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UNIVERSITY OF LONDON  
W.C. 1. (11)  
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LEGAL STUDIES  
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# In the Privy Council.

No. 69 of 1934.

## ON APPEAL FROM THE ROYAL COURT OF THE ISLAND OF JERSEY.

BETWEEN

CHARLES WILLIAM GILBERT, Procureur of  
GEORGE JAMES GILBERT co-heir to the  
Estate of GEORGE EDWARD CHING his  
cousin ... .. (Plaintiff) Appellant,

AND

FRANCIS HENRY CHING Procureur of JOHN  
JAMES CHING principal heir to the Estate  
of the said GEORGE EDWARD CHING his  
cousin ... .. (Defendant) Respondent.

### CASE FOR THE APPELLANT.

1. This is an appeal from the majority decision of the Superior Number of the Royal Court of Jersey dated the 31st of May 1933 affirming a decision of the Inferior Number of the Royal Court of Jersey dated the 21st of November, 1932 to the effect that by reason of Article 28 of the law of 1851 relating to Testaments d'Immeubles this action is misconceived in that it has been brought in the Cour d'Héritage and not in the Cour du Samedi, and declaring that certain proceedings earlier in date than the proceedings here in question but relating to the same dispute are null and void.

Record.  
pp. 13-15.

pp. 8-13.  
Appx. p. 7,  
l. 25.

Record.  
p. 15, l. 3.  
p. 15, l. 9.

The matters in dispute between the Appellant and the Respondent arise out of the proceedings taken in May 1929, to establish the right of George James Gilbert, for whom the Appellant is "Procureur," to a share of the real property in Jersey which was inherited by George Edward Ching (hereinafter called the "de cujus") and which was owned by him at the time of his death in Melbourne in Australia in August, 1907.

pp. 15 et seq.  
p. 16, l. 4.

2. The "de cujus" by his Will made at Melbourne on the 19th June, 1888, left all his real and personal estate including his real property in Jersey to Elizabeth Hessey. The "de cujus" a married man and the said Elizabeth Hessey who was not his wife, lived together as man and wife for some years

p. 41, l. 16.

Record. immediately before the death of the "de cujus" whose legitimate wife survived him and children were born to the "de cujus" and the said Elizabeth Hessey. Under these circumstances the devise of this Jersey realty by the said Will to the said Elizabeth Hessey was contrary to the rule of public policy in Jersey law "On ne peut léguer à une concubine." It may be doubted whether the said Will could or should be allowed to operate or should have been allowed to remain upon the books of the Public Registry, when once this flaw in it had been brought to the notice of the Court within a year and a day after the date of the registration of the said Will in the Public Registry of the Island, i.e. within the period prescribed by Jersey law for the institution of proceedings for the annulment of a Will. It is submitted that the said Will was liable in any event to be annulled upon the institution of such proceedings.

Appx. pp. 15-18. Record. p. 31, l. 29. p. 40, l. 20. Appx. p. 4, l. 25.

3. The de cujus died in Australia on 8th August, 1907, and his Will was proved by the Procureur of the said Elizabeth Hessey in Jersey on the 7th of September, 1909, and registered in the Public Registry of the Island on the 9th October, 1909. On the 24th of September, 1910, the Respondent as Procureur of John James Ching instituted proceedings against the said Procureur of the said Elizabeth Hessey to have the Will annulled on various grounds but in particular relying on the above mentioned rule. The Genealogical Tree at the end of the Appendix shows the relation to the de cujus both of the said George James Gilbert and of the said John James Ching. In default of a valid and operative Will the said John James Ching under Jersey law would be the Principal héritier or (to use a more complete phrase) the Principal héritier à la succession collatérale of the de cujus, the said George James Gilbert would be one of the co-heirs in the same succession, and both the said John James Ching and the said George James Gilbert would be entitled to shares of the aforesaid Jersey realty.

p. 31. p. 31, l. 20. pp. 34-36. p. 35, l. 36. p. 35, l. 42. pp. 36-7. p. 37, l. 5. p. 37, l. 32.

