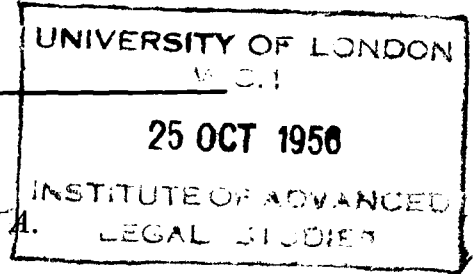


G.F.A. 9. 2

31, 1955

No. 44 of 1954.

In the Privy Council.



**ON APPEAL**  
FROM THE COURT OF APPEAL OF MALTA.

44817

BETWEEN:

GUSTAVO ROMEO VINCENTI

*Appellant*

— and —

COLONEL STEPHEN J. BORG

- - *Respondent*

**CASE FOR THE APPELLANT.**

1. This is an appeal from a judgment, dated the 15th June, 1953, of the Court of Appeal of Malta (L. A. Camilleri, C.J., Gauci and Harding, JJ.), dismissing an appeal from a judgment, dated the 24th February, 1953, of the Civil Court of Malta (Colombo, J.), granting to the Respondent a declaration that he had validly and lawfully exercised a right of pre-emption over certain property, and other consequential relief.

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

2. The statutory provisions relevant to this appeal are the following:

CODE OF ORGANISATION AND CIVIL PROCEDURE.

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313. (1) After the lapse of two days from the service of the decree ordering the sale by auction, or from the filing of the report of the referee, the Court shall, upon the demand of the creditor or of the debtor to be made by an application, appoint one or more days for the sale by auction, and order the issue of advertisements.

(2) The decree appointing the days for the sale by auction shall also be served on the consignatory, if any.

314. (1) The advertisement shall be signed by the Registrar and shall state the date of the judgment or decree ordering the sale by auction, the

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nature of the thing to be sold, the place of the sale and the day and hour in which the auction is to begin and to end.

(2) Where a valuation has been made, the estimated value shall be stated in the advertisement.

315. (1) The advertisement shall be served by the Marshal on the debtor or creditor who shall not have made the demand referred to in section 313, and shall be posted up at the main entrance of the building in which the Court sits, and also, if the Court deems it necessary, in the principal streets of the place where the auction is to be held and of the place in which the debtor resides.

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(2) It shall be lawful for the Court to order such advertisement to be published in one or more periodical newspapers.

(3) The posting up and publication of the advertisement shall, unless the Court otherwise directs, take place, as regards the sale of immovable property or of rights annexed to immovable property, or of ships, at least fifteen days before the day appointed for the sale by auction, and, as regards other movable property, at least four days before the day appointed for the sale.

\* \* \* \* \*

325. The adjudication shall not be made on the day of the auction— 20

(a) if there be less than three bidders;

(b) if, in an auction of immovable property or of rights annexed to such property, there has been no bid exceeding one moiety of the estimated value;

(c) if, in an auction of gold or silver articles, there has been no bid amounting to the intrinsic value thereof.

326. In the cases referred to in the last preceding section, the Court shall appoint another day for the continuation of the auction, and shall order the publication of a fresh advertisement. The adjudication shall be made on the day named in such advertisement, unless the Court, upon the demand of the creditor or any other interested party other than the debtor, shall, for just cause, grant another adjournment, at the expense of the person making the demand, in which case a fresh advertisement shall be published.

327. (1) The auction or adjudication shall in all cases be suspended upon the demand of the debtor with the consent of the creditor, or upon the demand of the creditor with the consent of the debtor, and in such cases, as well as in the case where the suspension is caused by any other lawful impediment, a fresh advertisement shall be issued for the continuation of the auction.

(2) (Saving of demand by the debtor without the consent of the creditor).

(3) (Demand not to be made less than four working days before 'the day appointed for the auction').

326. In the cases referred to in the last preceding section, the Court shall appoint another day for the continuation of the auction, and shall order the publication of a fresh advertisement. The adjudication shall be made on the day named in such advertisement, unless the Court, upon the demand of the creditor or any other interested party other than the debtor, shall, for just cause, grant another adjournment, at the expense of the person making the demand, in which case a fresh advertisement shall be published.

327. (1) The auction or adjudication shall in all cases be suspended upon the demand of the debtor with the consent of the creditor, or upon the demand of the creditor with the consent of the debtor, and in such cases, as well as in the case where the suspension is caused by any other lawful impediment, a fresh advertisement shall be issued for the continuation of the auction.

(2) (Saving of demand by the debtor without the consent of the creditor).

(3) (Demand not to be made less than four working days before 'the day appointed for the auction').

Provided that such right shall not be exercisable by any person, except the debtor, on whom, upon the demand, even verbal, of the debtor or of the execution creditor, the advertisement of the auction shall have been served.

