

Emmanuele Grech - - - - - Appellant

v.

Antonio Grech and Others - - - - - Respondents

FROM

THE COURT OF APPEAL, MALTA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 14TH JULY, 1952

Present at the Hearing :

LORD PORTER
LORD TUCKER
LORD COHEN

[*Delivered by* LORD TUCKER]

The appellant was one of the defendants in an action brought by the respondents in the Commercial Court in Malta on 2nd November, 1946, claiming a true and faithful account from the defendants of their administration of a Cinema and Wines and Spirits shop being Nos. 5 and 4, Piazza Sant'Anna, Sliema, together with the overlying premises. The appellant was sued as one of the administrators of the goodwill and leasehold of the said premises, which comprised the joint estate of Vincenzo and Barbara Grech deceased, appointed by contract enrolled in the records of Notary Giovanni Azzopardi on 25th April, 1932, and the remaining defendants were sued as representing the estate of their father, Alfredo Debono deceased, who had been appointed administrator jointly with the appellant Emmanuele Grech under the said contract.

The trial Judge on 10th May, 1949, granted the relief claimed against all the defendants. On appeal the Court of Appeal on 21st April, 1950, allowed a plea of prescription which had been pleaded by the children of Alfredo Debono and dismissed them from the suit, but confirmed the judgment for an account against Emmanuele Grech who is now the only appellant in the present appeal.

The respondents are the surviving children of Francesco Grech who died on 15th March, 1928, and his wife Ersilia. Francesco Grech was one of the children of Vincenzo Grech who died on 23rd June, 1929, and Barbara Grech who died on 5th October, 1913.

After the death of Vincenzo Grech disputes arose concerning the devolution and administration of the property of Vincenzo and Barbara. Proceedings were taken by Ersilia Grech as Curatrix ad litem on behalf of her then infant children, i.e., the present respondents together with Maria and Alessandro who are not parties to the present suit. The parties to those proceedings agreed to settle out of court and by a Decree of 14th December, 1931, of the Civil Court of Malta, First Hall, the proposed terms of settlement were approved by the Court and signed by the presiding Judge. Dr. Salvatore Schembri was appointed

Supplementary Judge for the purpose of carrying out the settlement and was a party to the contract of 25th April, 1932, and Ersilia Grech was appointed Special Curatrix on behalf of her infant children and signed the contract on their behalf.

In the action which was settled Ersilia Grech had sought an order for the evaluation and liquidation of the joint and personal estate of Vincenzo and Barbara Grech deceased—saving that subsequent to evaluation and liquidation the party lawfully entitled to appear on behalf of the minors should file an application before His Majesty's Civil Court, Second Hall, praying for the appointment of Tutors duly authorised to accept the inheritance with the benefit of inventory and to effect the partition thereof in separate proceedings. The settlement of the action, however, covered a wider field than the relief claimed. It provided:—

(1) That the disputed testamentary disposition of Vincenzo Grech should be deemed null and void.

(2) That the judgment whereby the plaintiff had been non-suited in a previous action respecting the estate of Barbara Grech should be waived.

(3) That the estate of Vincenzo Grech should devolve upon the parties to the agreement in equal shares between them as in cases of successions *ab intestato*.

(4) That the intestate inheritance of Barbara Grech should devolve upon the persons named in the proportions specified.

(5) That the parties proceed to the liquidation of the two estates.

(6) That the estates comprise only the goodwill and leasehold of the Cinema Savoia and the Wines and Spirits shop at Nos. 5 and 4, Piazza Sant'Anna, Sliema, together with the overlying premises, used as a club, together with the effects and equipment thereof.

(7) That the value of the estates is £400.

(8) That the estates be left unpartitioned.

(9) That Emmanuele Grech (the appellant) and Alfredo Debono be appointed administrators of the aforesaid Cinematograph and Wines and Spirits shop in the interests of all concerned.

(10) That each party bear one-ninth share of the costs ordered to be borne by the plaintiff in the previous suit and of the costs incurred in connection with the present deed and that the Administrators be authorised to pay such costs and deduct them from the next takings.

(11) That the Administrators shall render to the interested parties an account of their administration once every quarter.

(12) That the Administrators shall pay to Ersilia Grech not less than ten shillings a month pending final settlement at the end of each quarter.