4. The said proceedings were instituted in 1910 on behalf of the said John James Ching as Principal Héritier of the de cujus. The said John James Ching is so described in the records of the Royal Court which relate to the institution of the proceedings. He instituted them in his capacity as Principal Héritier and could not have instituted them in any other right or capacity. They were not prosecuted to judgment but were compromised upon terms set out in the Order of the Inferior Number dated the 16th of November, 1912, viz. that the Respondent "Procureur de Monsr. John James Ching principal héritier comme dit est" agreed to pay £550 to the Procureur of the said Elizabeth Hessey and the Procureur of the said Elizabeth Hessey agreed to "céder et transporter à fin d'héritage audit principal héritier" (i.e. to the said John James Ching) all the rights of the said Elizabeth Hessey in the said realty and to effect this by Conveyance passed in open Court. Such a Conveyance was, in fact, passed on the 28th of December, 1912. By this Conveyance the Procureur of the said Elizabeth Hessey purported to convey to the Procureur of the said John James Ching "tous les droits que ladite Mse. Elizabeth Hessey peut avoir ou auxquels elle pourrait prétendre aux héritages situés en cette Ile." In that Conveyance also the said John James Ching is described throughout as Principal Héritier and contracts in that capacity and the said Conveyance

relates to the realty in Jersey which by Jersey law would vest in the principal héritier (i.e. the said John James Ching) in the event of the intestacy of the "de cuius" or of the annulling of his Will. The result was as the Appellant submits, that the Jersey realty in question, which had belonged to the de cuius, vested in the said John James Ching as "principal héritier" with such rights and obligations as attach to the "principal héritier" in Jersey law.

Record.

5. The said George James Gilbert remained ignorant of his rights in the said Jersey realty until about 1928. Having come to hear of them and  
10 having failed to achieve an amicable arrangement with the said John James Ching, the said George James Gilbert, by the Appellant his said Procureur, instituted an action in the Cour d'Héritage on the 9th May, 1929, against  
the said John James Ching, by the Respondent his said Procureur, for the purpose of obtaining the share of the said realty to which he is entitled. p. 15, l. 30.

6. The Respondent contended that the Appellant should be required first to "justifier ses titre et qualité," and in the Inferior Number the Court accordingly sent the parties before the Greffier "pour trayer lignage." This genealogical enquiry was pursued before the Greffier on the following  
dates, viz., the 1st and 22nd November and 13th December, 1929, and 14th  
20 and 21st March and 4th, 11th and 25th April, 1930, and finally on the 9th of May, 1930, when the Greffier sent the parties back to be heard by the Inferior Number. On the 6th of November, 1930, the Inferior Number heard the parties and sent the case to proof. p. 16, l. 17.  
p. 16, l. 19.  
p. 16, l. 21  
et seq.  
p. 22, l. 25.

7. On the 2nd of July, 1931, the Inferior Number sat, heard witnesses, and decided that the Appellant had "établi les qualités qu'il assume dans l'action," thus deciding in favour of the Appellant the controversy between the parties as to the genealogical facts. Thereupon the Respondent put in a Defence under three heads, two of them related to formalities of pleading and alleged that the Appellant had not correctly described the said George  
30 James Gilbert for the purposes of the action in his Plea. The third raised a point of substance, viz., that the Will of the de cuius had not been annulled, that the said Elizabeth Hessey had conveyed to the said John James Ching her rights to the said realty given to her under the same Will and that accordingly "il n'y a jamais eu et il n'y a au moment actuel aucune succession successorale à partager," and that in consequence the Respondent was not bound to plead to the action and was entitled to be "renvoyé de l'action." The only two kinds of succession d'immeubles known to Jersey law are the "succession testamentaire" and "succession héréditaire." The Appellant replied to the Respondent's Defence and the Respondent put in  
40 an Answer to the Appellant's Reply. p. 23, l. 19.  
p. 24, l. 26.  
p. 25, l. 4.  
p. 25, l. 10  
p. 26, l. 6.  
p. 27, l. 18

