Privy Council Appeal No. 19 *of* 1961

Michael Abela and others – – – – – – – *Appellants*

v.

Maria Felicia Cremona and another – – – – – *Respondents*

FROM

THE COURT OF APPEAL, MALTA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND OCTOBER 1962

Present at the Hearing:

LORD EVERSHED

LORD MORRIS OF BORTH-Y-GEST

LORD GUEST.

[*Delivered by* LORD EVERSHED]

The question in this case is whether a certain document ought to be declared to be a nullity as constituting what is known in Maltese law as an " absolute simulation ". The relevant legal principles are derived from Roman jurisprudence and their Lordships were referred by Dr. Pace to certain statements in text-books and to decisions of the Maltese courts which he was good enough to translate into English for the assistance of the Board. In their Lordships' opinion the essential characteristic of transactions which come properly within the description of absolute simulations is clearly and succinctly stated by the Latin formula used in the judgments in the present case and referred to in the authorities cited by Dr. Pace: such a transaction is one *colorem habens, substantiam vero nullam.*

Another and related principle known to Maltese law is that of relative simulation. The characteristic of a transaction properly so described may again be discerned from the relevant Latin formula, namely, a transaction *colorem habens, substantiam vero alteram.* The distinction between the two kinds of transaction is thereby made reasonably clear. In the one case, that of absolute simulation, the transaction impeached is entirely a sham or fiction: notwithstanding its form or "colour", it has not and was not intended by the participants to it ever to have any juridical effect or substance whatever. In the case of relative simulation, on the other hand, the form of the transaction disguises its true intended effect and in this case the courts will, as their Lordships understand, substitute the substance for the form and give to the transaction the effect, if it be such as complies with the law, that in truth and in spite of the form its participants intended it to have. Their Lordships gratefully adopt two passages from the authorities translated for them by Dr. Pace. The first comes from the text writer Giorgi the reference being to page 172 of Vol. IV of his work on *Obligations* and reads as follows:—

> " A contract is simulated in an *absolute* manner when the parties did not *intend really to conclude any juridical transaction* (coloram habens, substantiam vero nullam). It is apparently *relative simulation* where they meant to conclude a transaction which is however different from that shown by the words used (colorem habens, substantiam vero alteram)."

The second citation is from the case of *Portelli v. Farrugia* Vol. 27/7/6/29 in the Maltese Court of Appeal and reads thus:

> " The contract is absolutely *simulated*—Colorem Habens Substantiam Vero Nullam, L.55 Digest: De Contrahenda Emptione (Vol. XVIII–I):

and is distinct from a contract effected by *relative simulation*; Colorem Habens Substantiam Vero Alteram (LL. 36, 38 Dig. de Contrahenda Emptione Vol. XVIII–I). In the first case, the parties did not intend to contract any juridical bond between them. In the second case, they meant to conclude a juridical bond, which is a different one from that shown by the name given to the transaction.

In the first case the parties had no intention to bind themselves in any way, but only to produce a fiction, in which case the deed is completely void, and can produce no effect whatsoever (v. Giorgi—Theory of Obligations Vol. IV No. 160—Page 173)."

It has been necessary to refer to the respective principles governing absolute and relative simulations and to the authorities cited because in the present case there has been not inconsiderable debate before the Board whether the transaction here impugned as an absolute simulation (as it was solely and unequivocally alleged in the claim formulated by the respondents the plaintiffs in the action) might or could more properly be regarded as a relative simulation only; and it seems indeed that the legal referee to whom the case was remitted by the civil court and the civil court itself (that is the court of first instance), were both inclined so to think. In their Lordships' opinion however there is no room here, upon the evidence and submissions made on either side, for any conclusion or view in favour of relative simulation. The question, and the sole question, which must be determined on this appeal is whether, as the plaintiffs alleged and allege, the transaction impugned was one of absolute simulation; that is, a transaction never intended by the parties to it to have any effect whatever or any effect which Maltese law would recognise.

It will now be appropriate to set out in full the relevant terms of the transaction in question. It is in form a sale or an agreement for sale under seal and is dated the 17th April, 1952. It is in the following language:—

" Before, me Joseph Gatt, Notary Public, and before the undersigned witnesses who are known to me and who possess all the qualifications required by Law have personally come and appeared:—

Of the one part—Joseph Abela, foreman, son of Carmelo and of the late Felicia née Spiteri, born in Valletta and residing at Marsa.

And of the other part—Michael Abela, foreman, who is appearing on this deed in his own name and on behalf of his sister Mary Abela, spinster, and of his brother Antonio Abela, Storekeeper at the Dockyard, daughter and sons of Carmelo and of the late Felicia née Spiteri, born Mary at Hamrun and the others in Valletta and all residing at Marsa.