On 1st March, 1942, Alfredo Debono died leaving as his children and heirs those persons who were co-defendants with the appellant in the present action but who were dismissed from the suit by order of the Court of Appeal.

It is common ground that since 25th April, 1932, no accounts have been rendered by the appellant or by Debono in accordance with the provisions of the contract of that date.

The appellant contended that a subsequent agreement had been entered into by all the heirs of Vincenzo and Barbara Grech, including Ersilia Grech on behalf of her infant children, that in recompense for their rights in the properties in question they should be paid eight shillings a day which payments had been regularly made and for which receipts were given and that the appellant was accordingly under no obligation to render any accounts whatsoever.

By a deed of 2nd February, 1925, Raffaele Psaila, Vincenzo Galea and Roberto Micallef had leased to Vincenzo Grech the house at No. 5,

Piazza Sant'Anna, Sliema, together with the courtyard annexed thereto and used as a cinematograph together with the adjoining shops on either side for a period of eight years from 1st February, 1925, and a further successive period of eight years at the option of the tenant at a rent of £82 per annum.

By an agreement of 15th January, 1932, the appellant (Emmanuele Grech), Alfredo Debono, Edgar Baldacchino, Alfredo Zammit and Alfredo Axisa agreed to dissolve an existing partnership and entered into a new partnership for a period of eight years under the style of "The Sliema Cinema Union" with the object of carrying on the business of the Cinema Teatro Axisa at No. 5, Tower Road, Sliema, and of the Cinema Savoia at Piazza Sant'Anna, Sliema. This agreement recited that the appellant and Debono were not then entitled to the lease of the Cinema Savoia for a period of eight years but they undertook to secure such lease by all means open to them, and if they failed to obtain an extension of the lease for a period of eight years to exercise all rights to which they were entitled by law to retain possession of the premises for as long as possible and in default to pay the sum of £1,000 by way of penalty to the other partners in equal shares.

By a contract of 4th July, 1932, Vincenzo Galea and Carmelo Galea as special attorney for Raffaele Psaila leased or purported to lease the premises comprised in the lease of 2nd February, 1925, to the appellant and Alfredo Debono jointly and in solidum for a period of eight years from 1st January, 1933, and a further successive period of eight years at the option of the tenants at a rent of £101 per annum. This lease contained a condition whereby the tenants bound themselves to relieve the landlords of all liability arising out of any claim on the part of the heirs of Vincenzo Grech respecting the unexpired lease of 2nd February, 1925.

By a contract of 18th August, 1932, made between the appellant and the other four members of the partnership called the Sliema Cinema Union (in which it was recited that the lease of 4th July, 1932, should have been entered into by the appellant and Debono on behalf of the other partners as well as in their own names) Baldacchino, Axisa and Zammit agreed to and accepted and undertook to be bound by the conditions of the lease. By this contract the parties further undertook to each other to pay the sum of eight shillings a day to the heirs of Vincenzo Grech during the period of the lease.

At the hearing in the Court of Appeal a further document which had not been in evidence at the trial was put in without objection. It was a sub-lease dated 12th April, 1926, of the Cinema Savoia situate at No. 4, Piazza Sant'Anna, Sliema, together with the goodwill thereof and the effects therein from Vincenzo Grech to the appellant for four years from 11th August, 1926, and a further successive period of three years optional at a rent of five shillings a day.

This sub-lease is not referred to in the judgments in either of the Courts below and their Lordships were informed by Counsel that it was relied upon in the Court of Appeal solely to show that the alleged subsequent agreement to accept eight shillings a day was a good bargain for the present respondents. In these circumstances their Lordships ruled that it could not be used in this appeal in support of any argument directed against the form of the order for an account.

In the Commercial Court three defences were relied upon:—

(1) The alleged subsequent agreement to accept eight shillings a day in discharge of all rights under the contract of 25th April, 1932.

(2) That even if it was not proved that Ersilia Grech was a party to this subsequent agreement she had never accepted the inheritance on behalf of the minors whom she represented in accordance with Maltese law and accordingly the whole inheritance was represented by the heirs who had attained their majority and were parties to the subsequent agreement.

