Qorti ta' l-Appell fit-28/2/1975.

Il-Qorti ta' l-Appell ċaħdet il-petizzjoni tal-konvenuti bl-ispejjeż.

Hu meħtieġ li, kompatibbilment ma' l-interessi tal-ġustizzja miż-żewġ naħat, il-limiti tar-ritrattazzjoni jiġu arġinati għal dawk tassativament indikati mil-liġi. (Vol. XLII.1.227; XXIX.1.798; VI p. 365; XXVII.1.818).

Fl-art. 743 Proċ. Ċiv. l-kelma "person" tista' tirriferixxi tant għall-attur kemm għall-konvenut.

Għall-applikazzjoni tal-inċiż (e) tal-Art. 814 hu rekwiżit li l-Qorti trid tkun applikat il-liġi ħażin, fi kwalunkwe każ il-kwistjoni ma tridx tkun dwar interpretazzjoni ta' liġi, li fuqha l-Qorti tkun tat espressament deċiżjoni.

No. 139 Anna mart Charles Bonnici vs Vincenza Camilleri

Ara sentenza Appell 28.2.1975 Dr. P. Mallia ne vs Vincenza Camilleri.

L-attriċi talbet il-ħruġ ta' mandat ta' "in factum", biex binha jiġi assenjat lilha, u l-Prim'Awla ċaħdet il-ħruġ ta' dawk il-mandati.

Issa l-attriċi talbet (1) revoka ta' dawk id-degrieti, (2) li l-konvenuti jiġu kkundannati jikkonsenjawlha 'l binha u tkun awtoriżżata titlob il-ħruġ tal-mandati.

Il-Prim'Awla laqgħet limitatament it-talba li awtoriżżat lill-attriċi li titlob il-ħruġ ta' mandat "in factum".

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenuti u kkonfermat bl-ispejjeż.

Il-mandat "in factum" ma jistax jintalab għall-esekuzzjoni ta' obbligazzjoni "di dare", anke jekk ordnat b'sentenza, imma jista' jintalab għall-esekuzzjoni ta' obbligazzjoni "di fare" (Vol. XVI. 11.340).

L-obbligazzjoni tal-konsenja tal-"ħaġa" hi obbligazzjoni "di dare" u mhux "di fare" (Vol. XVIII.111.56).

"Persuna" mhiex "ħaġa".

F'dan il-każ il-mandat "in factum" kien applikabbli.

Seduta tad-9 ta' Lulju 1975
(Sedi Inferjuri)

No. 140. Anthony Abela vs Dr. R. Frendo Randon ne

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M36 għax-xogħol u materjal ta' "servicing" ta' "air conditioner".

Il-Qorti tal-Maġistrati laqgħet it-talba għal £M26 kontra d-ditta kjamata in kawża, bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-kjamat in kawża u kkonfermat bl-ispejjeż.

Il-kwistjoni kienet ta' "servicing" u l-preskrizzjoni ta' tmintax-il xahar (2253(a)) ma kienetx applikabbli fiċ-ċirkostanzi tal-każ. Fil-każ setgħet tirċevi applikazzjoni l-preskrizzjoni ta' sentejn (2254(a) Kod. Ċiv.)

No. 141. Pio Vella et vs Andrea Schembri

L-attur talab l-iżgumbrament tal-konvenut minn fond għax ma kellux titolu.

Il-Qorti tal-Maġistrati laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell fuq appell tal-konvenut laqgħet l-eċċezzjoni tal-appellat u ddikjarat l-appell null bl-ispejjeż.

Kienet kwistjoni ta' provi, u l-kera kien inqas minn għaxar liri.

No. 142. Alfred Mifsud vs John Farrugia

L-attur talab li l-konvenut jiġi kkundannat li jerġa' jwaħħal fil-post oriġinali tagħhom il-ventijiet tat-"television" tal-attur li hu qala' minn posthom u waħħalhom fuq bejt ta' terzi.

Il-Qorti tal-Maġistrati laqgħet it-talbiet bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut bl-ispejjeż.

Seduta tat-18 ta' Lulju 1975.
(Awla Ċivili)

No. 143 Francis Camilleri vs Gladys Conti

Il-Prim'Awla ddikjarat ruħha nkompetenti "ratione materiae" u rrinvjat l-atti tal-Qorti ta' l-Appell.

Il-Qorti ta' l-Appell iddikjarat kompetenti l-Qorti tal-Kummerċ, peress li l-kompetenza kummerċjali kienet tohroġ mill-istess termini taċ-ċitazzjoni u għalhekk irrinvjat l-atti ta' dik il-Qorti.

Seduta tat-23 ta' Lulju 1976.
(Sedi Inferjuri)

No. 144. Joseph Agius vs Carmelo Frendo

L-attur talab li l-konvenut jiġi kkundannat jirrikonoxxih bħala inkwilin ta' fond.

Il-Qorti tal-Maġistrati ċaħdet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Ma ġiex pruvat li kien hemm ftehim dwar lokazzjoni.

No. 145. Anthony Buhagiar vs Charles Micallef

L-attur talab li l-"Malta Waterpolo Referees Association" tħallas £M32 dovuti lilu bħala "fees".

Il-Qorti tal-Maġistrati ċaħdet bl-ispejjeż, bla taxxa.

L-attur appella u l-appellati appellaw inċidentalment mill-kap ta' l-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appelli u kkonfermat.

Seduta tal-24 ta' Lulju 1975
(Awla Ċivili)

No. 146. Anna Camilleri vs Fredrick Camilleri

Il-Prim'Awla b'degriet iffissat l-alimenti provviżorji fi £M30 fix-xahar.

Il-Qorti ta' l-Appell irrespinġiet l-appell b'rikors tal-konvenut.

No. 147. Anna Camilleri vs Fredrick Camilleri

Il-Prim'Awla b'degriet ordna li wlied il-kontendenti, matul issajf, kellhom joqgħodu tlett ijiem għand l-omm u erbat ijiem filġimgħa għand il-missier.

B'degriet ieħor il-Prim'Awla ffissat li l-alimenti provviżorji

għall-attriċi u wliedha, għandhom ikunu £M60 fix-xahar.

Il-Qorti ta' l-Appell ċaħdet b'rikors l-appell tal-konvenut minn dawn id-degrieti.

Seduta tal-14 ta' Awissu 1975
(Awla Ċivili)

No. 148. Charles Bonnici pro et ne vs Dr. P. Mallia ne

Ir-rikorrent talab għar-rimedju taħt l-art. 47 tal-Kostituzzjoni fuq allegat ksur tad-drittijiet tal-bniedem bis-sentenza tal-Qorti ta' l-Appell fil-kawża Dr. P. Mallia ne vs Vincenza Camilleri tat-28 ta' April 1975.

Ir-rikorrent irrikuża mejn mill-Imħallfin li kienu membri tal-Qorti ta' l-Appell meta ngħatat dik is-sentenza.

Il-Qorti ta' l-Appell laqgħet l-eċċezzjoni.

Ara Kost. Avv. Dr. A. Caruana vs Cat. Gerada 18.10.68.

No. 149. Tabiba Anne Cremona Barbaro vs Prof. E. Borg Costanzi ne

L-attriċi talbet li jiġi dikjarat li l-eżami Orali Kliniku-Prattiku ta' Lulju 1975 kien null għax ma nżammx skond ir-regolamenti ta' l-Università, u li l-eżami jerġa' jsir.

Il-konvenut talab il-kjamata in kawża ta' l-istudenti kollha li qagħdu għal dak l-eżami.

Il-Prim'Awla ċaħdet l-eċċezzjoni u laqgħet it-talbiet.

Il-Qorti ta' l-Appell laqgħet l-appell għall-kjamata in kawża, annullat is-sentenza u rrinvjat l-atti lill-ewwel Qorti.

Ġie trattat estensivament il-punt dwar meta għandha tingħata l-kjamata in kawża u l-interess li għandu jkollu dak il-kjamat in kawża.