The appearers are known to me, Notary.

By virtue of these presents, Joseph Abela is selling and transferring to Michael Abela who accepts and buys for himself and his other two sister and brother, Mary Abela and Antonio Abela, the small Villa which is not yet completed and which is being built on the site which forms a divided part of the lands ' Ta Rexxew ' or ' Rdum Xemxija ' in the neighbourhood of Xemxija, limits of Saint Paul's Bay, measuring the said divided part one hundred and forty six decimal point three hundred and one square canes (146·301 sq. canes), bounded on the west and north with the property of Coleiro Brothers Limited, on the east with the property of Bezzina and Lupi and on the south with a new projected road which is still unnamed, as subject to the payment of a perpetual ground-rent of eleven pounds (£11) per year—the said portion of the site being indicated by the number thirty nine on the plan attached to the deed of emphyteusis in my records of the twenty fourth January one thousand nine hundred and fifty one.

The buyer proprio et nomine knows what works have been made in the Villa which he is buying, and undertakes to continue the works himself and his brother and sister for whom he is appearing.

The vendor warrants the sale as required by Law by a general hypothecation of his property present and future in favour of the buyer proprio et nomine who accepts.

> This sale is being made for the price of eight hundred pounds (£800) which the vendor declares to have already received from the buyer proprio et nomine and leaves receipt therefore."

The document was executed by Joseph Abela and Michael Abela but not by the sister and brother of the latter who were referred to in the Deed, namely, Mary and Antonio Abela, and who with Michael Abela are the defendants to the present proceedings and the appellants before the Board. Their Lordships were informed that the Latin phrase "*proprio et nomine*" which occurs more than once in reference to Michael Abela may be translated to mean "on his own behalf and on behalf of the sister and brother."

The plaintiffs in the action, the respondents before the Board, are the daughter and only child of Joseph Abela (the apparent vendor in the Instrument recited) and his widow. The former gave evidence before the legal referee and it appears from her evidence that she was then some 33 years of age. It also appears and was conceded before the Board that Joseph Abela parted company with the second plaintiff shortly after the birth of his daughter and ever since lived wholly apart from both his wife and child. It follows therefore that at the date of the Instrument of the 27th April, 1952, Joseph Abela had been separated from his wife and child for some 20 years. The marriage was however never dissolved. By the law of Malta a wife is entitled to one half of all property gained by a husband during the subsistence of their marriage. During the marriage the husband is entitled to dispose of and otherwise deal with any such after-acquired property but should he do so to his wife's disadvantage she would be entitled to recover compensation from him or his estate (see Sections 1362, 1365 and 1370 of the Maltese Civil Code). Upon her husband's death, his wife (the second plaintiff in the present case) is also entitled to the "usufruct" of a share in his estate; and likewise the first plaintiff as Joseph Abela's daughter (and only child) would on her father's death be entitled as such to legitim equivalent to one-third of his own free estate. In the present case however their Lordships were informed that the first plaintiff had taken out letters of administration to the estate of her father (or their equivalent) and as such therefore is now entitled to the whole of her father's free estate subject to any right or claim on her mother's part. From what has been said it will be apparent that Joseph Abela is now dead. Like so many matters of fact in this unhappy case the date and circumstances of his death were never proved. It may however be taken that he died in the month of August 1958, that is, rather more than six years after the date of the Instrument now challenged. It also appeared that at some date soon after the execution of the Instrument of April 1952 Joseph Abela left Malta: but again (unfortunately) there was no evidence of the date or of the purpose or reason of his departure nor of the length of his absence from Malta.

The writ of summons in the action is dated the 11th April, 1959, and as their Lordships have already observed the claim made thereby and by the plaintiffs' declaration in support was limited to the relief appropriate to the conclusion that the Instrument of the 17th April, 1952, was an absolute simulation. In the circumstances already narrated it was and has always been suggested by the plaintiffs that the Instrument of the 17th April, 1952, was in truth, and was known by Joseph and Michael Abela (at any rate) to be, a device aimed at depriving or at least seriously prejudicing the claims which the plaintiffs would have upon Joseph's death against his estate. So it was suggested to their Lordships that the true intention of the Instrument was by way of a *donatio mortis causa*, that is, while leaving Joseph's proprietorship of the villa unimpaired during his life, such as to enable the defendants upon his death then to claim by virtue of the Instrument a title to the property. As their Lordships have already intimated this submission cannot in their view avail the defendants. By the law of Malta a *donatio mortis causa* (which on the suggested view the Instrument would be intended to effect) is not acceptable to the law of Malta (see Section 623 of the Civil Code). It follows therefore that if such a *donatio* were in truth the intention of the parties to the Instrument of April 1952 (or, at any rate, of Joseph Abela) it is an intention which would not be effective by Maltese law. It follows equally that if such was the intention of the participants to it the Instrument could not be regarded as a relative

simulation but would fail wholly of effect as an absolute simulation. True it is that by the law of Malta a man may make a donation of his property while reserving a usufruct to himself; but since it was never suggested in evidence or argument that such had in fact been the avowed purpose of the Instrument it is unnecessary for their Lordships further to consider such a possibility.