(3) That the contract of 25th April, 1932, did not of itself constitute an acceptance by Ersilia Grech as such acceptance on behalf of minors could only be made in the Second Hall of the Civil Court and then only under benefit of inventory.

The trial Judge having heard the oral evidence and considered the documents held :—

(1) That the contention of the defendants that a subsequent agreement had been drawn up whereby the goodwill and leasehold in question were assigned to the appellant and Alfredo Debono in consideration of the payment of eight shillings a day and that this agreement had been signed by the respondents' mother Ersilia Grech could not be accepted.

(2) That even assuming Ersilia Grech had signed such an agreement her acceptance would have been null and void without the authorisation of the competent Court.

He accordingly allowed the claim of the respondents for an account.

The Court of Appeal, as previously stated, allowed the appeal of the heirs of Debono on the ground that their plea of prescription had been established. They affirmed the decision of the trial Judge as against the appellant and allowed him two months from the date of their judgment to render the account. Dealing only with the matters now in issue on this appeal the Court agreed with the trial Judge that it had not been established that Ersilia Grech had signed the alleged subsequent agreement which in any event she had no right to do, not having been appointed Tutrix on behalf of her children—apart from the question whether even if she had been appointed Tutrix she could have made the assignment without the authority of the competent Court. They further held that prior to the alleged subsequent agreement Ersilia Grech had by the contract of 25th April, 1932, accepted the inheritance on behalf of her children and had been duly authorised so to do by the First Hall of the Civil Court before which the suit was pending and which had jurisdiction concurrently with the Court of Voluntary Jurisdiction (the Second Hall of the Civil Court), and that it was within the power of the Court under section 160 (1) of the Civil Code to permit acceptance without benefit of inventory and it was apparent that the Court had so done.

The existence of the alleged subsequent agreement was the essential foundation of the defence. The agreement relied upon was said to have been in writing. No such agreement was produced and until proof had been given of its execution and its subsequent loss or destruction no secondary evidence of its contents was admissible. Some extremely vague and unsatisfactory evidence was given as to the terms of the agreement before its execution, loss or destruction had ever been established. The later evidence as to loss or destruction was as unsubstantial as that of its contents.

There was a suggestion that the appellant had placed it in the charge of Notary Vassallo but he never expressly so swore in his evidence. He said he thought he had given it to his brother Carmelo, since deceased, and Carmelo's son Giuseppe had been unable to find it. Giuseppe was not called. Francis Pace, formerly a clerk of Vassallo, stated that the records of Vassallo were now in the keeping of Notary Petit. Notary Petit was not called. In one part of his evidence the appellant stated that the eight shillings a day which he had been paying to his brothers and sisters pursuant to the alleged agreement was rent, but on being re-called he said it was not rent but compensation for the assignment.

No other witness swore to having signed or seen the agreement in writing. Several of them referred to the payments of eight shillings a day as rent.

In this state of the evidence the trial Judge said, "Meantime the instrument itself has not been produced and Emmanuele Grech claims and has stated in evidence that the document has been mislaid at the

office of Notary Dr. Ettore Francisco Vassallo. The Court, however, is unable to rely on the evidence of the defendant Emmanuele Grech who, in trying to correct his evidence, and to express himself more clearly, succeeded only in making himself still more difficult to follow. In the contract dated 18th August, 1932, reference is made to that payment of eight shillings a day to the heirs of Vincenzo Grech, but the instrument itself is not even mentioned; and it is hardly conceivable that, if it had existed at all, or if it had been drawn up in proper form, the instrument in question would have failed to be mentioned in that contract. The Court is therefore unable to accept the suggestion that Ersilia Grech had signed the instrument. On the other hand, Ersilia Grech's acceptance of the agreement—assuming she had ever signed it—would have been null and void."

It is true that the learned Judge did not find it necessary to state in terms that no such agreement had ever been made, but the nature of the evidence referred to above and the Judge's view of it render it impossible for their Lordships to deal with this appeal on the assumption that the appellant has established the existence of a valid written agreement by his brothers and sisters to accept eight shillings a day in compensation for the abandonment of their rights under the contract approved by the Court and dated 25th April, 1932, and that the only issue remaining for consideration is the legal result of the appellant's failure to satisfy the Courts below that Ersilia Grech had signed this document.