Seduta tal-20 ta' Awissu 1975
(Qorti Kostituzzjonali)

No. 150. Charles Bonnici pro et ne vs Dr. P. Mallia ne

L-istess kawża tas-seduta tal-14/8/1975.

L-Imħallef l-ieħor laqa' l-eċċezzjoni ta' rikużazzjoni, għax kien wieħed mill-Imħallfin li taw is-sentenza li allegatament kissru d-drittijiet fondamentali tar-rikorrent.

Seduta tad-19 ta' Settembru 1975
(Qorti Kostituzzjonali)

No. 151. Repubblika ta' Malta vs Joseph Gauci

L-akkużat appella b'rikors mid-deċiżjoni tal-Qorti Kriminali li kienet ċaħdet l-eċċezzjoni tiegħu li peress li fit-test Malti tal-art. 193(1) tal-Kodiċi Kriminali kien hemm vers maqbuż, ir-reat dedott ma jeżistix mill-kelma miktuba tal-liġi.

Il-Qorti Kostituzzjonali ċaħdet l-appell u rrimettiet il-proċess lill-Qorti Kriminali.

Skond il-Kostituzzjoni tal-1936 il-liġijiet kellhom ikunu bl-Ingliż u bil-Malti, u f'każ ta' konflitt kellu jipprevali it-test bl-Ingliż.

Skond il-Kostituzzjoni tal-1939, tal-1947 u tal-1961 il-pożizzjoni baqgħet l-istess.

Bil-Kostituzzjoni tal-1964 ingħatat prevalenza lit-test Malti fuq dak Ingliż.

L-art. 75 tal-Kostituzzjoni tal-1964 għandu jiġi nterpretat li unikament a rigward tal-liġijiet *emanati posterjorment* għad-daħla fis-seħħ ta' dik il-Kostituzzjoni għandu jipprevali it-test Malti fuq it-test Ingliż.

L-art. 193 tal-Kod. Krim. fit-test Malti kien jeżisti imma żbaljat, u dak l-artikolu kellu jiġi nterpretat skond it-test Ingliż.

(Sedi Inferjuri)

No. 152. Anthony Pace Bardon vs Leonard Camilleri

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M20 danni kaġjonati f'kolliżjoni.

Il-Qorti tal-Maġistrati laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut bl-ispejjeż.

Seduta tas-27 ta' Settembru 1975.
(Awla Ċivili)

No. 153. Tabiba Kirurga Anne Cremona Barbaro vs Prof. E. Borg Costanzi ne

L-istess kawża msemmija qabel.

Il-Prim'Awla ordnat is-sejħa fil-kawża ta' l-istudenti l-oħra.

Il-Prim'Awla laqgħet l-eċċezzjoni tal-kjamati fil-kawża fis-sens li l-eżamijiet fil-konfront tagħhom kienu definitivi u inalterabbli. u laqgħet it-talbiet ta' l-attriċi, spejjeż bla taxxa.

Il-Qorti ta' l-Appell irriġettat l-appell tal-konvenut bl-ispejjeż.

No. 154. Alfred Aquilina et vs Prof. E. Borg Costanzi ne

Kawża identika għal dik preċedenti.

Seduta ta' l-10 ta' Ottubru 1975
(Awla Kummerċjali)

No. 155. Frank Borg vs Francis Formosa et

Il-konvenut Formosa, bħala appaltatur, u l-konvenut Privitera, bħala perit, bnew "block flats" għall-attur, u wara tfaċċaw xi konsenturi.

L-attur talab (1) li l-konvenuti jiġu dikjarati responsabbli solidalment għad-difetti; (2) l-likwidazzjoni tad-danni; u (3) l-kundanna għall-ħlas.

Il-Qorti laqgħet it-talbiet u kkundannat lill-konvenuti jħallsu £M700 lill-attur għad-danni, u lill-konvenut Formosa biex iħallas ukoll £M86.64. Bl-ispejjeż għall-konvenuti.

Fuq appell tal-attur il-Qorti ta' l-Appell irriformat billi llikwidat id-danni fi £M800 flok £M700.

Seduta tat-13 ta' Ottubru 1975
(Awla Kummerċjali)

No. 156. Massimo Zerafa vs Avv. Dr. C. Mifsud Bonnici ne

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M3500 import ta' kambjala.

Il-Qorti tal-Kummerċ laqgħet it-talba bl-ispejjeż.

Fuq appell tal-konvenuti l-Qorti ta' l-Appell annullat is-sentenza u rrinvjat l-atti lill-ewwel Qorti għad-deċiżjoni, spejjeż bin-nofs.

Il-konvenuti kienu għadhom ma resqux il-provi tagħhom.

No. 157. Ersilia Craig et vs Charles Azzopardi et

L-atturi talbu li jiġu awtoriżżati jesegwixxu kuntratt peress li kienu għaddew iżjed minn tlett snin.

Il-Qorti tal-Kummerċ illiberat lill-konvenuti mill-osservanza tal-ġudizzju.

Il-Qorti ta' l-Appell fuq appell tal-atturi annullat is-sentenza appellata, u rrinvjat l-atti lill-ewwel Qorti, spejjeż ta' l-appell bin-nofs.

Il-kawża ġiet intentata kontra kuraturi "de jure" ta' eredità. Il-konvenuti b'nota fis-Sekond'Awla kienu irrinunzjaw għall-wirt tad-"decuius" (missierhom). Il-kawża messa kompliet kontra kuraturi deputati biex, wara s-soliti bandi, jirrappreżentaw dik l-eredità (Art. 257 Kod. Proċ.), u dan naturalment wara li l-konvenuti jiġu maħruġa barra mill-kawża.

(Awla Ċivili)

No. 158. Emmanuela Schembri et vs Dr. Arthur Valenzia et ne

L-attriċi talbet li tiġi awtoriżżata tesegwixxi sentenza tal-Qorti ta' l-Appell tat-12 ta' Jannar 1970, u dan peress li l-konvenut kien miet.

Il-Qorti ta' l-Appell laqgħet it-talba.

Seduta tal-15 ta' Ottubru 1975
(Sedi Inferjuri)

No. 159. John Cassar et vs Paul Spiteri

L-atturi talbu l-kundanna tal-konvenut għall-ħlas tal-bilanċ talkera ta' "flat".

Il-Qorti tal-Maġistrati ddiferiet il-kawża "sine die" rijappuntabbli wara li l-kera tal-"flat" jiġi stabbilit skond il-liġi.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-atturi u kkonfermat blispejjeż.

L-attur kien ta l-fond in enfitewsi għal 17-il sena lill-ċertu Pace Axiaq; dan qasam il-fond fi "flats" u kriehom ammobbiliti £M5 fix-xahar. Terminata l-enfitewsi, Pace Axiaq irrilaxxja l-fond; l-inkwilini baqgħu fil-kera. Il-kera ta' £M5 kellu jiġi maqsum parti għall-fond u parti għall-għamara.

No. 160. John Cassar et vs Giorgina Mercieca

Kawża identika bħal ta' qabel.

No. 161 John Cassar et vs Dolores Zammit

Kawża identika bħal ta' qabel.

No. 162. Joseph Spiteri et vs Carmen Frendo Cumbo

L-atturi talbu li l-konvenuta tiġi kkundannata tiżgombra minn fond minnha detenut bla titolu.

Il-Qorti tal-Maġistrati ċaħdet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-atturi bl-ispejjeż.

Il-konvenuta kienet toqgħod ma' nannitha li kellha in lokazzjoni dak il-fond, u għalhekk kienet kerrej fis-sens tal-liġi (Art. 2 Kap 109), wara li nannitha mietet.

No. 163. Joseph Zammit Tabona vs Alfred Cassano et ne

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M34 għal

xogħol esegwit fuq inkariku tad-ditta konvenuta.

Il-Qorti tal-Maġistrati laqgħet it-talba fil-kontumaċja tal-konvenut.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut bl-ispejjeż.

