

## M O O T\*

ON the 30th June 1947, A purchased a rare bird from B for £20 on the express understanding that the bird was a male that sang. The bird was truly a male but for a whole fortnight, it did not sing and A told B that if it did not sing by the 18th July, he would bring the bird back. B retorted that the change of place might have made the bird stop singing for a while and as to the rest he made no reply.

On the 19th July, 1947, A left the bird at B's dwelling-place with the latter's son as B was not in. Two days later the bird died and B refused to refund the £20.

It resulted from the evidence produced that the bird did sing before the sale but that it was completely dumb from the 30th June onwards. It was also clear that during the period it accidentally developed a disease which finally caused its death.

On the 24th June, 1947, A filed a writ of summons demanding:—

i) the defendant's condemnation to return the price as he had accepted A's suggestion to bring the bird back in the event that it did not sing by the 18th July;

ii) subordinate'y, the annulment of the sale on account of vice of consent due to a substantial error and the condemnation of the defendant to return the price.

The defendant pleaded that the disease had been contracted after the sale and that therefore the risk weighed upon the purchaser and that, in any case, the action which should have been exercised was the 'Actio Redhibitoria or Aestimatoria' as the plaintiff was alleging the existence of a latent defect.

Professor V. Caruana LL.D., B.Litt., kindly consented to hear the case.

Counsel for plaintiff: Mr. A. Cachia B.A.

Counsel for defendant: Mr. S. Camilleri.

Mr. Cachia started by saying that the whole matter referred to whether the silence of the defendant meant that he consented to the rescission of the contract. He maintained that one cannot say that writers unanimously agree on the question whether tacit consent can ever amount to a contract. The

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\* Reported by A. Rutter Giappone, L.P.

tendency of Italian and German writers, however, is that though we cannot lay down a hard and fast rule, there are cases when tacit consent gives rise to a contract. Those who condemn this theory justify their contentions by resorting to a *reductio ad absurdum*. Does a person to whom an offer is made, they ask, bind himself by the mere fact that he has remained silent? Naturally, this is taking things to extremes and the theory of tacit consent can only be adopted under certain conditions and in specific cases.

He submitted that the theory of tacit consent is not contrary to our law, where we find certain provisions which cannot but be based on the tacit consent of one of the parties, e.g. the tacit consent of a person who has attained majority to the continuance of the legal usufruct enjoyed by the father, the tacit renewal of lease. The law itself, moreover, says that we are to interpret the spirit and not the wording of a contract. We are to keep in mind that the letter killeth.

Pacifici-Mazzoni admits the theory of tacit consent when the party who remained silent "*loqui potuit et debuit*". Vivante also admits that if there exists between the parties a juridical relation then there can be tacit consent.

Mr. Cachia made reference to other Italian and German writers such as Dernburg, Windscheid and Ranelletti. Dernburg's criterion is that "*il silenzio è consenso quando secondo l'opinione pubblica e specialmente secondo le idee delle persone della stessa professione e condizione, un uomo ragionevole ed onesto avrebbe espresso una ripulsa nel caso che non fosse stato d'accordo.*" This view is endorsed by Gabba, who is the principal supporter of this theory. Gabba, Mr. Cachia pointed out, requires three requisites in order to have tacit consent, namely, that (1) the party who remained silent knew of the activity of the other party; (2) there was the possibility of a reply, and (3) the activity referred to was not prohibited by any penal law. The above requisites, Mr. Cachia continued, were accepted by our Courts in re "*Buhagiar vs. D'andria*".

Mr. Cachia concluded by comparing the conduct of the defendant with that of a *Bonus Pater Familias*. He maintained that a reasonable man would certainly have returned the bird to the plaintiff and the fact that defendant did not return the bird cannot but mean the completion of the tacit agreement.

In reply to the above, Mr. Camilleri, counsel for defendant, stated that though text-writers were not in full agreement on the matter, yet the majority were of opinion that, as a general rule, silence does not constitute consent; but, the said writers maintained, there are cases when silence implied consent: it followed that such cases formed exceptions to the general rule and it rested on the plaintiff to show that, in view of the particular circumstances of the case, the defendant's silence meant consent. Indeed, Mr. Camilleri went on, the theory that silence does not amount to consent is more in accordance with our Law of Obligations. The sections of the law quoted by the plaintiff were only few and could not form the basis for a general rule. Such general rule could more properly be deduced from our Law of Obligations, according to which, one of the requisites of contract is consent which is the union of the wills of the parties. In order to have such a union the wills of both parties must be expressed.

However, Mr. Camilleri submitted, the case awaiting decision was not one of silence; as Pacifici-Mazzoni tells us, in similar cases one cannot lay down an absolute rule and apply it unflinchingly. Each case must be examined in the light of the particular circumstances accompanying it. Such a view, indeed, is quite reasonable and is consonant with the general principles of law according to which the intention of the parties should be respected. In the case before us, therefore, we are to ascertain what that intention was and to give effect thereto.

He pointed out that when the defendant replied that the bird did not sing because of the change of place he clearly showed what his intention was: his reply implied that normally the bird sang and that therefore he saw no reason why the sale should not stand and consequently for accepting back the bird. The defendant's partial answer cannot but be interpreted in the sense that the defendant did not intend to accept the bird back, since he saw no reason for doing so.

Mr. Camilleri concluded by saying that the defendant retained the bird in order to verify whether the allegations of the plaintiff were true and did not mean that he accepted the bird back.

Professor V. Caruana summed up by saying that the question resolved itself into whether silence is enough to bind the

party. The conduct of the parties must be compared with that of the normal reasonable man. If a reasonable man would have in similar circumstances expressed his refusal then the silence implies consent and acceptance, silence being a part or a form of contract.

Of the various theories pointed out by the parties Professor Caruana preferred that of Dernburg.

Professor Caruana said that the question under review is to be divided into two phases: as to the first phase, that is, when the defendant did not reply, he considered that the silence did not mean that defendant accepted the rescission of the sale: defendant did not admit that the bird was not a singing bird but said that the bird did not sing because of the change of place. The silence with regard to the other part shows that defendant was not certain whether the bird did or did not sing and that he wanted to verify the allegation of the plaintiff. Professor Caruana continued that since we cannot explain in an undoubtful manner the reason for the silence we are to hold that the defendant did not accept the proposal made by the plaintiff.

With regard to the second phase, that is, when the plaintiff left the bird at B's dwelling place, Professor Caruana pointed out that there was no doubt that the defendant was aware of the fact that the bird had been returned to him. Had he taken the bird back to the plaintiff before anything had happened to it, then the action of the defendant would be equivocal but the defendant did not do anything of the sort and retained the bird notwithstanding that he knew that the plaintiff intended to annul the sale if the bird did not sing. In the opinion of Professor Caruana the above could only lead to one conclusion, namely, that the defendant had accepted the suggestion of the plaintiff and that therefore the sale had been rescinded.

Plaintiff's claim was allowed and it was, therefore, not necessary to consider his second claim.

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