8. The Inferior Number heard the case further on the 14th January, 1932, and delivered their reserved judgment on the 30th January, 1932. They decided in favour of the Respondent on all three points. Their conclusion on the third point was expressed as follows, viz., "Que ledit Testament daté le 19 juin 1888 a été dûment enregistré au Registre Public par  
"Acte de la Cour Royale en date du 9 octobre 1909 et n'a jamais été cassé p. 28, l. 22.  
p. 29, l. 17.

Record. “ ni annulé ; de sorte qu’à l’heure qu’il est il a conservé toute sa force et  
 “ vertu ; que par conséquent il est impossible de dire que ledit Monsr.  
 “ George Edward Ching est mort ‘ ab intestat ’ laissant une succession  
 “ collatérale à partager ; la Cour jugeant qu’il n’y a pas à l’heure qu’il est  
 “ succession successorale à partager a renvoyé le défendeur de l’action et  
 “ est l’acteur condamné aux frais.”

p. 29, l. 30. 9. The Appellant having appealed to the Superior Number the case was  
 heard in appeal on the 19th of May, 1932. The Superior Number affirmed  
 p. 30, the judgment of the Inferior Number on the two formal points but reversed  
 ll. 29-40. it by a majority on the point of substance. By reversing the judgment on 10  
 the said third point, the Superior Number decided, as the Appellant submits,  
 that there is a succession ab intestat to be divided as between the said John  
 James Ching and the said George James Gilbert. The Respondent did not  
 appeal from that decision. By reason of their concurrence, however, with  
 the Inferior Number on the two formal points the Superior Number declared  
 p. 30, l. 41. “ que le défendeur n’est pas tenu de plaider à l’action dans sa forme actuelle  
 “ et l’a renvoyé de l’action, chaque partie devant porter ses frais.”

p. 8. 10. The Appellant amended his Plea in respect of the two matters of  
 form aforesaid and the case came before the Cour d’Héritage again on the  
 21st of November, 1932. The Respondent then for the first time raised 20  
 p. 8, l. 31. the defence that the said Will not having been annulled the action should  
 have been brought in the Cour du Samedi and that the Cour d’Héritage  
 had no jurisdiction by reason of the provisions of Art. 28 of the said Law on  
 “ Testaments d’Immeubles.” That Article reads as follows :—

Appx. p. 7, l. 25. “ Les actions touchant la validité des Testamens contenant des  
 “ legs d’immeubles seront instituées à la Cour du Samedi, et aussi les  
 “ actions en partage des immeubles d’une succession, lorsque ces  
 “ immeubles auront été légués en tout ou en partie par Testament.”

p. 9, l. 6. 11. The Appellant replied and the Respondent put in an Answer to  
 p. 12, l. 21. his Reply. The Inferior Number on the 21st of November, 1932, pronounced 30  
 p. 13, l. 22. in favour of his Defence, and, the Appellant having appealed, the Superior  
 p. 15, l. 7. Number consisting of nine Judges, on the 31st of May, 1933, upheld this  
 decision by a majority. Leave was given by the Superior Number to the  
 p. 15, l. 15. Appellant to appeal to His Majesty in Council and this appeal has been  
 brought accordingly.

Appx. p. 18, l. 15 et seq. pp. 1-8. 12. Wills of realty were not allowed by Jersey law before the law  
 relating to Testaments d’immeubles of 1851. This law as its preamble  
 declares was passed to enable owners of real property who had no children  
 or other descendants to dispose of their real property by Will within specified  
 limits and it is concerned throughout solely with testamentary successions 40  
 p. 7, l. 25. to realty. It is submitted that Article 28 of the said law in its reference to  
 “ actions en partage ” is both intended and expressed to apply only to  
 “ actions en partage ” of realty when the parties to the action en partage  
 or some of them are interested in realty formerly belonging to the deceased  
 and involved in the action en partage or alternatively are interested in realty  
 formerly belonging to the deceased and in either event are so interested as  
 being effective devisees under his Will.