No. 164. Paolina Mercieca vs Carmela Delia

L-attriċi talbet li l-konvenuta tiġi kkundannata tagħmel f'terminu, il-fossa u l-vaska tal-loki komodu li kien jinsab fil-fond, u li hi neħħiet, u fin-nuqqas li l-attriċi tiġi awtoriżżata tagħmel ix-xogħol hi għas-spejjeż tal-konvenuta.

Il-Qorti tal-Maġistrati ċaħdet it-talba, bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attriċi bl-ispejjeż.

Il-konvenuta kienet inkwilina tal-fond, u ma ġiex pruvat li meta hi daħlet fil-fond kien hemm dik il-fossa u vaska. Kwistjoni ta' provi.

No. 165. Peter Brian Curtis vs Edgar Bonello

L-attur kien xtara mingħand il-konvenut ċurkett bi djamant li suppost kien ta' .60 karat, mentre fil-fatt kien biss ta' .42 karat, bil-prezz ta' £M120.

L-attur talab ir-rifużjoni ta' parti ta' dak il-prezz liema ammont kellu jiġi likwidat.

Il-Qorti tal-Maġistrati laqgħet l-eċċezzjoni u ddikjarat l-azzjoni preskritta taħt l-art. 1457 Kod. Ċiv. u ċaħdet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur u kkonfermat bl-ispejjeż.

L-azzjoni eżerċitata ma kienetx għax-xoljiment tal-kuntratt, imma għad-diminuzzjoni tal-prezz. F'dan il-każ si trattava tal-kwalità patuwita. L-art. 1457 kien ikopri wkoll dan il-każ. (Ara Ed. Vincenti vs Clo. Mazzitelli App. Inf. 29.41 (XXXI.1.678, u XXIX.111.137).

No. 166. Bartolomeo Xuereb vs G.M. Agius

L-attur talab li l-konvenut jiġi kkundannat jiżgombra minn post minnu okkupat bla titolu.

Il-Qorti tal-Maġistrati ċaħdet it-talba bl-ispejjeż. Il-konvenut kien jgħix ma' zijuh l-inkwilin u baqa' fil-post wara l-mewt ta' zijuh.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-attur bl-ispejjeż.

Seduta tas-17 ta' Otturbru 1975
(Awla Kummerċjali)

No. 167. Godfrey Aquilina vs Julian Schembri pro et ne

L-attur kien xtara "car" mingħand il-konvenut bil-prezz ta' £M2450, mar biha l-Italja għal xi tiswija, u l-awtorità Taljana ħaduhielu għax ma setatx tinbih għax ma kienetx ġiet imħallsa mix-xerrej oriġinali, li kien inkariga lill-konvenut ibiegħ dik il-"car" hawn Malta.

L-attur talab il-kundanna tal-konvenut: (1) għall-ħlas tal-prezz ta' £M2450, imħallas; (2) ħlas tad-danni li jiġu likwidati.

Il-Qorti tal-Kummerċ iddikjarat il-bejgħ riżolut u kkundannat lill-konvenut iħallas il-prezz bl-ispejjeż, u ddiferiet għall-kontinwazzjoni.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut, ikkonfermat bl-ispejjeż u rrinvjat l-atti lill-ewwel Qorti.

(Awla Ċivili)

No. 168. Lorenza Azzopardi vs Direttur tas-Servizzi Soċjali

L-attriċi kienet talbet il-benefiċju għal "invalidity pension" għax saret inkapaċi għax-xogħol. Id-direttur kien ċaħad it-talba għax irritiena li r-rikorrenta ma kienetx inkapaċi permanentement għax-xogħod għat-termini ta' l-art. 16A(1) Att VI/1956. L-arbitru ċaħad l-appell u kkonferma d-deċiżjoni tad-Direttur, għax il-każ ma kien iqanqal ebda punt ta' liġi.

Ir-rikorrenta appellat mid-deċiżjoni tal-arbitru.

Il-Qorti ta' l-Appell ċaħdet l-appell u kkonfermat spejjeż bla taxxa.

Il-Bord Mediku kien qal li l-marda ta' l-appellanti ma kenitx tali li tirrendiha permanentement inkapaċi għax-xogħol ta' kull xorta. Ma kienx hemm kwistjoni ta' liġi.

Seduta tal-24 ta' Ottubru 1975
(Awla Kummerċjali)

No. 169. A.I.C. Joseph Caruana Huber vs A.I.C. Walter Caruana Montaldo

Azzjoni ta' millantazjoni. Il-konvenut ippretenda li hu kien kreditur ta' l-atturi f'£M1395 dwar bini ta' "flats". L-atturi talbu li jiġi prefiss terminu lill-konvenut biex jaġixxi, u fin-nuqqas li lilu jiġi impost is-silenzju perpetwu.

Il-Qorti tal-Kummerċ laqgħet l-ewwel talba u mponiet lill-kon-

venut xahar żmien biex jagixxi; sussegwentement il-Qorti laqgħet it-tieni talba għaliex il-konvenut kien ippreżenta l-kawża wara li kien skada t-terminu lilu impost.

Il-konvenut appella minn dawk iż-żewġ sentenzi.

Il-Qorti ta' l-Appell iddikjarat l-appell mill-ewwel sentenza null għax fin-nota ta' l-appell hu ddikjara li kien qed jappella mit-tieni sentenza u kkonfermat it-tieni sentenza u ċaħdet l-appell minnha bl-ispejjeż.

Re Proroga tat-Terminu ara Appell 28.6.1936 in re Baldacchino vs Clarke (Vol. XXIX.1.276).

Re Restitutio in Integrum: Appell 30.4.1934, Dimech vs Formosa Vol. XXVIII.1.581; 24.3.1950 Darmanin vs Micallef Vol. XXXIV.1. 248; Appell 25.10.1899 Lloyd vs Scicluna Vol. XVII.1.62 u App. Inf. 12.7.1965 Leone Misrahi vs Rosaria Cassar.

(Awla Ċivili)

No. 170. Jago Vassallo La Rosa et vs Amante Scicluna

Il-konvenut kien esekutur tal-awtur ta' l-atturi, u kien irrenda l-kontijiet ta' l-amministrazzjoni tiegħu. L-atturi talbu: (1) il-korrezzjoni tar-rendikonti, u (2) li l-bilanċ favur l-amministrazzjoni kien £M1635.2,8.

Il-Prim'Awla laqgħet it-talbiet u ddikjarat li l-bilanċ kien ta' £M709.53,3. Spejjeż proporzjonatament.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

No. 171. Frank Schembri vs George Scicluna

Ċertu Alfred Calleja kien bena l-post in kwistjoni taħt il-"pilot scheme", u f'dak l-att ġie stabbilit li "the rent or other compensation" ma kelliex teċċedi £M20 fis-sena. Calleja wara biegħ dak il-fond lill-konvenut, u wara saret novazzjoni bejn il-konvenut u l-Gvern. Wara l-konvenut ta l-fond in kwistjoni in enfitewsi lill-attur biċ-ċens ta' £M38 fis-sena u rigal ta' £M100.

L-attur issa talab ir-rifużjoni ta' dak li hu ħallas żejjed.

Il-Prim'Awla laqgħet it-talba limitatament għal £M27 li hu kien laħaq ħallas sa ċerta data, għax wara dik id-data kien jaf u ħallas l-istess. Spejjeż bin-nofs.

Tant l-attur kemm il-konvenut appellaw.

Il-Qorti ta' l-Appell laqgħet l-appell tal-konvenut u ċaħdet dak tal-attur, u ċaħdet it-talba "in toto", bl-ispejjeż taż-żewġ istanzi.

L-art. 6 tal-Ord. XVI tal-1944 kienu applikabbli biss għal-lokazzjonijiet ta' djar u mhux għall-enfitewsi.

No. 172. Benedetto Agius vs John Hayman

L-attur kellu b'lokazzjoni biċċa raba u kamra rurali. Hu talab: (1) li jiġi dikjarat li hu kellu d-dritt tal-passaġġ bir-rigal u bil-bhima minn fuq il-fond tal-konvenut; u (2) li l-konvenut jiġi inibit milli jimpedixxi l-liberu passaġġ tiegħu.

