

Memorandum by
The Minister of Justice
Code of Organization and Civil
Procedure (Cap. 15)
Suspensive Effect of Appeal

The best legal doctrine and the Codes of Procedure of Italy, France, Germany, Austria, the old Codice Sardo and Roman and Canon Law recognise that even in civil matters an appeal has not only a devolutive effect, by virtue of which the case is reviewed by a court of higher degree, but also a suspensive effect, by virtue of which the judgment does not become definitive until it has been either acquiesced in by the parties or confirmed by the higher court.

The same principle was recognised both in the abrogated Italian Code of 1865 and in the modern Code of 1940. Our Code, promulgated in 1854, unfortunately enunciates the opposite rule, namely that an appeal does not operate as a stay of execution. The source of this mistaken theoretical approach is not clear as all continental legislation having a similar civil law background states the proper rule, but it is possible that the mistake is due to English influence, appeal being more or less new to English law.

This state of affairs has caused difficulties in the Government Circular case even though the first judgment was annulled, and it is considered advisable, particularly as there is no doubt of which, "de lege condenda", should the true rule of the law, that the Code should be properly amended so as to obviate, in

the public interest, any unpleasant surprise in other important cases that may arise. In legal practice, moreover (due to a number of restrictions which were introduced in the Code to temper the rigour of its approach to the question) execution "pendente appello" is the exception rather than the rule.

In order to place the law on a sound theoretical footing and to make it fall more into line with what is already happening in the majority of cases, the Law Officers have drafted the attached Bill which enshrines the correct principle and allows, on the precedent of the Italian Code, a provisional enforcement only in (a) cases exhaustively specified in the law and (b) other cases in which the Court is satisfied that delay would be more prejudicial to the creditor.

A system of guarantees, also provided for in the Bill, will create a balance fair to both sides. Judgments already pronounced will not be affected.

Further details are explained in the Objects and Reasons.

Hon. Ministers are invited to approve that the Bill, which has already been introduced in the Assembly, should be taken through its further stages and be given the necessary priority.

16th April, 1963.

A BILL
entitled

AN ACT further to amend the Code of Organization
and Civil Procedure, Cap. 15.

ENACTED by the Legislature of Malta:-

Short title.

1. This Act may be cited as the Code of
Organization and Civil Procedure (Amendment) Act,
1963, and shall be read and construed as one with
the Code of Organization and Civil Procedure,
hereinafter referred to as "the principal law".

Substitution of
section 256 of
the principal
law.

2. For section 256 of the principal law
there shall be substituted the following section:-

"256. Where a period of three years has
expired since the day on which according to law
any of the executive titles mentioned in section
251 could have been enforced, the enforcement may
only be proceeded with upon a demand to be made by
writ of summons before the competent Court."

Substitution of
section 264 of
the principal
law.

3. For section 264 of the principal law
there shall be substituted the following section:-

"Provisional
enforcement of
judgments by
order of the
Court.

264. (1) Except in the cases
mentioned in section 265, a
judgment which does not constitute
a res judicata shall not be
enforceable unless, on the demand
of the interested party, such
judgment has been declared by
the Court to be provisionally
enforceable.

(2) Such demand shall be made by means of an application which shall be served on the opposite party who shall be entitled to file an answer thereto within two working days.

(3) The Court of first instance shall, after summarily hearing the parties, dispose of the application as soon as may be after the filing thereof:

Provided that -

- (a) if the application is filed before the delivery of the judgment, the Court of first instance shall dispose of the application as soon as may be after such judgment is delivered; and
- (b) if, on appeal from the judgment of the Court of first instance, the lodging of the record of the proceedings before the appellate Court takes place prior to the disposal of the application by the Court of first instance, such application shall be dealt with and disposed of by the appellate Court, and, in any such

case, if the answer to the application has not been filed prior to such lodging it shall be filed in the appellate Court.

(4) Where the Court of first instance has declared a judgment to be provisionally enforceable, the appellate Court may, at any time before delivering judgment, on the application of the interested party, confirm, vary or revoke the decision.

(5) The provisions of subsection (2) of this section shall apply to any application filed under the last foregoing subsection.

(6) Where a demand for a declaration under subsection (1) of this section is not made to the Court of first instance, such demand may be made to the appellate Court at any time prior to the delivery of the judgment on appeal.

(7) The Court shall declare the judgment to be provisionally enforceable if it is satisfied that delay in the execution of the judgment is likely to cause greater prejudice to the party demanding a declaration under subsection (1) of this section than such execution would cause to the opposite party.