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CIVIL CODE.

1396. A sale is a contract whereby one of the contracting parties binds himself to transfer to the other a thing for a price which the latter binds himself to pay to the former.

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1397. A sale is complete between the parties, and, as regards the seller, the property of the thing is transferred to the buyer, as soon as the thing and the price have been agreed upon, although the thing has not yet been delivered nor the price paid; and from that moment the thing itself remains at the risk and for the benefit of the buyer.

\* \* \* \* \*

1508. (1) The right of pre-emption granted by law consists in the right of a person of assuming a sale made to another person, succeeding to all his rights and obligations.

(2) The person entitled to exercise such right may not transfer it to any other person.

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\* \* \* \* \*

1510. (1) The right of pre-emption is granted—

(a) to the co-owners;

(b) to persons related to the seller by consanguinity;

\* \* \* \* \*

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1518. Provided the title shall have existed since the time of the sale, the time within which the right of pre-emption may be exercised, except where the sale was made by auction under the authority of the Court, is of one year to be reckoned from the day of the registration of the deed of sale in the Public Registry, or, if the sale was conditional, from the date of the instrument whereby the seller and the buyer shall have declared the condition to have been fulfilled.

1519. Where, however, the buyer or the seller shall have, by means of a judicial act, given due notice of the sale which has taken place to the party entitled to the right of pre-emption, and shall have together with the said act filed a copy of the deed of sale, the time for the exercise of the right of pre-emption shall be of two months from the days of service of such act.

1520. (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 men-

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tioned in section 314 of the Code of Organization and Civil Procedure (Chapter 15).

(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.

Ex. p. 69, II.  
17-23.  
Ex. pp. 69-70.  
p. 119, II. 11-42.

3. On the 24th July, 1946 the Civil Court made an order that certain property in Valletta be sold by licitation. On the 20th June, 1947 a sale notice appeared in the Government Gazette, announcing that the sale of this property would take place on the 18th July, 1947 at 9 a.m. On the 17th July the sale was adjourned; and on the 30th December, 1947 a second sale notice appeared 10 in the Gazette, announcing that the sale would take place on the 22nd January, 1948. On that date, and also on the 29th January and the 19th and 26th February, the sale was adjourned in the hope of more advantageous bids. On the 28th February the sale was resumed, and the property was adjudicated to one Theuma for £21,200. The 'quindena' (a period of fifteen days allowed by law for the acceptance of higher bids) then began, and after a few days was interrupted by the Appellant's offer of £21,300. The property was definitely adjudicated to the Appellant ~~at that price~~ on the 1st April, 1948, *at the price of £32,200.*

Ex. p. 71, I. 35-  
p. 72, I. 4.

Ex. pp. 67-69.

Ex. pp. 9-11.

4. On the 3rd September, 1948 a schedule of pre-emption was filed in the Civil Court on behalf of the Respondent as attorney of Patricia Borg and Helen 20 Borg who were absent from Malta. The Respondent alleged that Patricia and Helen Borg ~~who~~ were entitled by reason of consanguinity to exercise the right of pre-emption over the property. Having deposited in Court a sum equivalent to the purchase price, the Appellant's costs and interest thereon, the Respondent claimed to recover the property from the Appellant.

pp. 5-7.

5. The writ in these proceedings was issued on the 12th February, 1949. The Respondent, suing as attorney of Patricia and Helen Borg, claimed:

(i) a declaration that the right of pre-emption exercised by him was valid and lawful,

(ii) an order directing the Appellant to re-sell to him 283/360ths., 30 or other larger portion, of the property,

and (iii) certain consequential relief.

p. 53.

6. The Appellant's defence was filed on the 16th November, 1949, after interlocutory proceedings in the Civil Court and the Court of Appeal. The defence contained the following pleas:

(i) that the Respondent had not established the bond and degree of consanguinity between the pre-emptors and the vendors,

(ii) that Patricia and Helen Borg, being absent from Malta, had been duly notified of the sale and so were not entitled to exercise the right of pre-emption,

and (iii) that Patricia and Helen Borg were exercising the right of pre-emption for the benefit of third parties. The Appellant admitted, after the defence had been filed but before the trial began, that the necessary degree of consanguinity had been established. RECORD.  
p. 55.

7. The trial of the action began before A. V. Camilleri, J. on the 15th February, 1950. Evidence was heard on that day and on the 8th and 29th March, 1950 and the 3rd and 27th April, 1951. The year's interval was due to the necessity of issuing letters of request for evidence to be taken in Australia and New Zealand. In the event, the witnesses from Australia and New Zealand came to Malta and gave their evidence on the two dates in April, 1951. The Appellant's submissions, directed to the second and third pleas in his defence, were filed on the 16th May, 1951, and the Respondent's submissions on the 19th May. pp. 56-94.  
pp. 94-100.