Il-Prim'Awla laqgħet it-talbiet bl-ispejjeż.

Il-konvenut appella.

Il-Qorti ta' l-Appell irriformat fis-sens li lliberat lill-konvenut mill-osservanza tal-ġudizzju kwantu għall-ewwel talba, u ċaħdet l-appell dwar it-tieni talba u kkonfermat l-ispejjeż kollha 3/4 għall-konvenut u 1/4 għall-attur.

No. 173. Litterio Runza vs Angelo Degiorgio et

Kawża dwar kolliżjoni. "Fork lifter" misjuq mill-konvenut Degiorgio laqgħat il-"car" ipparkjata ta' l-attur. Degiorgio kien impjegat mal-konvenut Pace u l-attur ippretenda li Pace assuma r-responsabbiltà.

Il-Prim'Awla ddikjarat lil Degiorgio responsabbli, u lil Pace mhux responsabbli, u kkundannat lil Degiorgio jħallas £M338 danni li ġew likwidati. Pace jħallas l-ispejjeż tiegħu, Degiorgio l-kumplament.

L-attur appella għax ippretenda li anke Pace kellu jiġi ritenut responsabbli.

Il-Qorti ta' l-Appell laqgħet l-appell u rriformat billi ddikjarat li anke Pace kien responsabbli u għalhekk ikkundannatu jħallas l-ammont likwidat; u kkundannat lil Pace u Degiorgio jħallsu l-ispejjeż tal-prim'istanza, l-ispejjeż tal-appell għal Pace.

Il-Qorti rriteniet bħala pruvat li Pace kien assuma verbalment ir-responsabbiltà ta' l-inċident, u dan mhux bħala sempliċi garanti ta' Degiorgio.

Seduta tat-3 ta' Novembru 1975
(Awla Kummerċjali)

No. 174. Lawrence J. Manche vs Louis Galea ne

L-attur talab li jiġi deċiż: (1) li l-konvenut ma kellux dritt ibiddillu l-karika li kellu f'Barclays, (2) li d-deċiżjoni tal-konvenut li jittermina l-impieg tal-attur kienet nulla, (3) li l-attur jiġi reintegrat fl-impieg tiegħu, (4) li l-konvenut kien responsabbli għad-danni.

Il-Qorti tal-Kummerċ ċaħdet it-talbiet bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur u kkonfermat, spejjeż kollha bla taxxa, bid-dritt tar-Reġistru għall-attur.

Kwistjoni ta' provi.

Seduta tal-5 ta' Novembru 1975
(Sedi Inferjuri)

No. 175. Emmanuel Caruana vs Joseph Vella

L-attur talab l-iżgumbrament tal-konvenut minn fond li kien "decontrolled", billi hu kien ta l-kon ġedo.

Il-Qorti tal-Maġistrati laqgħet bl-ispejjeż.

Il-Qorti ta' l-appell ċaħdet l-appell u kkonfermat bl-ispejjeż.

No. 176. Francesca Tabone vs Grazzio Abela et

L-attriċi talbet l-iżgumbrament tal-konvenut minn għalqa minnu okkupata bla titolu.

Il-Qorti tal-Maġistrati laqgħet it-talba bl-ispejjeż.

Fuq appell tal-konvenut il-Qorti ta' l-Appell irrevokat u rrinvjat l-atti lill-ewwel Qorti, biex jiġi deċiż jekk l-iskrittura tal-lokazzjoni kienetx nulla għar-raġunijiet li ssemmew (cioè li żewġ l-attriċi ma kienx fil-pussess tal-użu tar-raġuni meta saret dik l-iskrittura).

L-ewwel Qorti kienet iddikjarat in-nullità ta' l-iskrittura għar-raġuni biss ta' difett ta' forma.

Fis-sens proprju tagħha fiċ-ċessjoni hemm il-prezz. (art. 1551 Kod. Ċiv.) Prim'Awla Xuereb vs Camilleri 28.10.1921.

No. 177. Salvu Said vs Maria Said et

L-attur talab li l-konvenuta tiġi kkundannata tiżgombra minn "boathouse", li minnha ġie spossessat lill-konvenuta.

Il-Qorti tal-Maġistrati kkundannat lill-konvenuta nomine tikkonsenja lill-attur ċavetta tal-"boathouse", spejjeż bin-nofs.

Tant l-attur kif ukoll il-konvenuta appellaw.

Il-Qorti ta' l-Appell iddikjarat l-appelli nulli għax il-kera talpost kien 7/- fis-sena, u l-kwistjoni ma kienetx dwar punt ta' liġi maqtugħ fis-sentenza.

Seduta tas-7 ta' Novembru 1975
(Awla Ċivili)

No. 178. Avv. Carmelo Caruana vs Joseph Attard Kingswell

Ara Sentenza Appell 11.2.1974.

Il-Prim'Awla laqgħet it-talba, iddikjarat il-kontenut tal-fuljett inġurjuż, illikwidat id-danni fi £M50, u kkundannat lill-konvenut iħallas dawn il-£M50, bl-ispejjeż.

Il-konvenut appella u l-attur appella inċidentalment kwantu għallammont tad-danni.

Il-Qorti ta' l-Appell ċaħdet iż-żewġ appelli bl-ispejjeż u kkonfermat.

"L-istampatur hu responsabbli ċivilment in kwantu kien l-istampatur fiż-żmien ta' l-inġurija in kwistjoni, u r-responsabbiltà tiegħu hija personali għax stampatur, pjuttost milli bħala stampatur, dejjem naturalment f'dak iż-żmien" (Collez. Vol. XXVIII.11.65).

No. 179. Bertu Bezzina et vs Giljan Calleja

Ir-rikorrenti talbu r-ripreża ta' l-appartament mikri lill-intimat, għax dan kien joqgħod band'oħra u r-rikorrenti kellhom bżonnu.

Il-Bord tal-Kera ċaħad it-talba tar-rikorrenti għall-korrezzjoni fl-ismijiet tar-rikorrenti, laqa' l-eċċezzjoni li l-ġudizzju ma kienx integru, u llibera lill-intimat mill-osservanza tal-ġudizzju bl-ispejjeż.

Fuq appell tal-attur il-Qorti ta' l-Appell irriformat billi kkonfermat in kwantu il-Board ċaħad it-talba għall-korrezzjoni, u rrevokat in kwantu laqgħet l-eċċezzjoni dwar l-integrità tal-ġudizzju u akkordat il-liberatorja, u rrinvjat l-atti lill-Bord, spejjeż mingħajr taxxa.

Il-korrezzjoni mitluba ma setatx tingħata għaliex din kienet timporta s-sostituzzjoni ta' tlett kompropjetarji li kellhom interess fit-talba, għal bniedem estraneju għal kollox, u hekk il-każ ma kienx kopert mill-art. 175 Kod. Proċ.

In-nuqqas ta' parteċipazzjoni fil-kawża tal-kompropjetarji, jista' jiġi sostitwit bil-prova ċerta ta' l-adeżjoni ta' dawk il-kompropjetarji għad-domanda magħmula minn wieħed minnhom (Ara App. Ċiv. Cla. Scicluna vs Ros. Azzopardi, 3.4.64).

Seduta tal-14 ta' Novembru 1975
(Awla Kummerċjali)

No. 180. Kummissarju ta' l-Art vs Carmelo Borg ne

L-attur talab li l-konvenut jiġi kkundannat jiżgombra minn ħanut, għax l-attur kien ittermina l-lokazzjoni b'avviż.

Il-Qorti tal-Kummerċ laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell u kkonfermat bl-ispejjeż.

F'kawżi ta' terminazzjoni ta' lokazzjoni u żgumbrament huwa l-inkwilin li di fronte għas-sid hu l-leġittimu kontradittur. (F'dan il-każ il-konvenut kien kuratur biex jirrapreżenta l-eredità ġjaċenti tal-inkwilin). (Ara Vol. XLI.1.427, u XXXI.1.337).

Il-fatt li l-Kummissarju tal-Pulizija rrinnova l-liċenzja, ma jfissirx rinunzja da parti tal-attur.

