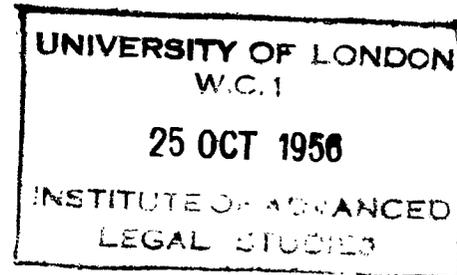


31,1955

No 44 of 1954



44818

In the Privy Council.

**ON APPEAL**

*FROM THE COURT OF APPEAL OF MALTA.*

BETWEEN

GUSTAVO ROMEO VINCENTI A. & C.E. (Defendant) *Appellant*

AND

COLONEL STEPHEN J. BORG (Plaintiff nominee) *Respondent.*

**CASE FOR THE RESPONDENT.**

1. This is an appeal from the judgment of the Court of Appeal of Malta (Sir Luigi Camilleri, President, Montanaro Gauci and Harding J.J.) delivered on the 15th June 1953 which affirmed the judgment of H.M. Civil Court of Malta (First Hall) dated the 24th February 1953.

RECORD  
pp. 183-194.  
pp. 159-164.

2. The question raised on this appeal relates to the right of pre-emption granted by section 1510 of the Malta Civil Code "to persons related by consanguinity to the seller." By section 1508 (1) of the same Code, this right of pre-emption "consists in the right of a person of assuming a sale made to another person, succeeding to all his rights and obligations."

10 3. The sale in question took place, under the authority of the Civil Court of Malta, pursuant to its Order, dated the 24th July 1946 in *re Colonel Stephen Borg R.M.A. & Others v. The Right Rev. Mgr. Canon Gerolamo Chetcuti & Others* and consisted of the property situate at the corner between Kingsway and St. John Street, Valletta. It formed previously the block of buildings on the same site which had been destroyed by enemy action during the Second Great War.

Exhibits  
pp. 67-68.

RECORD  
Exhibits  
p. 68.

4. After various postponements, the property in question was adjudicated to the Appellant for the sum of £32,200 on the 1st April 1948. It carried with it "the right to the amount of compensation payable by the War Damage Commission."

Exhibits  
pp. 5-9.

5. The Respondent is the attorney of his two nieces, Miss Patricia Borg and Dr. Helen Borg, daughters of his predeceased brother, Dr. Anthony Borg and direct descendants, through their grandmother, Mrs. Virginia Borg, of one of the original owners of the property, Dr. Pasquale Debono. A genealogical table is appended to the Record (Exhibit at p. 13).

Exhibits  
pp. 9-11.

6. By a "Schedule of Pre-emption" dated the 3rd September 1948, the Respondent exercised on behalf of his said nieces the right of pre-emption, as prescribed by section 1517 of the Civil Code, and claimed the recovery from the Appellant of the said property. He deposited, at the same time under the authority of the Civil Court, the sum of £33,213 4s. 1d., made up of £32,200 for the purchase price, £335 15s. 0d. for costs incurred by the Appellant and £677 9s. 1d. for interest thereon "according to law up to the present day in order that this sum may be freely paid" to the Appellant as soon as he effects the re-sale of the property to the Respondent according to law, a period of four days being given to him for the purpose. 10

Exhibits  
p. 64.

7. The Appellant refused to effect the re-sale, so claimed, and accordingly the Respondent served on the Appellant a judicial letter dated the 4th October 1948 warning him that "in default, he would take steps against him according to law without prejudice to the recovery of the damages sustained by reason of unjustifiable delay" on his part. 20

Exhibits  
pp. 11-12.

8. As appears from the correspondence exchanged between Counsel for the parties, the Appellant had decided on the 22nd January 1949, to release to the Respondent the property in question, excepting certain quotas which are not relevant to the present appeal. It seems, however, that later on, the Appellant changed his mind and refused to effect the re-sale of any portion of the property. 30

p. 8.  
ll. 7-8.

p. 5.