8. A. V. Camilleri, J. delivered judgment on the 28th May, 1951. After setting out the course of the proceedings, he held contrary to the Respondent's contention, that the Appellant had not waived the second plea, in his defence. He then referred to the relevant sections of the Civil Code and the Code of Organization and Civil Procedure, shewing that, while a year was allowed for the exercise of the right of pre-emption on a voluntary sale, the period allowed on a judicial sale was only four months; that in either case the period might be abridged on certain conditions, if the parties took certain action; and, that on a judicial sale the period might lapse altogether in respect of persons served with the advertisement of the sale. pp. 101-113.  
p. 102, I. 17-  
p. 104, I. 9.  
p. 104, I. 16-  
p. 106, I. 21.

The learned Judge then set out s. 1520 (2) of the Civil Code, and said ss. 1519 and 1520 constituted a penalty for the carelessness of those who did not enforce their rights within the time prescribed. Forfeiture occurred only when there had been a strict and rigid observance of the law prescribing it. Forfeiture under s. 1520 (2) occurred only if there had been an advertisement under s. 314 of the Code of Civil Procedure, and publication of that advertisement in the Gazette at least one month before the day fixed for the sale. The purpose of the advertisement was to give the widest possible publicity to the proposed sale, and in cases of immovable property or ships it had normally to be published at least fifteen days before the day appointed for the sale. In the present case, the advertisement had been published in the Gazette on the 30th December, 1947, stating that the sale had been fixed for the 22nd January, 1948. No other notice had been published subsequently in the Gazette before the final adjudication on the 1st April, 1948. It followed that the period between the publication of the advertisement and the day fixed for the sale fell short of that required by s. 1520 (2), and the right of pre-emption had not been forfeited. This interpretation was supported by the following considerations:— p. 106, I. 37-  
p. 108, I. 2.  
p. 108, II. 3-35.  
p. 108, I. 36-  
p. 109, I. 15.

(i) A law prescribing forfeiture had to be strictly interpreted, and s. 1520 did not mention the day of adjudication. p. 109, II. 18-24.

RECORD.  
p. 109, II. 25-36.

(ii) The law required publication of the advertisement in the Gazette at least one month before the day fixed for the sale, and it made no difference whether Patricia and Helen Borg did or did not know of the adjournments of the sale after the first appointed day.

p. 109, I. 37-  
p. 110, I. 21.

(iii) Wherever the various Codes provided for notifying absent persons, a time clause or a special procedure was imposed.

p. 110, I. 22-  
p. 111, I. 2.

(iv) The framer of the old Municipal Code had laid down a special procedure for the exercise of pre-emption. In later times, an altogether special procedure had been prescribed until 1884, and thereafter an 'ad hoc' formality and time clause.

p. III, I. 3-  
p. 112, I. 38

(v) Before 1884, the publication of a notice of sale in the Gazette had been an extraordinary event, for which, presumably, an application had been necessary. Under a Rule of Court made in 1884 such notices had begun to appear in the Gazette, and in very few cases had the interval between the date of publication and the day fixed for the sale been as much as a month. In certain cases the advertisement had to be published in the Gazette, such publication being subject to the normal time clause contained in s. 315 (3) of the Code of Civil Procedure. If any party required the period to be extended, an application had presumably to be made; and no such application had been made in the present case. Before 1884 advertisements had been published in ordinary newspapers, so that publication in the Gazette (under a section since replaced by s. 1520) had needed an application 'ad hoc.' This shewed that s. 1520 had to be very strictly interpreted. Consequently, the learned Judge dismissed the second plea set up by the Appellant in his defence.

p. 113, II. 8-12.

pp. 117-122.  
pp. 126-139.

9. The Appellant appealed to the Court of Appeal, by a petition dated the 9th June, 1951. The judgment of the Court of Appeal (L. A. Camilleri, Ag.C.J., Gauci and Gouder, JJ.) was delivered on the 4th February, 1952. After setting out the course of the proceedings and the judgment of A. V. Camilleri, J., the learned Judges recounted the dates of the advertisements and the sale and quoted s. 1520 of the Civil Code and s. 134 of the Code of Organization and Civil Procedure. S. 1520, since it prescribed forfeiture, did not admit of an extensive interpretation. Forfeiture could take place only if the provisions of the law were scrupulously observed. There was an interval of less than a month between the publication of the first advertisement and the date originally fixed for the sale, and another interval of less than a month between the publication of the second advertisement and the date then fixed for the sale. No subsequent advertisement had appeared in the Gazette, so the requirements of the law had not been satisfied. Forfeiture could have occurred only if a fresh advertisement had appeared in the Gazette at least one month before each new day fixed for the sale. The appeal was dismissed.

pp. 126-137.

p. 137, I. 37-  
p. 138, I. 23.

p. 138, II. 25-34.

p. 138, I. 35-  
p. 139, I. 13.

p. 139, II. 14-16.

pp. 139-144.