No. 181. Donald Darmanin ne vs Kur. Edward Gatt

Kawża dwar nuqqas ta' merkanzija impurtata.

Il-Qorti tal-Kummerċ laqgħet it-talbiet u kkundannat lill-konvenut Caruana ne jħallas £M171, u lill-konvenut Mifsud iħallas £M34, bl-ispejjeż.

Il-konvenut Caruana appella.

L-appell kien ġie ppreżentat fit-3 ta' Ġunju 1974 u sa sena wara ma kienx ġie konkluż billi l-petizzjoni ma ġietx notifikata lill-attur.

Il-Qorti ta' l-Appell iddikjarat il-kawża dežerta, bl-ispejjeż.

It-terminu ta' sena mill-petizzjoni hu terminu perentorju.

(Awla Ċivili)

No. 182. Avertano Grech vs Carmen Camilleri

Kawża dwar reżiliment ta' għarusija

L-attur talab: (1) il-likwidazzjoni tad-danni, (2) il-kundanna tal-konvenuta għall-ħlas tad-danni, (3) li l-konvenuta tirritornalu r-rigali li ġew mogħtija lilu fl-okkażjoni ta' l-għarusija u dawk li hu ta lilha u (4) in difett ta' restituzzjoni l-ħlas ta' £M90.30,0 valur ta' dawk l-oġġetti.

Il-Prim'Awla ddikjarat li l-għarusija tħassret tort tal-konvenuta, ċaħdet l-ewwel żewġ talbiet għax kien hemm rinunzja mill-attur, u laqgħet l-aħħar żewġ talbiet. Spejjeż kollha għall-konvenuta.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenuta u kkonfermat bl-ispejjeż.

Kwistjoni ta' provi. Il-konvenuta kienet ippretendiet li huma jemigraw; l-attur ma riedx.

Seduta tal-21 ta' Novembru 1975
(Awla Ċivili)

No. 183. Costantino Borg vs Francesco Tonna et

Kawża dwar kolliżjoni.

Il-Prim'Awla ddikjarat responsabbli għall-kolliżjoni lill-konvenut f'żewġ terzi, u lill-kjamat fil-kawża f'terz. Sussegwentement il-Prim'Awla ċaħdet it-talbiet għal-likwidazzjoni u kundanna għall-ħlas tad-danni. Spejjeż kollha għall-attur.

Qabel l-inċident l-attur kien ittrasferixxa l-karrozza lil John Vassallo, li safa mejjet fl-inċident.

L-attur appella mit-tieni sentenza.

Il-Qorti ta' l-Appell ċaħdet l-appell u kkonfermat, spejjeż bla taxxa, dritt tar-Reġistru għall-attur.

Il-Qorti ta' l-Appell ċaħdet iż-żewġ appelli bl-ispejjeż u kkonfermat.

"L-istampatur hu responsabbli ċivilment in kwantu kien l-istampatur fiż-żmien ta' l-inġurija in kwistjoni, u r-responsabbiltà tiegħu hija personali għax stampatur, pjuttost milli bħala stampatur, dejjem naturalment f'dak iż-żmien" (Collez. Vol. XXVIII.11.65).

No. 179. Bertu Bezzina et vs Giljan Calleja

Ir-rikorrenti talbu r-ripreża ta' l-appartament mikri lill-intimat, għax dan kien joqgħod band'oħra u r-rikorrenti kellhom bżonnu.

Il-Bord tal-Kera ċaħad it-talba tar-rikorrenti għall-korrezzjoni fl-ismijiet tar-rikorrenti, laqa' l-eċċezzjoni li l-ġudizzju ma kienx integru, u llibera lill-intimat mill-osservanza tal-ġudizzju bl-ispejjeż.

Fuq appell tal-attur il-Qorti ta' l-Appell irriformat billi kkonfermat in kwantu il-Board ċaħad it-talba għall-korrezzjoni, u rrevokat in kwantu laqgħet l-eċċezzjoni dwar l-integrità tal-ġudizzju u akkordat il-liberatorja, u rrinvjat l-atti lill-Bord, spejjeż mingħajr taxxa.

Il-korrezzjoni mitluba ma setatx tingħata għaliex din kienet timporta s-sostituzzjoni ta' tlett kompproprjetarji li kellhom interess fit-talba, għal bniedem estraneju għal kollox, u hekk il-każ ma kienx kopert mill-art. 175 Kod. Proċ.

In-nuqqas ta' parteċipazzjoni fil-kawża tal-kompproprjetarji, jista' jiġi sostitwit bil-prova ċerta ta' l-adeżjoni ta' dawk il-kompproprjetarji għad-domanda magħmula minn wieħed minnhom (Ara App. Ċiv. Cla. Scicluna vs Ros. Azzopardi, 3.4.64).

Seduta tal-14 ta' Novembru 1975
(Awla Kummerċjali)

No. 180. Kummissarju ta' l-Art vs Carmelo Borg ne

L-attur talab li l-konvenut jiġi kkundannat jiżgombra minn ħanut, għax l-attur kien ittermina l-lokazzjoni b'avviż.

Il-Qorti tal-Kummerċ laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell u kkonfermat bl-ispejjeż.

F'kawżi ta' terminazzjoni ta' lokazzjoni u żgumbrament huwa l-inkwilin li di fronte għas-sid hu l-leġittimu kontradittur. (F'dan il-każ il-konvenut kien kuratur biex jirrapreżenta l-eredità ġjaċenti tal-inkwilin). (Ara Vol. XLI.1.427, u XXXI.1.337).

Il-fatt li l-Kummissarju tal-Pulizija rrinnova l-liċenzja, ma jfissirx rinunzja da parti tal-attur.

No. 181. Donald Darmanin ne vs Kur. Edward Gatt

Kawża dwar nuqqas ta' merkanzija impurtata.

Il-Qorti tal-Kummerċ laqgħet it-talbiet u kkundannat lill-konvenut Caruana ne jħallas £M171, u lill-konvenut Mifsud iħallas £M34, bl-ispejjeż.

Il-konvenut Caruana appella.

L-appell kien ġie ppreżentat fit-3 ta' Ġunju 1974 u sa sena wara ma kienx ġie konkluż billi l-petizzjoni ma ġietx notifikata lill-attur.

Il-Qorti ta' l-Appell iddikjarat il-kawża dežerta, bl-ispejjeż.

It-terminu ta' sena mill-petizzjoni hu terminu perentorju.

(Awla Ċivili)

No. 182. Avertano Grech vs Carmen Camilleri

Kawża dwar reżiliment ta' għarusija

L-attur talab: (1) il-likwidazzjoni tad-danni, (2) il-kundanna tal-konvenuta għall-ħlas tad-danni, (3) li l-konvenuta tirritornalu r-rigali li ġew mogħtija lilu fl-okkażjoni ta' l-għarusija u dawk li hu ta lilha u (4) in difett ta' restituzzjoni l-ħlas ta' £M90.30,0 valur ta' dawk l-oġġetti.

Il-Prim'Awla ddikjarat li l-għarusija tħassret tort tal-konvenuta, ċaħdet l-ewwel żewġ talbiet għax kien hemm rinunzja mill-attur, u laqgħet l-aħħar żewġ talbiet. Spejjeż kollha għall-konvenuta.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenuta u kkonfermat bl-ispejjeż.

Kwistjoni ta' provi. Il-konvenuta kienet ippretendiet li huma jemigraw; l-attur ma riedx.

Seduta tal-21 ta' Novembru 1975
(Awla Ċivili)

No. 183. Costantino Borg vs Francesco Tonna et

Kawża dwar kolliżjoni.

Il-Prim'Awla ddikjarat responsabbli għall-kolliżjoni lill-konvenut f'żewġ terzi, u lill-kjamat fil-kawża f'terz. Sussegwentement il-Prim'Awla ċaħdet it-talbiet għal-likwidazzjoni u kundanna għall-ħlas tad-danni. Spejjeż kollha għall-attur.