9. By a Writ of Summons issued in the Civil Court of Malta on the 12th February 1949, the Respondent claimed that the Appellant, notwithstanding reiterated requests made to him by judicial letter, had refused to surrender the said property to him and prayed for: (1) a judicial Declaration that the right of pre-emption exercised by him was validly and lawfully exercised; (2) that liquidation be made, if necessary, of any legitimate expenses incurred by the Appellant in connection with the purchase of the property over and above those lodged by the said Schedule; (3) that the Appellant be condemned to effect the re-sale to the Respondent, within a short and preremptory period of time of the part of the property claimed under the right of pre-emption to wit a 283/360ths

portion or other varying portion thereof, even larger, such re-sale in default being effected by virtue of the Court's judgment; (4) that the Appellant be condemned to pay to the Respondent all the damages sustained by him in consequence of delay and default on the part of the Appellant with interest according to law, together with costs—such damages being assessed by Judicial Referees appointed for the purpose. RECORD

10. By his statement of defence, dated the 23rd February 1949 and by his Minute of the 7th March 1949 the Appellant submitted that the Writ of Summons was a nullity on the ground that the cause of the claim was not stated clearly and because the Respondent had failed to produce the necessary documents together with the Writ of Summons. pp. 12 & 16.

11. The Civil Court by a judgment delivered on the 4th May 1949 (A. V. Camilleri, J.), dismissed both preliminary pleas of the Appellant. pp. 24-29.

12. The Appellant, by a petition dated the 25th May 1949, appealed to the Court of Appeal from the said judgment of the Civil Court. On the 14th November 1949 the Court of Appeal (Sir George Borg, President, Ganado and L. A. Camilleri JJ.) dismissed the Appellant's appeal with costs. pp. 33-40.  
pp. 43-49.

13. On the 16th November 1949, the Appellant filed a further statement of defence alleging that (1) the Respondent had not established the bond and degree of consanguinity between the pre-emptors and the vendors; that (2) the said Helen and Patricia Borg who were both absent from Malta had been duly notified according to law of the notices respecting the sale and they were not therefore entitled to exercise the right of pre-emption in respect of the property and (3) that the said Helen and Patricia Borg were not exercising the right of pre-emption in their own interests but on behalf of and for the benefit of third parties. p. 53.

14. On the 30th October 1950, the Civil Court, on the Appellant's application, ordered that the Registrar of H.M. Superior Courts should draw up Letters of Request for the examination of Miss Patricia and Dr. Helen Borg and of their mother Mrs. Kathleen Borg in Australia and New Zealand respectively. The interrogatories to be put to these three witnesses are set out at pp. 72 to 76 of the Record. They were, however, never so interrogated as they visited Malta on or about the 26th March 1951 on their way to this country and their evidence was taken by the Civil Court during their short stay in the island. pp. 79-80.  
pp. 80-81.  
pp. 82-94.

15. The Civil Court (A. V. Camilleri J.) by a judgment delivered on the 28th May 1951, dismissed the second plea of the Appellant that the said Patricia and Helen Borg had forfeited their right to the exercise of pre-emption. The Court based its decision on the ground that the period of time that had elapsed between the date of publication of the advertisement of the judicial sale in the pp. 101-113.

RECORD

p. 109.  
ll. 1-4.

Malta Government Gazette (30th December 1947) and the day fixed for the sale (22nd January 1948) fell short of the minimum time required by section 1520 of the Civil Code for forfeiture to occur in the case of persons absent from the Maltese Islands.

16. The said section reads as follows:—

(1) Where the sale was made by judicial auction, the right of pre-emption shall not be competent to the persons to whom notice of the proposed sale was given by service of a copy of the advertisement mentioned in section 314 of the Code of Organisation and Civil Procedure.

(2) The provisions of this section shall also apply to absent persons if the said advertisement shall have been published in the Government Gazette at least one month before the day fixed for the sale. 10

pp. 117-122.