As their Lordships have already observed the case was in the civil court of first instance referred by Mr. Justice Magri to Dr. Fortunato Mizzi as a legal referee to investigate and report upon it. By the same order (which was dated the 26th June, 1959), the court rejected the claim of the defendants that the action was barred by prescription (that is, limitation) and that plea has not since played any part in the case. Before the learned Referee evidence was given on the plaintiffs' side by one Joseph Pavia who was a tenant of part of the premises in question and by the achitect who had been instructed by Joseph Abela upon the building of those premises. The first defendant, Michael Abela, was also called on the plaintiffs' side though he gave evidence as well—as did his co-defendants, his brother and sister—on the defendants' behalf.

It must be conceded that upon many relevant and highly important matters of fact the evidence adduced before the legal referee was jejune in the extreme. To one highly significant and controversial matter namely a number of receipts in Michael's name their Lordships will later return. It was however stated with reasonable clarity in the evidence on the defendants' part—(1) that the suggestion for the so-called sale came entirely from Joseph who also named the price of £800; (2) that according to Joseph's original suggestion the " sale " should be to Michael alone but that he later accepted Michael's suggestion that Antonio and also their sister Mary should be added as " transferees " of the property; (3) that Antonio knew little and Mary knew practically nothing of the proposal or the transaction itself; (4) that it was always contemplated by Joseph and Michael and, so far as they knew about it, by Antonio and Mary that Joseph should thereafter live with his brothers Michael and Antonio—as seemingly he had already done—in the premises and that the joinder of Mary was by way of recognition of the fact that she had kept house for her brothers in the past and would do so in the future; and (5) that no money had passed or would pass to Joseph from Michael or from himself and his brother and sister, the purchase price being " satisfied " by an appropriation of a right (originally) of Michael to a like amount of undistributed profits in a partnership of which Michael, Antonio and Joseph were members and (later) by corresponding rights of Michael and Antonio to such undistributed profits.

At this point their Lordships return to the language of the Instrument of the 17th April, 1952. On the face of the document, and more particularly in light of the evidence given on the defendants' part already mentioned and hereafter referred to, two points emerge of (to say the least) a somewhat striking character. First, the language of the Instrument upon its face manifestly suggests that the villa was at the date of the Instrument very far from complete. In truth it is not now in doubt that though the villa was not in all respects entirely finished it had at least reached the stage of habitability and Joseph, his brother and sister, were almost certainly already living in it and parts of it had been let to the Pavias. This fact has a bearing on the intended significance and effect of the obligations by Michael for himself and on behalf of his brother and sister to continue the works and (presumably, though the Instrument notably does not so state) pay for them. The same point has a bearing also on the stated price of £800. The site itself was apparently worth not less than £300 and in their Lordships' opinion there can be no doubt whatever that, having regard to the state of completion which the villa had reached, the sum of £800 bore little relation to the true value of the property. Upon this matter their Lordships have no doubt that the legal referee intended in his report to find and did find that £800 was " considerably low ". He said (see page 23 of the Record): " In point of fact, the evidence points unmistakably to the fact that the price of £800 was considerably low." He also twice used the epithet " derisory " in reference to the price.

The second point emerges from the statement that the " vendor " declared that he had already received £800 from the buyer *proprio et nomine* " and leaves receipt therefor." It was said on the appellants' behalf that this formula meant no more than an acknowledgment by Joseph of satisfaction of the price by the means already mentioned, namely, a set-off of a like sum due (presumably in equal shares) to Michael and Antonio out of the undistributed profits of the partnership. But even if this be so, it is, in their Lordships' view, somewhat astonishing that no reference was made to the manner of satisfaction of the price, in particular to the alleged fact that Joseph was thereby discharged of the debts due by him to his brothers out of the partnership business. In other words it is, in their Lordships' opinion, most remarkable that the opportunity was not taken by Joseph to make clear on the face of the Instrument that he had been so discharged.