Qabel l-inċident l-attur kien ittrasferixxa l-karrozza lil John Vassallo, li safa mejjet fl-inċident.

L-attur appella mit-tieni sentenza.

Il-Qorti ta' l-Appell ċaħdet l-appell u kkonfermat, spejjeż bla taxxa, dritt tar-Reġistru għall-attur.

F'dan il-każ il-bejgħ tal-karrozza ma kienx bil-"hire purchase", imma bejgħ sempliċi b'dilazzjoni għall-pagament.

Seduta tat-28 ta' Novembru 1975
(Awla Kummerċjali)

No. 184. Thomas Agius vs Edwin Vella

Il-kontendenti kienu partu karrozza. L-attur ippretenda li l-karrozza li tah il-konvenut ma kienetx tal-kwalità patuwita u għalhekk talab ir-rexissjoni ta' dik il-permuta.

Il-Qorti tal-Kummerċ illiberat lill-konvenut mill-osservanza tal-ġudizzju peress li rriteniet li l-karrozza li ta l-attur ma kienetx tiegħu imma ta' missieru.

Fuq appell ta' l-attur il-Qorti ta' l-Appell irrevokat u rrimettiet l-atti lill-ewwel Qorti; spejjeż kollha bla taxxa, dritt tar-Reġistru għall-konvenut.

Għalkemm il-karrozza kienet ta' missieru, però n-negozju l-attur kien għamlu f'ismu u mhux bħala mandatarju ta' missieru.

No. 185. Commodore M. Lindsay Cotton Crawford ne vs Roger Camilleri

Waqt li l-konvenut kien qiegħed iġorr "generator" bi "crane", il-"generator" waqa' u ġratlu ħsara. L-attur talab: (1) li l-konvenut jiġi ddikjarat responsabbli ta' l-inċident, u (2) li jiġi kkundannat iħallas id-danni ammontanti għal £M2773.2,5.

Il-Qorti tal-Kummerċ laqgħet l-ewwel talba bl-ispejjeż. Sussegwentement il-Qorti laqgħet it-tieni talba u kkundannat lill-konvenut iħallas lill-attur £M837 bħala danni. Spejjeż 1/3 għall-attur u 2/3 għall-konvenut.

L-attur appella mit-tieni sentenza, u anke l-konvenut appella.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut, u laqgħet dak ta' l-attur, irriformat u kkundannat lill-konvenut iħallas bħala danni £M2478. Spejjeż 1/9 attur u 8/9 konvenut.

L-art. 1179, 1180 Kod. Ċiv. jiftehmu fis-sens li d-debitur li jkun biss f'"culpa", ma huwiex tenut għad-danni li ma kienux prevedibbli u (kif anke jekk ikun f'"dolus") għal dawk li ma jkunux l-effett immedjat u dirett tan-nuqqas tiegħu. Id-determinazzjoni tal-prevedibbiltà jew le tad-danni hija kwistjoni ta' fatt imħollija għall-apprezzament tal-Qorti. Id-dannu previst jew prevedibbli għandu jiġi riżarċit fl-interezza tiegħu, purkè naturalment, ikun konsegwenza immedjata u diretta tad-debitur.

Il-Qorti ma ammettietx ċerti spejjeż għax dawn kienu biex tingieb Malta magna oħra, u mhux dik danneġġjata li kienet ittieħdet l-Ingilterra għat-tiswija.

No. 186. A. & I.C. Roger Degiorgio et vs Reginald Delicata et

L-atturi talbu l-kundanna tal-konvenuti għall-ħlas ta' £M956.25,0 bilanċ ta' drittijiet professjonali.

Il-Qorti tal-Kummerċ laqgħet l-eċċezzjoni tal-preskrizzjoni ta' sentejn (art. 2254(c) Kod. Civ.) u ċaħdet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-attur u kkonfermat bl-ispejjeż.

No. 187. Emmanuele Mercieca vs Saviour Polidano

L-attur kien ittrasferixxa favur il-konvenut il-kera ta' ħanut, u biegħlu diversi oġġetti f'dak il-ħanut bil-prezz ta' £M2300. L-attur issa talab il-ħlas tal-bilanċ ta' £M2100 dovut lilu.

Il-Qorti tal-Kummerċ laqgħet it-talba bl-ispejjeż, b'dan li dik is-sentenza ma kienetx esegwibbli qabel ma l-attur jagħmel dak kollu li kien meħtieġ skond il-liġi għat-"transfer" tal-liċenzji kollha skond il-liġi, f'isem il-konvenut.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat, spejjeż bin-nofs.

Fil-kors tal-appell irriżulta li kull ma kien jonqos għall-ħruġ tal-liċenzji, kien li l-konvenut imur iħallas għalihom.

(Awla Ċivili)

No. 188. Saver Galea vs Ganni Galea

Kawża dwar spoll kommess mill-konvenut, sid ir-raba mikri lill-attur.

Il-Prim'Awla laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

L-attur kien ġie mogħti terminu mill-Bord tal-Qbejjel biex jiżgombra mir-raba. Wara li għalaq dak it-terminu l-konvenut daħal fil-fond, mingħajr ma talab l-esekuzzjoni ta' dik is-sentenza fil-mod stabbilit mil-liġi.

Hadd ma għandu dritt jesegwixxi sentenzi inklużi dawk ta' żgumbrament b'idejh; il-liġi tistabilixxi l-mod ta' esekuzzjoni tas-sentenzi.

No. 189. Chev. John Doublesin et ne vs Segretarju tad-Djar

Il-Gvern irrekwiżizzjona fond tar-rikorrenti ne, adjaċenti għall-Apap Institute u allokah lill-Każin tal-Banda ta' Santa Venera, u talab lir-rikorrenti biex jirrikonoxxih bħala inkwilin.

Ir-rikorrenti talbu li jiġu awtoriżżati li ma joqogħdux għal dik it-talba.

Il-Prim'Awla laqgħet it-talba tar-rikorrenti.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-intimat u kkonfermat bl-ispejjeż.

F'dan il-każ kieku r-rikorrent irrikonoxxa lill-inkwilin huma kienu jsofru preġudju serju, għax il-fond kien ġie eżentat mil-liġi taʼ-manomorta taħt il-kondizzjoni li jiġi mgħaqqad mal-Apap Institute.

Ara App. 26.6.1967, Perit G. Vincenti vs Sp. Farrugia ne.

No. 190. Carmelo Falzon vs Michele Bonnici et

L-attur kien xtara xi fondi. L-attur talab (a) li jiġi ddikjarat li hu b'dawk l-atti akkwista drittijiet li jisserva b'xi kmamar, u (b) li t-terminu mogħti lill-konvenuti biex jipproċedu kontra l-attur skada. L-attur irrinunzja għat-tieni talba.

Il-Prim'Awla laqgħet l-ewwel talba.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Id-domanda setgħet issemmħ biss fuq il-kawżali ta' l-akkwist ta' drittijiet.

No. 191. Bartolomeo Xuereb ne vs Dorothy Jessie Griffiths

B'konvenju l-konvenuta obbligat ruħha li tixtri dar mingħand l-attur. Dan issa talab li l-konvenuta tiġi kkundannata taddivieni għall-kuntratt.

Il-Prim'Awla ċaħdet it-talba, spejjeż bla taxxa, dritt tar-Reġistru bin-nofs, peress li in vista tal-Att tal-1974 dwar l-Akkwist taʼ Proprjeta Immobbli minn Persuni mhux Residenti il-konvenuta ma kienetx marbuta.

Il-Qorti ta' l-Appell laqgħet l-appell tal-attur dwar il-kap ta' l-ispejjeż u ordnat li l-ispejjeż kollha jitħallsu mill-konvenuta.

Din il-kawża kienet ġiet introdotta qabel ma kien ġie ppublikat l-abbozz ta' dik il-liġi.

Seduta tat-3 ta' Diċembru 1975
(Sede Inferjuri)

No. 192. Salvu Mercieca vs Cristina Farrugia

L-attur talab li l-konvenuta tiġi kkundannata tiżgombra minn "garage" minnha okkupat bla titolu.