17. By a petition dated the 9th June 1951, the Appellant appealed to the Court of Appeal. He confined his appeal to the question that due notice of the judicial sale had been given to the Respondent which was the second plea advanced in his statement of defence filed on the 16th November 1949.

p. 53.

pp. 126-139.

18. The Court of Appeal (L. A. Camilleri, Acting President, Montanaro Gauci and Gouder JJ.) by a judgment delivered on the 4th February 1952 dismissed the appeal and affirmed the judgment of the Civil Court. The Court held that section 1520 in prescribing forfeiture of the right of pre-emption admitted of no extensive interpretation. For forfeiture to take place, it was therefore an indispensable necessity that the provisions of the law be scrupulously observed *ad unguem*. As a *since qua non* condition “the law requires the publication of the advertisement of the sale, specifying the day of the sale, at least one month before the day fixed for the sale. In default, no forfeiture takes place.” 20

p. 139.

pp. 143-144.

19. The Appellant then petitioned for leave to appeal to the Judicial Committee of the Privy Council which was refused by the Court of Appeal on the 10th March 1952 on the ground that the judgment appealed from was not definitive and final and was no bar to the continuation of the proceedings on the merits. 30

p. 148.

20. By a procès-verbal filed in the Civil Court on the 27th March, 1952, the parties agreed that the fourth claim in the Respondent's Writ of Summons of the 12th February 1949—to wit that the Appellant be condemned to pay to the Respondent all the damages sustained and that may be sustained in consequence of delay and default on the Appellant's part to be assessed by Judicial Referees—“need not be determined by this Court and they make the request that it be left for judgment in separate proceedings—without prejudice to their rights.”

21. By a judgment delivered on the 24th February 1953 (J. Caruana Colombo, J.), the Civil Court, after examining the evidence of the witnesses heard, decided:—

RECORD  
pp. 159-164.

(1) as to the plea set up by the Appellant regarding the one-thirtieth quarter acquired by Mrs. Grace Borg, that the right of gentilious pre-emption only belonged to the persons descending by consanguinity from a common ancestor and did not therefore appertain to her. On this quota as well with regard to the quotas already excluded by the Respondent himself, no question arises on this appeal;

p. 162.  
ll. 37-39.

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(2) as to the Appellant's plea that Patricia and Helen Borg were not exercising the right of pre-emption on their behalf but on behalf of a third person, the Court found that there was no evidence, direct or circumstantial, that pre-emption had not been exercised in their interest. On this point the Appellant's allegation was untenable. "In fact the circumstances referred to by him in support of the contention that the Respondent nomine exercised pre-emption in the interests of other parties, and not in the interests of his constituents, are rather indirect and do not lead to the moral conviction above-mentioned—the more so when both Patricia and Helen Borg, in their evidence, affirmed that they had been informed they were entitled to the exercise of pre-emption, that they had authorised the Respondent to exercise that right on their behalf, that there has been no pre-concerted plan between them and any other person, the object of which was to recover the property in order that they might then transfer it to such person—that they are aware that, in the long run, they will have to pay the costs if they lose the case, and that they exercised the right of pre-emption in order to exploit the pre-empted property in their own interests, and not in the interests of any other person";

p. 163.

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(3) reserved pronouncement on the second claim contained in the Respondent's Writ of Summons with regard to liquidation of expenses if and where necessary, "until the present judgment becomes absolute";

(4) allowed the third claim and condemned the Appellant to re-sell the property to the Respondent—bar the above-mentioned quotas—within fifteen days from the day on which liquidation was made of the lawful expenses incurred by the Appellant in connection with the purchase of the property over and above those lodged by the Respondent together with the Schedule of pre-emption and declared that where the re-sale of the property failed to be effected within the aforesaid period, such re-sale shall be deemed effected by virtue of the present judgment;

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(5) ruled that there should be a separate suit for cognisance of and judgment on the fourth claim in the said Writ of Summons;

RECORD

p. 164.