10. The Appellant applied to the Court of Appeal for leave to appeal to the Privy Council from this judgment. On the 10th March, 1952 the Court

refused to grant this leave, on the ground that the judgment of the 4th February, 1952 was not a final judgment.

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11. The hearing of the action was resumed in the Civil Court, on the Appellant's contentions that a certain portion of the property was not subject to pre-emption and the right was being exercised for the benefit of third parties, and Colombo, J. delivered judgment on the 24th February, 1953. The learned Judge granted a declaration that the Respondent had validly and lawfully exercised the right of pre-emption (barring certain portions of the property), ordered the Appellant to re-sell the property (barring the same portions) to the Respondent, and deferred consideration of the Respondent's other claims. The Appellant appealed to the Court of Appeal, and on the 15th June, 1953 his appeal was dismissed. On the 4th October, 1954 the Court of Appeal granted to the Appellant final leave to appeal to the Privy Council from the judgments of the 14th November, 1949 (in the interlocutory proceedings), the 4th February, 1952 and the 15th June, 1953.

pp. 159-164.  
p. 164, II. 7-23.

pp. 169-194.

p. 208.

12. The Appellant respectfully submits that s. 1520 of the Civil Code is to be interpreted by examination of the words of the legislation, not by reference to the extraneous considerations on which the learned Judge in the Civil Court based his judgment. The 'one or more' days which, under s. 313 (1) of the Code of Civil Procedure, the Court must 'appoint . . . for the sale by auction' are not, in the Appellant's submission, the same as the 'day fixed for the sale' mentioned in s. 1520 (2) of the Civil Code. The sub-title of the Code of Civil Procedure in which s. 313 occurs deals with the procedure of judicial sales. The word 'sale' in s. 313 means, as is indicated by the fact that 'one or more days' may be appointed for it, the whole function at which the property is offered and bids are made. On the other hand, the part of the Civil Code in which s. 1520 occurs deals with the substantive right of pre-emption. The word 'sale' in s. 1520 means the transfer of title to something; as appears from the expression 'the sale was made by judicial auction' in s. 1520 (1), and from the definition of 'sale' in ss. 1396 and 1397 of the Code (set out in paragraph 2 of this Case). Thus, 'the day fixed for the sale' mentioned in s. 1520 (2) is the day on which the property was in fact adjudicated by the Court. In the present case this day was the 28th February, 1948, and the Notice appearing in the Gazette on the 20th June, 1947, was published more than one month before that day.

13. The Appellant respectfully submits that this interpretation is further supported by the language of s. 1520 (2) itself. If 'the day fixed for the sale' related to the day originally appointed by the Court and announced in the advertisement, then at the date of publication of the advertisement it would at once be determined whether or not the requisite interval of a month had been left. The use, however, of the words "shall have been published," as opposed to "shall be published," prescribes a test to be applied *ex post facto* to accom-



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plished facts, and not one which was already rendered otiose at the moment of publication. By reason of the possibility of adjournments of the sale, the date of the final adjudication cannot be fixed at the time of the publication of the advertisement. The final adjudication is the relevant event which alone affects the rights of the party entitled to the right of pre-emption. The object of the provisions of s. 1520 (2) being to protect the interests of that party by affording him at least one month's notice of the event affecting his rights, it is natural for the legislature to have used language which looks back from that event, when ascertained, to the date of publication of the advertisement in order to see whether the necessary interval in fact elapsed. No purpose would 10 be served by looking back from a purely provisional date on which no rights were affected, more particularly when that provisional date was already known before the advertisement was published.

14. The Appellant respectfully submits that the judgment of the Court of Appeal of Malta was wrong and ought to be reversed, and the Respondent's action ought to be dismissed, for the following (amongst other)

### REASONS.

1. BECAUSE 'the day fixed for the sale' was the 28th February, 1948;
2. BECAUSE the advertisement mentioned in s. 314 of the 20 Code of Organization and Civil Procedure was published in the Government Gazette more than one month before that day;
3. BECAUSE the right of pre-emption was not competent to Patricia Borg and Helen Borg.

WALTER RAEBURN.

J. G. LE QUESNE.

**In the Privy Council.**

**ON APPEAL**

*FROM THE COURT OF APPEAL OF MALTA.*

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BETWEEN

GUSTAVO ROMEO VINCENTI - *Appellant*

AND

COLONEL STEPHEN J. BORG - *Respondent.*

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**Case for the Appellant.**

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