Il-Qorti tal-Maġistrati laqgħet it-talba bl-ispejjeż.

Fuq appell tal-konvenuta l-Qorti ta' l-Appell iddikjarat l-appell irritu u null, bl-ispejjeż.

Il-valur tal-pretensjoni ma jiskorrix £M10 u l-kwistjoni ma kienetx dwar punt ta' dritt maqtugħ fis-sentenza.

No. 193. Joseph Busuttil et vs Salvatore Busuttil

L-atturi talbu li l-konvenut jiġi kkundannat jiżgombra minn "garage" minnu okkupat bla titolu.

Il-Qorti tal-Maġistrati laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Kwistjoni ta' provi.

No. 194. Joseph Caruana vs Salvatore Pulis

L-attur talab li l-konvenut jiġi kkundannat jiżgombra minn post minnu okkupat mingħajr titolu.

Il-Qorti tal'-Maġistrati laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell laqgħet l-appell tal-konvenut, irrevokat, u ċaħdet it-talba, spejjeż kollha bla taxxa, dritt tar-Reġistru għall-attur.

Il-konvenut kien joqgħod ma' l-inkwilin qabel ma dan miet fil-fond in kwistjoni.

Il-Qorti rriteniet li l-espressjoni membru tal-familja tal-kerrej ma tirrikjedix li l-konsangwinita hi bilfors u dejjem prerekwiżit tal-"membership" tal-istess familja. F'dan il-każ il-konvenut kien ġie mrobbi mill-kerrej u għalhekk kellu jiġi kunsidrat bħala membru tal-familja tiegħu (Art. 2 Kap 109). Il-kelma "familja" f'dan il-kontest m'għandhiex tingħata interpretazzjoni stretta (Vol. XXXVII.1.568; ara wkoll Vincent Zammit vs Vincent Kerr, App. Inf. 11.3.66).

No. 195. John Mary Vella vs Giuseppe Schembri

L-attur talab li l-konvenut jiġi kkundannat jiżgombra minn razzett minnu okkupat bla titolu.

Il-Qorti tal-Maġistrati ċaħdet it-talba billi rriteniet li l-konvenut kien qiegħed jokkupa l-fond b'lokazzjoni, spejjeż 1/4 il-konvenut u 3/4 l-attur.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-attur bl-ispejjeż.

F'dan il-każ ġie ritenut li l-korrispettiv għall-godiment tal-ħaġa pagabbli annwalment kien id-demel li kull sena l-konvenut kien ikollu ossija jipproduċi permezz tal-bhejjem tiegħu.

No. 196. Carmela Camilleri vs Carmelo Mallia

L-attriċi talbet li l-konvenut jiġi kkundannat ineħħi f'terminu x-xkiel li għamel fi sqaq tagħha u fuq art tagħha.

Il-Qorti tal-Maġistrati ċaħdet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell bl-ispejjeż.

F'dan il-każ il-konvenut kien għamel mansab f'raba li kien imqabbel għandu, il-mansab kien ilu hemm xi 14-il sena.

No. 197. Paul Xuereb vs Amabile Fiott

L-attur talab li l-konvenut jiġi kkundannat jikkonsenjalu f'terminu, "sofa" antik li kien ikkonsenjalu biex jittapezzah, u in difett iħallas il-valur tiegħu.

Il-Qorti tal-Maġistrati ċaħdet it-talba għax ma kienx jirriżulta li l-konvenut kellu l-pussess tas-"sofa", u laqgħet l-eċċezzjoni talpreskrizzjoni (sentejn) dwar it-talba għad-danni, bl-ispejjeż għallattur.

Il-Qorti ta' l-Appell fuq appell tal-attur annullat is-sentenza u rrinvjat l-atti lill-ewwel Qorti biex tiddeċiedi mill-ġdid. Spejjeż bla taxxa.

L-ewwel Qorti ma ddeċidietx l-eċċezzjoni tal-preskrizzjoni kwinkwennali li kienet ġiet sollevata dwar l-ewwel talba. Inoltre dwar it-tieni talba l-Qorti kienet akkoljiet preskrizzjoni diversa minn dik eċċepita. Dan iġib għal nullità.

(Vol. XXVII.1.663; XXXVII.1.80; XXXIX.1.502; u Vol. XXXV.1. 101).

Seduta tal-5 ta' Diċembru 1975
(Awla Kummerċjali)

No. 198. Carmelo Chircop ne vs Rev. Mons. Philip Calleja ne

L-attur kien għamel sekwestru kawtelatorju f'idejn il-konvenuti maħruġ mill-Qorti Kummerċjali. Issa talab li l-konvenut jiġi kkundannat jiddepożita fir-Reġistru ta' dik il-Qorti s-somma ta' £M1288.

Il-Qorti tal-Kummerċ laqgħet l-eċċezzjoni ta' inkompetenza "ratione materiae", billi l-konvenut ma kienx kummerċjant, u bagħtet l-atti lill-Qorti ta' l-Appell.

Il-Qorti ta' l-Appell iddikjarat kompetenti l-Qorti tal-Kummerċ. Hawn si trattava ta' proċedura li tinserixxi ruħha fl-esekuzzjoni ta' mandat maħruġ mill-Qorti tal-Kummerċ, bħala derivativ minn sentenza ta' kanonizzazzjoni ta' kreditu minn dik il-Qorti fil-kompetenza tagħha, u għalhekk kienet kompetenti l-Qorti tal-Kummerċ.

(Awla Ċivili)

No. 199. Carmelo Zammit vs Bartolomeo Xuereb

L-attur talab li jiġi deċiż: (1) li l-konvenut ma kellux dritt jiftaħ bieb u jeżerċita passaġġ fuq il-proprjetà ta' l-attur; (2) li l-konvenut jagħlaq il-bieb; (3) li fin-nuqqas l-attur jiġi awtoriżżat jagħlqu hu.

Il-Prim'Awla ddikjarat ruħha nkompetenti "ratione materiae". Il-konvenut kien kummerċjant u l-att allegat kien kummerċjali.

Il-Qorti ta' l-Appell iddikjarat kompetenti l-Qorti tal-Kummerċ. Il-konvenut kien kummerċjant, u għalhekk kien hemm preżunzjoni (art. 7 Kap. 17) ta' kummerċjalità ta' l-atti magħmulin minnu. Il-limiti tal-prova kontrarja huwa li trid tkun tirriżulta mill-att stess. (Ara Prof. F. Cremona ne vs Reginald Schembri App. Ċiv. 14 ta' Ottubru 1966).

No. 200. Emmanuela Pace pro et ne vs Antonio Pace

L-attriċi talbet li l-konvenut żewġha jiġi kkundannat iħallas £M944 alimenti arretrati għaliha u għal uliedha.

Il-Prim'Awla laqgħet it-talba.

Il-Qorti ta' l-Appell laqgħet l-appell tal-konvenut, u annullat is-sentenza, u rrinvjat lill-ewwel Qorti.

Il-konvenut ma ġiex mogħti l-opportunità li jinstema' dwar l-eċċezzjonijiet minnu mogħtija.

Seduta tat-12 ta' Diċembru 1975
(Awla Kummerċjali)

No. 201. Richard Soler ne vs Giuseppe Maria Dalli

Il-konvenut kien ħa appalt mingħand il-Gvern, u ma bediex ix-xogħol fiż-żmien miftiehem, u għalhekk l-attur issa talab il-kundanna tal-konvenut għall-ħlas tal-penali.

Il-Qorti tal-Kummerċ laqgħet it-talba bl-ispejjeż.

Fuq appell tal-konvenut il-Qorti ta' l-Appell annullat is-sentenza u rrinvjat lill-ewwel Qorti, spejjeż bla taxxa.

Il-kawża kienet fl-ewwel istanza, tħalliet "sine die" u meta ġiet rijappuntata l-konvenut ma ġiex notifikat bir-rijappuntament.

No. 202. Avv. B. Delia ne vs Ronnie Said

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M3842 prezz ta' larinġ lilu mibjugħ.