(6) ordered that the costs incurred up till the judgment, including those reserved, but excepting those already ordered, shall in the circumstances of the case be paid as to 1/4th by the Respondent and 3/4th by the Appellant.

p. 165.

p. 176.

pp. 63-64.

pp. 173-183.

22. By a Note of Appeal dated the 3rd March 1953, the Appellant appealed from the judgment to the Court of Appeal and by a further Minute dated the 4th May 1953, he alleged that the judgment of the 24th February 1953 delivered by the Civil Court, was null and void in that the transcription of the shorthand notes of the evidence given by Mr. Victor Grech A. & C.E. had not been read out to the witness and was not signed either by the witness or the Deputy Registrar. On the 4th May 1953, the Court of Appeal (L. A. Camilleri, President, Montanaro Gauci and Harding JJ.) dismissed the plea of nullity on the ground that it could be raised only in the cases envisaged in section 792 of the Code of Civil Procedure, none of which was to be found in this instance. Moreover the violation therein mentioned could be remedied by the Appellant "recalling the witness" who had been produced by him.

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pp. 183-194.

23. By a judgment delivered on the merits by the Court of Appeal on the 15th June 1953, that Court, constituted as before, dismissed the appeal with costs and affirmed the judgment of the Court below. As the Court held, it was now a settled principle in the jurisprudence of Maltese Courts that a person who is entitled to exercise the right of gentilious pre-emption is not bound to retain the pre-empted property for himself and that, after the property has been re-sold to him, he may dispose of it at a profit even if before exercising the right of pre-emption, it was his intention so to do. What was prohibited and rendered the pre-emption exercised simulated and therefore null and void was that the consanguineous pre-emptor should agree beforehand with another person to transfer the property on recovery to such person since a pre-existing agreement of that kind amounted to a transfer of the right of pre-emption contrary to the provisions of section 1508 (2) of the Civil Code "that a person entitled to exercise the right of pre-emption may not transfer that right to any other person." Evidence as to simulation might be direct or it might be circumstantial, in which case the indications or conjectures must be precise, concordant and of a grave nature. The Court of Appeal found that there was no such direct or circumstantial evidence sufficiently convincing to show the existence of any such prior agreement. The Court further held that the Respondent was not an extraneous party and it was but natural that he wished the property to remain within his family. The Court accordingly, after carefully weighing the circumstantial evidence set out by the Appellant, as well as the facts established in the course of the proceedings, agreed with the Court below that the Appellant had not succeeded in proving the existence of a prior agreement, "such as could have invalidated the pre-emption exercised."

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24. By a decree given on the 4th October 1954, the Court of Appeal granted to the Appellant final leave to appeal to the Judicial Committee of Her Majesty's Privy Council.

RECORD  
p. 208.

25. The Respondent humbly submits that the said judgment of the Court of Appeal of Malta dated the 15th June 1953 is right and ought to be affirmed and that this appeal ought to be dismissed with costs for the following among other

### REASONS.

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1. BECAUSE the right of pre-emption under Maltese Law was properly exercised.
  2. BECAUSE the notice published in the Malta Government Gazette advertising the judicial sale of the property concerned did not meet the condition prescribed by Maltese law and there could accordingly be no forfeiture of the right of pre-emption of Patricia and Helen Borg.
  - 20 3. BECAUSE there was no direct or circumstantial evidence to prove affirmatively that the Respondent had exercised such right of pre-emption for himself personally or that any agreement had ever been entered between him and the said Patricia and Helen Borg for the transfer of such right to him.
  4. BECAUSE the concurrent findings of law and of fact of both Courts in Malta are right and ought to be affirmed.

C. J. COLOMBOS.

R. B. GREENBURGH.

In the Privy Council.

**ON APPEAL**

*FROM THE COURT OF APPEAL OF MALTA.*

BETWEEN

GUSTAVO ROMEO VINCENTI A. & C.E.  
*Appellant (Defendant)*

AND

COLONEL STEPHEN J. BORG  
*Respondent (Plaintiff nominee)*

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**Case for the Respondent.**

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