13. The Appellant submits that it is now too late for the Respondent to raise the defence, which is based on the said Article 28 of the Law on Testaments d'Immeubles. The Respondent raised it for the first time before the Inferior Number in November, 1932, by which time the case had come before the Inferior Number five times, before the Greffier eight times and before the Superior Number once and the Appellant had amended his pleadings in accordance with the submissions of the Respondent himself as approved by and embodied in the judgments of the Inferior and of the Superior Number in the first action. The principle is plainly stated by writers whose works are treated as authorities by the Courts in Jersey that the plea of no jurisdiction, if it is to be raised at all, must be raised at the outset. It is convenient to refer to the proceedings mentioned in paragraph 10 hereof as a new or second action and such phraseology is used by the Appellant in this case, but in truth the so-called first and second actions are one set of proceedings between the same parties and relating to one and the same cause of action, and such distinction as may legitimately be drawn between them is not sufficient, as the Appellant submits, to prevent or to invalidate the application of the above principle to the raising of the said point for the first time in the present action.
14. The Respondent in his first Defence, as the Appellant has already pointed out in paragraph 7 hereof, uses language, which perhaps implies or at any rate is compatible with the proposition that there is no succession at all in issue between the parties as to the Jersey realty. The same observation applies to the language used by the majority of the Superior Number towards the close of their judgment under appeal. "Le droit du défendeur, "és qualités, aux héritages dont partage est réclamé ne découle pas du "décès d'un de cujus intestat, mais découle de l'achat par ledit défendeur "au mois de décembre 1912 des droits conférés par le Testament d'immeubles "du de cujus a ladite Mse. Elizabeth Hessey comme seule légataire."
- In reply to any such proposition the Appellant submits firstly that the point is not open to the Respondent, since in the circumstances set out in paragraph 17 hereof it has been already decided and is res judicata between the parties to this appeal that there is a succession in issue between the said parties. Further, if there were no succession, then Article 28 on which the Respondent relies could have no application here, since it applies only to "actions en partage des Immeubles d'une succession," i.e., only when there is a succession. In the phrase just quoted from the said law, not only the word "succession" but also the words "actions en partage" denote a dispute about realty between heirs as is shown by the quotations from the authorities which are set out at pages 13 and 14 of the Appendix. If such a contention by the Respondent were upheld, the Respondent would in effect be allowed to deprive his co-heirs of rights in the said realty to which in Jersey law they are clearly entitled, and it is submitted that on this ground also such a contention should fail. Further such a contention would be inequitable, inasmuch as it would be a claim that, though the Respondent instituted his action against the Procureur of the said Elizabeth Hessey on the 24th of September, 1910, and entered into the Conveyance of the 28th of December, 1912, in his capacity as principal héritier, yet he can now repudiate the obligations of Trusteeship towards his co-heir the

Record.

p. 8, l. 39.

p. 28, l. 22.

p. 30, l. 29.

Appx. pp. 10-13.

Record.

p. 25, l. 10.

p. 14, l. 43.

p. 30, l. 39.

p. 29, l. 21.

Appx. p. 7, l. 25.

Appx. pp. 13-14.

p. 31, l. 20.

p. 37, l. 5.

Record.

said Gilbert, which the status and office of Principal héritier impose upon him in Jersey law. Further if it should be held that the said Conveyance has the effect of entitling the said John James Ching to keep the said realty for himself absolutely, the Appellant submits that the precedent so established would be dangerous as well as inequitable and would seriously diminish the existing safeguards of the rights of co-heirs.