Nor can their Lordships accede to the application made by Counsel on his behalf that the case should be remitted for a new trial to enable him to prove the existence of an agreement in writing which was essential to his case and which he had failed to do during a hearing which had, with numerous adjournments, covered a period from March, 1947, to February, 1949.

Their Lordships, accordingly, do not find it necessary to express an opinion with regard to the appellant's contentions based upon the requirements of the Civil Code in relation to the acceptance of inheritances on behalf of minors and the circumstances in which the Court can dispense with the necessity for an inventory, nor as to whether Section 160 of the Code has any application to cases where the father of the minors is dead. But in so saying their Lordships must not be taken to imply disagreement with the views expressed by the Court of Appeal on these and other matters of procedure under the Maltese Code which only arise on proof of the existence of a contract in writing subsequent to that of 25th April, 1932, absolving the appellant from his duty to account on the basis of the earlier document.

On this view of the case it remains, however, to consider whether the respondents, or some one or more of them, have ever accepted the inheritance in accordance with the requirements of the law of Malta. One of the parties to the contract of 25th April, 1932, was Giuseppa, daughter of Ersilia Grech and married to Carmelo Bonello. She was born on 30th December, 1909, and had accordingly attained majority at the date of the contract which she expressly ratified and agreed to with the consent and concurrence of her husband who signed on her behalf. Their Lordships do not accept the contention of Counsel for the appellant that this contract was merely declaratory and definitive of the manner in which the estate should be administered if and when the inheritance was subsequently accepted. The whole agreement proceeds on the basis of the parties' acceptance of the proportions fixed thereby and goes on to prohibit partition—which would normally follow acceptance—to provide for payment of costs out of the shares fixed, to appoint Administrators and expressly to impose on them the duty to account to the interested parties and to make payments on account to Ersilia Grech of ten shillings a month. By becoming a party to an agreement in these terms, Giuseppa, in their Lordships' view, impliedly accepted the inheritance, and thereby has become entitled to an account in the terms of the contract.

It was argued that implied acceptance could only take place in the cases enumerated in section 894 of the Civil Code. This section reads as follows:—

894.—(1) “Any donation, sale, or assignment of his rights of succession by one of the co-heirs, whether in favour of a stranger or of all or any of his co-heirs, shall imply his acceptance of the inheritance.

(2) “The same applies—

(a) “with regard to a renunciation made, even if gratuitously, by one of the heirs in favour of one or more of his co-heirs ;

(b) “with regard to a renunciation made, even in favour of all his co-heirs indiscriminately, when such renunciation is made under an onerous title.”

This section must be construed in relation to section 891 which precedes it and is as follows:—

891.—(1) “Acceptance may be either express or implied.

(2) “It is express, if the status of heir is assumed either in a public deed or in a private writing.

(3) “It is implied, if the heir performs any act which necessarily implies his intention to accept the inheritance, and which he would not be entitled to perform except in his capacity as heir.”

