MOOT

FARRUGIA NOE. VS. SPITERI*

In 1926 Mr. Spiteri, a Maltese Roman Catholic, domiciled in Italy, married Miss Agius, a Maltese Roman Catholic domiciled in Malta. The marriage took place in Italy according to the rites established by the council of Trent i.e. not in accordance with the provisions of Italian law which, at that time, required civil marriage. In 1927 Mr. Spiteri abandoned Mrs Spiteri and contracted a second marriage in 1940, in Malta, with Miss Arnold according to the rites prescribed by the Council of Trent.

Mr. Spiteri, on a charge of having committed bigamy, has pleaded the nullity of his marriage with Miss Agius. The Criminal Court has decreed that the question of the validity of the marriage was to decided upon by the Civil competent authority. He is now being summoned by the Public Prosecutor before the Civil Court to shew cause why his marriage with Miss Agius should not declared valid.

Professor W . Buhagiar, B.A., B.C.L, (Oxon), LL.D., kindly consented to hear the case.
Counsel for plaintiff: Mr. J. M. Ganado,B.A.;
Mr. V. Frendo.
Counsel for defendant: Mr. A. Ganado, B.A.;
Mr. E. Busuttil, B.A.

The first question to be dealt with was a plea in bar raised by the defendant: it was contended that the Courts of Malta were incompetent to decide on the validity or otherwise of the marriage contracted in Italy between Mr. Spiteri and Miss Aguish, in view of the principal of Private International Law (at least as interpreted by English Courts [1]), that for the purposes of pronouncing upon the status of the parties as well as for affecting that status, the Court of the law which regulates or determines the personal status of the parties has an exclusive jurisdiction; except in cases the Courts of the *locus celebrationis* would also be competent. It was further stated that the domicile of the wife, who if the marriage had been void would have retained her Maltese domicile, was not an argument in favour of the competence of the said Courts; because, as Cheshire holds [2], the mere performance of a marriage ceremony should invest the parties with a common domicile; and therefore the established rule in such a case is that the Court of the husband's domicile, and that Courtalone, is competent to annual the marriage.

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* Reported by Edgar Mizzi, B.A.

1. The court of Appeal in re Valentini vs. Valentini decided on the 19th October, 1923 (Vol. xxv, Pt. 1, P.636) held that in the absence of provisions of Private International Law in our Code it was usual for His Majesty's Judges in Malta to have recourse to the principles of English Private International Law. Vide also Smith vs. Muscat Azzopardi, 4th Febuary, 1936, First Hall Civil

2 G. C. Cheshire—Private International Law, second edition, pages 343 and 344.

Professor Buhagiar thought it unnecessary to examine the pros and cons of this view; but he upheld the competence of the Courts of Malta on the ground that once the said Courts had to decide on a question of bigamy, and they were quite competent to do so, they were necessarily competent to pronounce also upon the validity or invalidity of both marriages which together constituted the crime of bigamy.

The point at issue was then examined. Unfortunately our Courts—it was pointed out – have held different views on the matter. There are judgments which state that the law governing the formalities of marriage is the personal law of the husband [3]; and it may be stated here that, according to recent judgements, following English Case Law, the personal law is taken to mean the *lex domicilii* [4] . there are however other pronouncements which follow the prevailing view in Private International Law that the *lex loci celebrationis* should apply [5]. This difference of opinion, however, did in no way affect the case under review, because both views led, in that case, to the same, conclusion, viz, the nullity of the marriage, since the husband's domicile was Italian, and the marriage was celebrated in Italy—the law of which regarded the marriage, at the time of its celebration, as null.

This notwithstanding Professor Buhagiar upheld the validity of the marriage. Independently of what law should govern the formalities of marriage—he stated—it is a fundamental principle of Private International Law that any foreign law which is repugnant to the public policy of the *lex fori* is to be disregarded and cannot be applied by the Courts of the *forum*. "There are certain national sentiments, prompted by a sense of decency, of justice or of morality which rightly or wrongly appeal to be sufficiently important to merit unfailing observation by the Courts. There is a distinctive policy... to which the application of a foreign law must always remain subject" [6].

In this case the application of Italian law would have implied the nullity of a marriage contracted in Italy by two Maltese Roman Catholic persons one of whom was domiciled in Malta, according to the formalities required by the Council of Trent. On being analyzed the case presented the following important facts; the husband, though domiciled in Italy, was of Maltese origin and a Roman Catholic; the wife was a Roman Catholic, a Maltese and domiciled in Malta; the marriage was celebrated according to Canon Law, which is the law of the parties religion and of Malta cannot, for reasons of public policy, declare such a marriage null. Such a

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3. Vide. La Primaudaye vs. Cutajar (Vol. XVIII. Pt 1. P. 96);Warrington vs. Carter noe, on appeal (Vol. XXV, Pt. 1); Bessolo vs Ellul. 2nd December 1933 : Dr. Frendo Azzopardi noe. Vs. Doyle (Vol. XXVII, Pt. 2, P. 387)

4. In the Court vs. Kreslkake decided by the first Hall, Civil Court, on the 9th July, 1934, it was stated that the personal law is for us the *lex domicilii*. In earlier judgments, however the personal law was taken to mean the lex patriae. Vide the judgments mentioned in footnote (3).