15. The succession in issue between the Appellant and the Respondent, must be either "testamentaire" or "héréditaire." When parties concerned in a succession take under a Will, the succession is "testamentaire"; when they take as on an intestacy the succession is "héréditaire." If the Respondent contends that there is here some third kind of succession, not "testamentaire," because none of the parties took under the Will, not "héréditaire," because there is still a Will in existence, but as it were "quasi-testamentaire" or "quasi-héréditaire," no such succession is known to Jersey law. If the principal héritier obtains possession or ownership as such of the real estate, the co-heirs are entitled to share in it as a "succession héréditaire."

16. The succession here is not as the Appellant submits a "succession testamentaire." The said John James Ching is not mentioned in the said Will. No rights whatever in the said realty were devised to him by the de cujus. None of the rights here in question to the said realty arise under the said Will, for the Will devised or sought to devise the whole of the said realty to the said Elizabeth Hessey and it is the foundation of the argument of the Respondent that the said Will did operate as a devise of the said realty to the said Elizabeth Hessey. The said Will accordingly has not operated to vest any rights to the said realty either in the said John James Ching or in the said George James Gilbert. Indeed the Respondent himself admits that his rights in the said realty are not derived from the said Will but from the said Conveyance between the said Elizabeth Hessey and himself. Further, if the succession were "testamentaire," no question of lignage or of partage could have arisen and the Respondent neither could nor need have applied to the Inferior Number on 23rd May, 1929, that the parties be sent before the Greffier "pour trayer lignage," since the said Will devises all the said realty to one and only one person whom the Will specifically names.

17. Further if the Respondent seeks to contend that the succession in question is a "succession testamentaire," the contention is not now open to the Respondent, inasmuch as in the previous action, which was an action between the same parties and relating to the same matters as the present action, it was decided, contrary to the arguments then advanced by the Respondent, that the succession in question is a "succession héréditaire" or (to use the term used by the Respondent) a "succession successorale" and this decision constitutes a "res judicata" between the Appellant and the Respondent and is no longer disputable by the Respondent.

18. The Superior Number in their judgment in this action after affirming the judgment of the Inferior Number went on further to declare that all

the proceedings in the first action were null "à partir du jugement inter-  
 "locutoire du Nombre Inférieur en date du 2 Juillet 1931, jour où l'existence  
 "dudit testament et dudit contrat a été portée à la connaissance du Nombre  
 "Inférieur." The Appellant submits that the Superior Number had no  
 jurisdiction to make this further declaration. The point to which it  
 relates, viz., the jurisdiction of the Cour d'Héritage in the first action, is  
 not raised either by the Defence or by the Answer of the Respondent in  
 this present action. On the contrary the Respondent himself at the begin-  
 ning of his Answer in this action plainly states that the only question before  
 10 the Court at the moment is whether the Cour d'Héritage has or has not any p. 12, l. 23.  
 jurisdiction in the present action ("la seule question maintenant devant  
 "la Cour, à savoir, celle de la compétence de la Cour d'Héritage dans la  
 "présente action"). Further the Respondent in argument neither raised  
 nor asked leave to raise this point although it was not covered by his pleading.  
 Further, to repeat what has already been stated in paragraph 13 above, in  
 Jersey law the plea of no jurisdiction if it is to be raised at all must be raised  
 at the outset so that if the Respondent had sought to raise this point in the  
 first action itself, but not at the outset, e.g., if he had sought to raise it  
 before the Superior Number he would not have been entitled to do so. In  
 20 fact the Respondent did not raise this point in any shape or form during  
 the whole of the procedure in the first action, and the Appellant submits  
 that he clearly would not have been entitled to raise it when this present  
 action came to be heard by the Inferior Number in November, 1932. For  
 the same reason, upon the basis that the two actions only constitute one  
 set of proceedings it would have been too late for the Respondent to raise  
 this point in November, 1932. Appx. pp.10s  
 13.