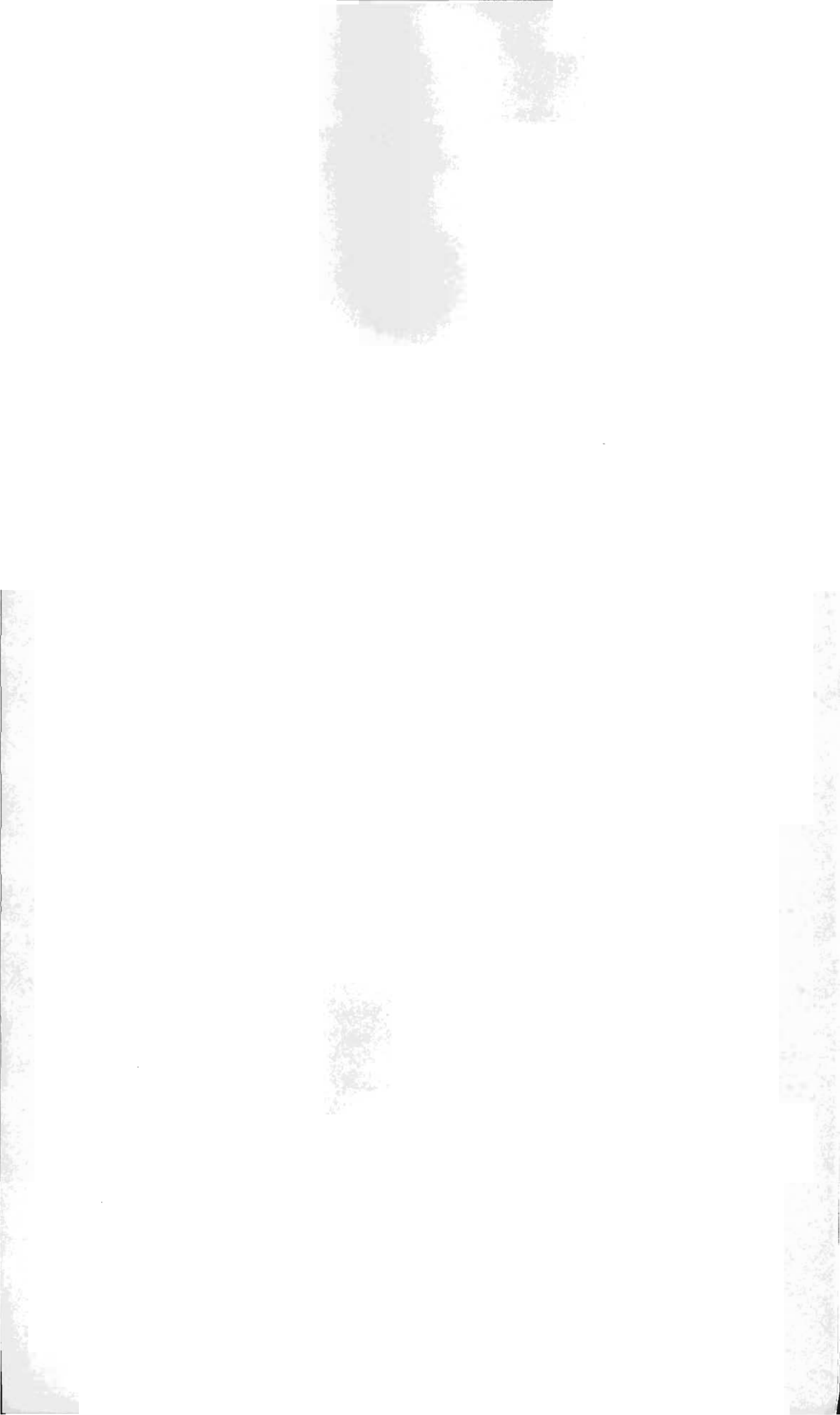
Section 894 is not, in their Lordships' opinion, definitive, but merely designed to remove doubts with regard to specific cases as to which questions might have arisen whether or not they were within section 891 (3). Were it otherwise there would have been no need for subsection (3) of section 891.

The acceptance by Giuseppa would alone suffice to justify an account, but all the other respondents had attained their majority at the date of the issue of the writ in the present action and by such writ they clearly impliedly accepted the inheritance, which acceptance (if section 894 is not definitive), would, it is conceded, by virtue of section 890 of the Civil Code operate retrospectively. It is said, however, that even so those respondents who were minors would only be entitled to an account as from the date on which each of them attained majority.

Having regard to the fact that Giuseppa is clearly entitled to claim an account in respect of the whole period and that an account must be taken for that period the Court in its discretion could order one account in preference to a number of separate accounts in respect of each respondent and their Lordships can see no ground for varying the form of the order made by the Courts below.

It only remains to add that a point was taken in connection with the form of the order with regard to the right of Ersilia Grech to usufruct, which, it was said, had not been provided for. No such question can arise at this stage. On taking the account credit will no doubt be given for all payments—whether in respect of usufruct or otherwise—proved to have been properly made.

For these reasons their Lordships will humbly advise Her Majesty that the appeal be dismissed, but that the order of the Court of Appeal in Malta be varied by extending the appellant's time for rendering the account until two months from the date of dismissal of this appeal. The appellant must pay the respondents' costs of the appeal.



In the Privy Council

EMMANUELE GRECH

p.

ANTONIO GRECH AND OTHERS

DELIVERED BY LORD TUCKER

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