(8) The party against whom execution of a judgment declared provisionally enforceable under this section is sued out shall, in case of reversal or variation of such judgment, be entitled to damages and interest.

(9) The Court before which the record of the proceedings relating to a judgment declared provisionally enforceable under this section is for the time being lodged may at any time order the party entitled to the execution of such judgment to give to the other party sufficient security for the payment of the damages and interest which may become due under subsection (8) of this section.

(10) Where a judgment has been declared provisionally enforceable under this section, its execution shall be stayed if the interested party gives sufficient security for the execution of the judgment on its becoming res judicata, including, where the matter refers to the payment of moneys, security for the payment of interest, and, where the matter refers to other things, security to make good any damage which may be caused thereto through his negligence or fault and to restore any fruits derived therefrom.

(11) If any question arises as to the sufficiency of the security tendered under subsection (10) of this section the Court may give such directions as it may deem proper as to whether the execution of the judgment should be suspended until such question is decided by another judgment constituting a res judicata.

(12) In this section the expression "Court of first instance" shall be construed as if it included a reference to the Rent Regulation Board."

Substitution of section 265 of the principal law.

4. For section 265 of the principal law there shall be substituted the following section:-

"Provisional enforcement of judgments by operation of law.

265. The following judgments shall be in all cases provisionally enforceable -

- (a) any judgment referred to in section 252 and in paragraphs (b) and (c) of section 253; and
- (b) any judgment providing redress against infringement of the individual's right to life or providing remedies against illegal arrest or forced labour."

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Substitution of section 266 of the principal law.

5. For section 266 of the principal law there shall be substituted the following section:-

"Other sections applicable to provisional enforcement. 266. The provisions of sections 252, 253, 254 and 255 shall apply to the provisional enforcement of judgments."

Repeal of sections 267, 268 and 270 of the principal law.

6. Sections 267, 268 and 270 of the principal law shall be repealed.

Amendment of section 269 of the principal law.

7. Section 269 of the principal law shall be amended by the deletion of the words "or disallowing the demand for the stay of execution of another judgment."

Amendment of section 826 of the principal law.

8. Section 826 of the principal law shall be amended as follows:-

(a) for subsection (2) thereof there shall be substituted the following subsection:-

"(2) Notwithstanding the provisions of subsection (1) of this section, the Court before which a new trial is demanded may, at the instance, by writ of summons, of the party making such demand, order a stay of execution of the judgment if -

(a) together with his demand such party gives sufficient security for the execution of the judgment, if it is not set aside, including such security as is mentioned in subsection (10) of section 264; and

(b) it is shown to the satisfaction of the Court that the execution of the judgment is likely to cause greater prejudice to

such party than the stay of execution would cause to the opposing party.";

and

(b) by the addition of the following subsections:-

"(3) The security referred to in paragraph (a) of subsection (2) of this section, when given, shall in all cases operate as a stay of execution of a judgment ordering the arrest or imprisonment of the debtor.

(4) The filing of the writ of summons containing the demand for the stay of execution of the judgment sought to be set aside shall not operate as a stay of execution of such judgment unless, upon an application to that effect, the Court shall for just cause order such stay of execution.

(5) Where the enforcement of a judgment has been authorised by the judgment sought to be set aside the provisions of subsections (2), (3) and (4) of this section shall not apply.

(6) An appeal from a judgment disallowing the demand for the stay of execution of the judgment sought to be set aside shall in no case operate as a stay of execution of the latter judgment."

Transitory provision.

9. The amendments of the principal law made by the provisions of this Act shall not apply to judgments of a Court of first instance delivered before the date of the coming into force of this Act.

Objects and Reasons

The object of this Bill is that of giving proper recognition, on the precedent of continental legislation having the same civil law background, to the principle that, as a general rule, the enforcement of judgments of a court of first instance is suspended during the time allowed for an appeal to be made and while the appeal is being dealt with. This rule will be subject to two categories of exceptions in which the system of provisional enforcement will operate, namely (a) those in which the courts will have a discretion depending on their estimate of the prejudice likely to be caused to the respective parties and, (b) those in which, having regard to the nature of the case, the judgment will be provisionally enforceable by operation of law.

In order to create a just balance the courts are empowered to require a security for damages from the party suing out provisional enforcement, while the party suffering such enforcement may also obtain a stay by providing security for the execution of the judgment on its becoming definitive. The procedure will be by application which may be made at any time either to the Court of first instance or to the appellate Court.

The reform brought about by the Bill does not extend to the procedure of new trial and will not affect judgments delivered before the Bill becomes law.