Il-Qorti tal-Kummerċ laqgħet it-talba għal £M1747, spejjeż bin-nofs.

L-attur appella, u talab li l-konvenut ikun ikkundannat iħallas £M644 oħra. Anke l-konvenut appella.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut bl-ispejjeż u laqgħet dak tal-attur fis-sens biss li żiedet £M333, spejjeż bin-nofs.

Kwistjoni ta' provi.

(Awla Ċivili)

No. 204. Albert Agius Ferrante P.L. vs Ernest Jennings ne

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M1286 taxxa tad-divertiment kalkolata fuq il-"membership fees" u £M155 taxxa ta' divertiment fuq il-"guest fee receipts'' tal-Villa Rosa.

Il-Prim'Awla ddikjarat li t-taxxa kellha tiġi kalkolata limitatament għal dawk l-"entertainments" tan-natura li jattivaw taxxa, u ddiferiet il-kawża biex jiġi determinat dak l-ammont.

Il-Qorti ta' l-Appell irrespinġiet l-appell u kkonfermat. Spejjeż tal-appell bla taxxa.

Il-kwistjoni jekk post huwiex "bona fide" club hija kwistjoni ta' fatt. Il-fatt li "club" ikun proprjetà ta' kumpanija kummerċjali ma jneħħix il-fatt li dak jista' verament ikun "bona fide club".

No. 205. Kontrollur tad-Dwana vs Giuliano Schembri

Il-konvenut kien ottjena mandat ta' inibizzjoni kontra l-attur biex dan ma jiddisponix minn karrozza, li l-konvenut kien jippretendi li kienet tiegħu.

L-attur issa talab li jiġi dikjarat li dak il-mandat ġie maħruġ illegalment għax kien jirrigwarda obbligazzjoni "di dare" u mhux "di non fare".

Il-Prim'Awla ċaħdet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur, u kkonfermat, spejjeż kollha bla taxxa, dritt tar-Reġistru għall-appellant.

Fil-kawża Zerafa vs Buhagiar, 23.4.1958 (Vol. XLII. p. 983), u Borg vs Hili (Vol. XVI.111.46) kien ġie ritenut li l-mandat ta' inibizzjoni kellu jiġi maħruġ dwar obbligazzjonijiet "di non fare" u mhux "di fare".

Il-Qorti ta' l-Appell ma qablitx ma' din l-interpretazzjoni għall-art. 876 Kod. Proċ. jgħid ukoll "or from doing anything whatsoever" kliem ġeneriku, u li ma fihom ebda limitazzjoni li ried jagħmel l-attur. In sostenn ta' din l-interpretazzjoni l-Qorti ċċitat Saliba vs Azzopardi (Vol. XX.1.475), Baldacchino vs Bellizzi (Vol. XXXVII. 1.519) u App. Kumm. 7.4.1967 Spir. Mizzi vs Edgar Tabone.

No. 206. Paul Grixti vs Direttur tax-Xogħolijiet Pubbliċi

Il-konvenut kien għamel mandat ta' qbid kontra l-attur għal £M242.26,2.

L-attur ippretenda li ma kienx debitur u għalhekk talab ir-revoka ta' dak il-mandat.

Il-Prim'Awla ddikjarat li l-konvenut iġġustifika l-kontumaċja

tiegħu, u ammettietu jippreżenta nota ta' l-eċċezzjonijiet, bl-ispejjeż għall-konvenut.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur u kkonfermat bl-ispejjeż kontra l-appellant.

F'dan il-każ in-notifika saret f'idejn is-segretarju tal-konvenut fl-uffiċju, u l-konvenut ma kienx ġie mogħti ċ-ċitazzjoni mis-segretarju.

In-notifika kienet valida, però dan ma kienx jeskludi lill-konvenut li jiġġustifika l-kontumaċja jekk ikollu raġuni tajba.

Għall-prinċipji li jirregolaw din il-materja ara App. 29.5.1937 Vittorio Cassar ne Carmelo Vassallo (XXIX.1.1581) u cioe:

1. Kontumaċja ma tistax tiġi ritenuta ġustifikata jekk kienet voluntarja.
2. Lanqas tkun ġustifikata jekk tkun kolpuża.
3. Biex ikun hemm ġustifikazzjoni trid tiġi pruvata kawża ġusta.
4. Kawża ġusta trid tkun tikkonsisti f'impediment leġittimu.
5. Impediment biex ikun leġittimu jrid ikun indipendenti mill-volontà tal-kontumaċi.
6. L-iżball irid ikun invinċibbli.
7. L-impediment leġittimu jista' jkun "una necessità impellente di chiamata ad altri doveri imprescindibili".
8. L-impossibilità li tidher trid tkun fiżika, eċċezzjonalment biss tista' tkun morali.

F'dan il-każ il-konvenut ma kellu ebda ħtija għax l-impjegat ma qallux biha.

Seduta tal-15 ta' Diċembru 1975
(Awla Kummerċjali)

No. 207. Charles Micallef ne John Le Peuple ne

Il-Qorti ta' l-Appell b'degriet iddikjarat li l-liġi applikabbli għall-kuntratt in kwistjoni, kienet il-liġi Ingliża. Għalhekk bagħat lill-kontendenti ħmistax-il ġurnata żmien biex għat-termini ta' l-art. 646 Kod. Proċ. Ċiv. jipproponu l-isem ta' perit.

Il-liġi stranjiera tiġi pruvata permezz ta' esperti.

(Awla Ċivili)

No. 208. Carmelo Callus vs Andrew Cassar

Kawża dwar kolliżjoni.

Il-Prim'Awla ddikjarat il-konvenut responsabbli unikament tal-kolliżjoni, illikwidat id-danni, u kkundannat lill-konvenut iħallas lill-attur £M235, bl-ispejjeż.

Il-Qorti ta' l-Appell irrespingiet l-appell u kkonfermat. Però għamlet temperament fl-ispejjeż.

F'dan il-każ id-danni kienu jikkonsistu fi ħlas ta' kiri ta' karrozza oħra. L-attur kien ħa l-karrozza għat-tiswija u l-"mechanic" ippretenda li jitħallas qabel ma jikkonsenjalu l-karrozza, għax qal li kellu l-"jus retensionis". L-attur talab lill-konvenut iħallas il-kont, u dan irrifjuta, u għalhekk l-attur kompla jikri karrozza oħra, sakemm ingħatatlu tiegħu. Il-każ tal-"locatio operis" kombinat malfornitura tal-materjal naturalment fi grad suffiċjenti, jagħtu lok għall-"jus retensionis".

Il-Qorti ta' l-Appell skartat is-sentenza Dingli vs Zammit, 21.12.1951 (XXXV.111.670) li ddeċidiet li dak id-dritt ta' ritenzjoni kellu jiġi rikonoxxut biss fil-każijiet fejn hu espressament rikonoxxut mill-liġi; u minflok segwiet is-sentenza Fr. Gulia vs Jos. Agius et, App. 26 ta' Marzu 1968, li kkonċediet id-dritt ta' retenzjoni lill-enfitewta għall-valur tal-miljorament f'każ ta' xjoljiment tal-enfitewsi qabel iż-żmien.

No. 209. Evelyn Falzon vs Joseph Tabone

Ir-rikorrenti talbet ir-ripreża tal-fond mikri lill-intimat għax kellha bżonnu, u offriet "alternative accommodation".

Il-Bord tal-Kera laqa' t-talba, spejjeż bla taxxa.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-intimat u kkonfermat, spejjeż bla taxxa.

No. 210. Rev. Don Giuseppe Borg Bonavia et vs Maria Agius et

Ir-rikorrenti talbu r-ripreża ta' remissa mikrija lill-intimati għax kellhom bżonnha.

Il-Bord tal-Kera laqa' t-talba, spejjeż bla taxxa.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-intimati, spejjeż bla taxxa.

"Dak li hu mportanti f'każijiet bħal dawn hu li tiġi stabbilita d-destinazzjoni prinċipali li għaliha l-fond ikun ġie mikri".