19. Further, both as regards the point under discussion in paragraph  
 13 and as regards the point under discussion in paragraph 18, assuming the  
 point to have been raised in the first action and to be sound, there would  
 30 then have been time for the Appellant to institute fresh proceedings, but  
 as regards proceedings started in or after November 1932 some question  
 might be raised by the Respondent whether they are not barred by Article 1  
 of the law on Succession Ouvertes of 1862, which is printed at pages 8 and 9  
 of the Appendix. Appx. p. 8,  
 l. 27.

20. It would appear also from the Answer of the Respondent in this  
 action, that, if he is wrong in his contention that the Cour d'Héritage has  
 no jurisdiction, he claims to be still entitled to "plaider sur le fonds." The  
 Respondent has not specified in any way what his further points of substance  
 would be, but the Appellant submits that in view of the Defence and Answer  
 40 of the Respondent in the original proceedings he is no longer at liberty to  
 put in a further pleading "sur le fonds" at this stage, and the Appellant  
 respectfully asks that it may be declared accordingly and that the parties  
 may be sent before the Greffier Arbitre for the purpose of effecting the said  
 Partage. Record.  
 12, l. 21.

21. There is, as the Appellant submits, a "succession héréditaire" in  
 issue here between the Appellant and the Respondent and "actions en  
 partage" in respect of such a succession have always been brought and

Record.

heard in the Cour d'Héritage and are not within the scope of Article 28 of the law of 1851 on Testaments d'Immeubles. All matters relating to the devolution of realty would come normally before the Cour d'Héritage, as the name of that Court itself implies, and the aforesaid law of 1851 creates an exception to that principle, but creates it only when the parties to an action en partage or some of them are interested in realty formerly belonging to the deceased and involved in the action en partage or alternatively are interested in realty formerly belonging to the deceased and in either event are so interested as being effective devisees under his Will. In truth the rights of the Respondent to the said realty are to be treated as accruing to him as principal héritier and are accordingly subject to all the rights of his co-heirs and fall within the jurisdiction of the Cour d'Héritage.

Appx. p. 7,  
l. 25.

The Appellant accordingly contends that the judgment of the majority of the Superior Number now under appeal should be reversed for the following (amongst other)

### REASONS.

1. Because there is a succession in issue between the parties to the appeal and that succession is a "succession héréditaire" and an "action en partage" in respect thereof was properly instituted in the Cour d'Héritage. 20
2. Because Article 28 of the said law relating to "Testaments d'Immeubles," in so far as it applies to an "action en partage" of realty, applies only when the parties to that action or some of them are interested in realty formerly belonging to the deceased and involved in such action or alternatively are interested in realty formerly belonging to the deceased and in either event are so interested as being effective devisees under his Will.
3. Because the Respondent is bound by the previous decision between the same parties that there is a succession, viz., 30 a "succession héréditaire" in issue between the parties.
4. Because in any event when the Respondent raised the point under Article 28 of the said law relating to Testaments d'Immeubles it was too late for him to raise it.
5. Because the judgment of the Superior Number on the point of substance of the 19th of May, 1932 is valid and operative and constitutes a res judicata between the parties to this appeal and cannot now be called in question.
6. Because the rights of the Respondent in the said realty vested in him and belong to him as principal héritier and are subject to the complementary right of the co-heirs to share in the said realty. 40

C. T. LE QUESNE.  
H. W. GIFFARD.



# In the Privy Council.

No. 69 of 1934.

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*On Appeal from the Royal Court of the Island  
of Jersey.*

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BETWEEN

CHARLES WILLIAM GILBERT, Procureur  
of GEORGE JAMES GILBERT, co-heir  
to the Estate of GEORGE EDWARD  
CHING, his cousin - - - (*Plaintiff*) *Appellant*,

AND

FRANCIS HENRY CHING, Procureur of  
JOHN JAMES CHING, principal heir  
to the Estate of the said GEORGE  
EDWARD CHING his cousin  
*(Defendant) Respondent*

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CASE FOR THE APPELLANT.

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BLAKE & REDDEN,  
17, Victoria Street, S.W.1.