5. Vide Nuzzo vs.Ardonio (Vol. XVIII,Pt. 2, P.322); The Court vs. Kreslake, 9th July, 1934 Vella vs Vella, 9th February, 1940

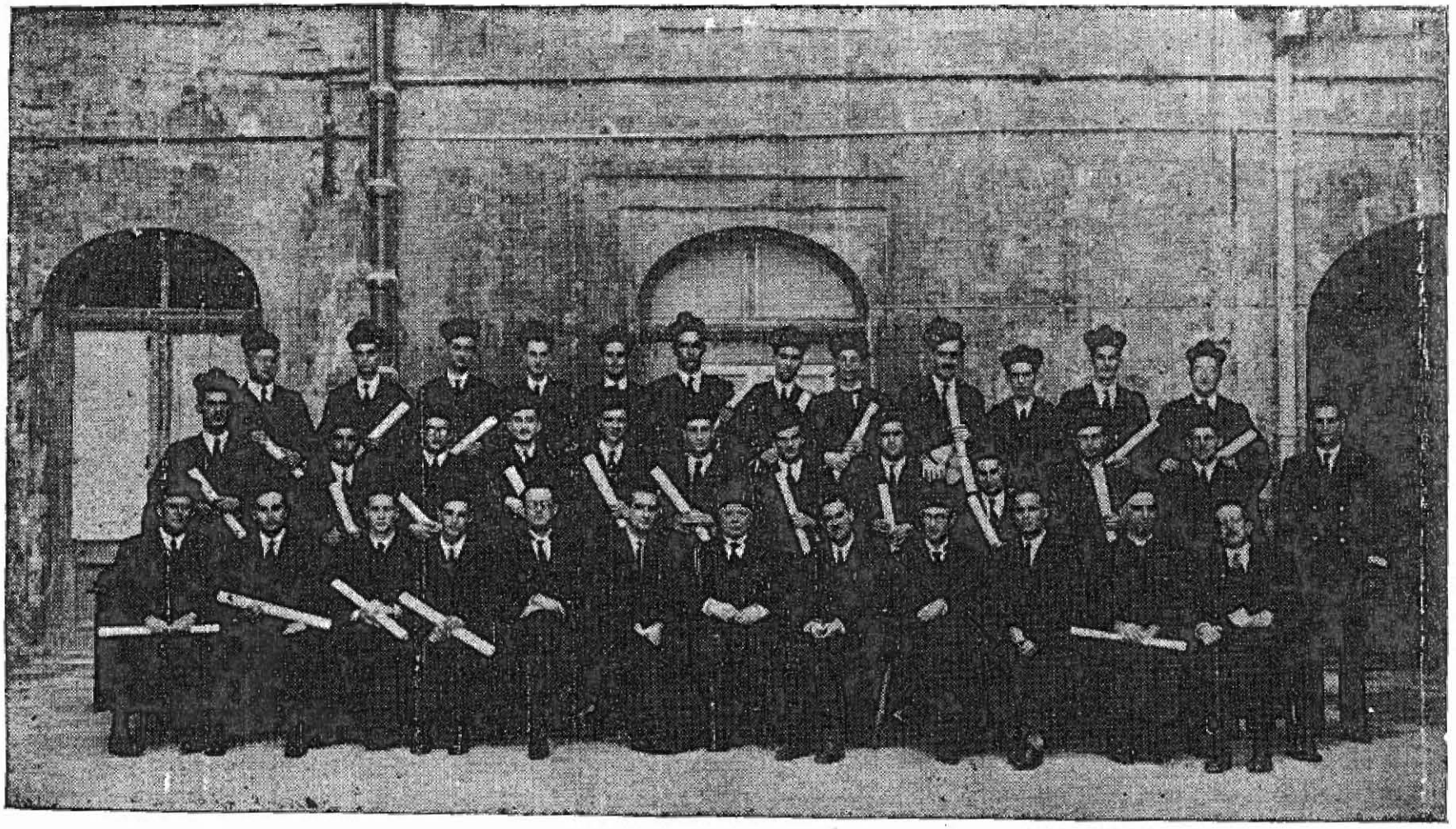
6. Cheshire. op. cit. P. 139

declaration—he said—would be repugnant to our senses of decency and of morality and to our religious sentiments. The behavior of a Maltese person, even though the ties of nationality be somewhat loosened through a change of domicile, who on being charged with bigamy contests the validity of his marriage celebrated abroad in terms of the law of our Church and of our law and according to the dictates of his conscience, simply because he happened to marry in a place where the formalities complied with by him were without effect is against our distinctive policy[7]

7. An *obiter dictum* by judge Mercieca (later Sir A. Mercieca C.J.) in Warrington vs. Carter (Vol. XXV, Pt. 2, P. 433) may here be mentioned. He was prepared to accept the principle that the personal law of the husband should govern the formalities of marriage if it was a limited to mean that the courts of Malta could not declare null a marriage so'emnizes abroad according to the rites of the Roman Catholic church but without conforming to the requirements of the *lex loci.* The probable reason for this assertion is that such a declaration would be against public policy in Malta.

HIS Honour Sir ADRIAN DINGLI, G.C.M.G., C.B., LL.D.

(We intend publishing some biographical notes on eminent Judges and Barristers and we have thought it befitting to publish in our first issue the photograph of Sir Adrian Dingli, who, as is well-known, is the author of the greater part of our Civil Laws. A short biography will be included in the second issue).



THE ACADEMICAL COURSE OF LAWS (1941-46).

The Hon. the Rector, Professors of the Faculty of Laws and Graduates.

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