Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal between Bugeja and another, and Camilleri and another, from Her Majesty's Court of Appeal of the Island of Malta and its Dependencies; delivered 5th July, 1870.

Present:—

LORD CAIRNS.
SIR WILLIAM ERLE.
SIR JAMES W. COLVILE.

IN this case a villa in Malta, apparently in the neighbourhood of a town, consisting of an ornamental residence, certain out-buildings, gardens, and some pieces of land, which either were ornamental to, or contributed to the view and amenities of, the villa, devolved some time since, upon the death of the owner, who had occupied the villa in this condition, upon his ten children. In that state of things if an application had been made upon the subject of partition, it is difficult to see how the villa could have been divided into ten portions without that inconvenience and disadvantage which by the code of Malta are considered an objection to specific partition. In the course of years, however, the shares of eight of these children appear to have centred in the Respondent, the Appellants being entitled, each of the two, to one-tenth, the shares of two other children; and the Appellants contend that the villa and property may now be divided without inconvenience and without disadvantage in the proportions which have been mentioned, namely, eight-tenths to the Respondent, and one-tenth to each of the Appellants.

That depends upon the construction of the Maltese code to which reference has been made:—"If a common thing cannot be conveniently divided

" and without disadvantage, or if in a partition of " common property made by mutual consent there " be something which no one of the sharers can " have or wish to have, the same are sold by auc- " tion." It is unnecessary to refer to the code of 1864 in addition to this, which is the code of 1859, because the code of 1864 in substance throws us back on the code of 1859.

The question, then, to be determined is, could partition, under the circumstances of this case, be made conveniently, and be made without disadvantage? Of course that is a question to be solved in the exercise of a judicial discretion, after all the evidence has been adduced of which the case is susceptible; but their Lordships would, under any circumstances, be extremely slow to differ from the exercise of that judicial discretion by the Court upon the spot, especially if their Lordships were satisfied that that Court had all the evidence before it which was relevant to the case, and, above all, found that the Court or members of the Court had had the advantage which their Lordships cannot have, of personally inspecting the property with regard to which the question has arisen.

In this case three experts, as they are termed, were in the first instance appointed; one, as we understand, by each of the parties who are in contest, a mode of appointment which gave two of the three to the Appellants, and one to the Respondents. Those experts made their report, stating a certain number of facts and their opinion with reference to them, and the two experts who were appointed at the instance of the Appellants stated a certain mode in which they thought the property might be divided; but the expert who was appointed by the Respondents stated his opinion to be against the possibility of division without inconvenience and without disadvantage. Then the Judge of First Instance, with these reports before him, and with the advantage of the presence of the experts, visited, as it appears, the property in question, and that learned Judge also arrived at the conclusion that the property could not be divided specifically without inconvenience and without disadvantage.

From that decision there was an appeal to the Court of Appeal in the Island, and the Court of Appeal, in substance, confirmed the Judgment of

the primary Judge, adding their own adhesion to the facts stated by the expert who had been appointed at the instance of the Respondents, and dismissing, therefore, the Appeal which had been made to them. In that state of things some case of error would require to be very clearly established to induce their Lordships to come to a conclusion which in the main must be a conclusion of fact differing from the Judge of First Instance, and from the majority of the Court of Appeal.

Their Lordships, however, might be obliged to come to a different conclusion, if it were clearly made out to their satisfaction that those Judgments proceeded upon erroneous grounds; but so far from being satisfied that this has been the case, their Lordships are of opinion that if this scheme of division which was suggested by the two experts who were in the majority is looked at, it is a scheme which clearly would entail that inconvenience and disadvantage which are struck at by the Code; for their Lordships find that this scheme of division would involve, in the first place, the allotment to one person of out-buildings clearly useful for the enjoyment of the portions of arable land, which arable land, by the same scheme, would be allotted to a different person. The scheme would also involve the construction of works, the interference with existing lights, serious operations for the purpose of securing or preserving a supply of water; and, in addition to all that, payments of considerable amount, by way of equality of partition.

Now the necessity in any scheme of partition of those acts and payments to which reference has been made, has always, by all commentators upon the passages in the Code Civil which tally with the Maltese Code, been considered one of the obstacles to partition *in specie* which ought to prevent that partition taking place. Therefore, if their Lordships' attention were confined to that scheme so propounded, their opinion would be entirely in accordance with that of the primary Judge, and with the Court of Appeal in the Island.

But then it is said by the learned counsel who have argued the case with great ability on behalf of the Appellants, that even although they themselves would scarcely be prepared to maintain the

scheme propounded by these two experts, yet it by no means follows that there may not be some other scheme, according to which the property might be divided, and which might be free from the objections which have been mentioned.

Their Lordships entertain very strongly the opinion that it is not competent to raise a suggestion of this kind at this bar, and at this stage of the case. It was open to the Appellants to make any suggestion, to produce any scheme of partition, before the Court in the Island. That scheme could then have been examined upon the spot; evidence could have been produced with regard to it; and, if necessary, a personal inspection by the Judges could and would have taken place. The Appellants appear in the Island to have been satisfied with the scheme which was propounded by the two experts, and to have rested their case upon that; and so far as we can find upon the record, there is no trace of any application for substituting another scheme, or suggesting a scheme of a different kind, and their Lordships are of opinion that upon a code worded as the Code upon this subject is, the only practical way by which any Judgment of the Court can be arrived at is by the suggestion by the party who insists upon specific division, of some scheme or some mode in which that specific division is to take place; and if, having suggested a particular scheme in the Island, and being worsted upon that scheme, and not having suggested any other scheme as a substitute upon the spot, it were open to that party upon an appeal to their Lordships, to simply state that it had not been proved that it was utterly impossible that there might be some other scheme which would be free from the objections which had been thus sustained,—if that were competent for any litigant in the position of the Appellants, it is obvious that interminable appeals might be brought here, the result of which would be simply to send back the case, again and again, to the Island for further investigation.

Their Lordships are clearly of opinion that this is not a course competent to be taken; and that the Appellant having failed to show that the Judgment of the Court was erroneous upon those facts, and upon that scheme which were before them, and to which their consideration was invited, nothing can now remain for their Lordships to do but humbly to recommend to her Majesty that this Appeal should be dismissed with costs.