Of all the significant matters of fact none was more important but less investigated, as their Lordships venture to think, than this matter of the alleged partnership and its accumulated profits. As will later appear it was left ultimately in doubt who were the partners. On the defendants' own evidence neither Michael nor (still less) Antonio contributed substantially to any work done by the alleged firm. No books of account were produced let alone any written record of the shares therein of the partners or otherwise of the terms of the partnership. The station in life of both Michael and Antonio (at any rate) were relatively humble and their Lordships confess that it appears to them remarkable that there could have been accumulated profits of not less than £2,400 (that is, three times £800) undistributed at the relevant date and that there should have been no evidence of any other distribution of profits at any time. Moreover, as already observed, Antonio according to his own evidence took very little part in the transaction inpugned—as he did not suggest that for his own part he had made any contribution whatever to any additional expenses incurred on completing the premises, a point to which their Lordships, as did the Court of Appeal in Malta, attach considerable importance and to which they will later return. In their Lordships' opinion the story put forward by Michael about the alleged partnership and the amount of its undistributed profits has an air of unreality and indeed of high improbability about it which, when added to the facts already stated about the condition of the villa and the price named in the Instrument, raises at least grave doubts of the genuineness of the bargain recorded by the language of the Instrument.

Their Lordships have already made some reference to the evidence given on the defendants' side before the learned Referee. As regards the plaintiffs' witness Joseph Pavia he gave evidence that there had been a letting both to him and to his brother by Joseph Abela of parts of the premises in question and that rent had been paid by them to Joseph Abela. This witness also stated that he new nothing whatever of the alleged sale and that neither Michael nor Antonio Abela had ever suggested to him that they had any interest in the premises. It is true that rent receipts were made out as coming from Michael. They appear to have been written by Antonio Pavia, the witness's brother, on his own initiative and Joseph Pavia indeed stated that his brother had put on the signature of Michael. Finally, the witness Pavia stated that the rent in respect of the first six months after Joseph's death was paid in fact to Mary Abela but thereafter such rent was paid into court having regard to the dispute which had arisen and of which he was then aware.

The witness Antonio Abela agreed apparently that the Pavias had paid rent to Joseph. He also stated that the cost of works at or in connection with the villa had all been at his brother Michael's expense. He stated that two other brothers, namely, Felice and Gerardu had not been members of the partnership. Most remarkable, however, Antonio in the course of some further cross-examination after he had been re-examined and questioned by the legal referee suddenly produced a large number of documents which he stated were in fact in the possession of his brother Michael. How it came about that Antonio produced these documents nowhere appears. On the face of the documents however, which were largely made up of receipts, it

would appear that considerable sums had been paid by Michael though it is not in many cases clear in respect of what the payments were made, i.e. whether they were made in respect of work done to the villa itself or to certain boat-houses or garages some of which at any rate were quite apart from the villa. It is obvious that the receipts and the proper inferences to be drawn from them are matters of considerable importance and they have caused their Lordships no little concern. Mr. Wells for the appellants made for their Lordships a list of such receipts as could with reasonable certainty be attributed to work done on or in connection with the villa. The total however only amounts to a little over £300 and of at any rate two of the items (the receipts being dated respectively in April and May 1952) it would at least appear that the work in question might well have been done before the impugned transaction. To these important documents their Lordships will later return.

There finally remains the evidence which Michael gave on behalf of the defendants—he having, as already noticed, been first called by the plaintiffs. For present purposes the most important part of Michael's evidence related to the payments he himself said that he had made. The evidence was in this respect not very full nor did he refer to the documents which his brother had produced. He did however say, first, that he had made considerable payments in respect of the boat-houses and that the money for this purpose had been obtained by him from his savings and his bank account with Barclay's Bank. He did not specifically state that he had paid any money for works done to the villa (as their Lordships understand his evidence) but he did add in answer to questions by the legal referee that the rent paid by the brothers Pavia used to be handed eventually to himself.

Their Lordships now turn to the Report of the legal Referee. In their Lordships' judgment Mr. Le Quesne was justified in stating that the only real findings of fact made by the Referee were those already indicated, namely, that the villa at the date of the transaction in question was very nearly completed and that the price of £800 suggested in the Instrument was at the least considerably low. After stating that the mere fact that the price was derisory would not be enough of itself to lead to the conclusion that the sale was fictitious, the Referee stated (see page 24 of the Record): " It is therefore of the greatest importance to establish on the evidence heard whether the said price was paid and in the affirmative under what circumstances and by whom." With this observation their Lordships most heartily agree: but most unfortunately the learned Referee never thereafter proceeded to come to any conclusion or state any finding at all on this matter which was, as he said, of the greatest importance. The rest of his Report consists for the most part of a recital of the cases and evidence put forward on the two sides. Specific reference was made to proceedings which had been initiated by Joseph after the date of the alleged sale against one Zammit in respect of a claim for failure on Zammit's part to do proper work as contractor to the villa with (among others) the consequence that he, Joseph, alleged that he had lost rent. As the legal Referee observed, these proceedings against Zammit were obviously of considerable importance but having regard to the apparent payments made by Michael according to the receipts and other documents the Referee did not feel that the inference which might otherwise have been drawn from the Zammit proceedings could be treated as conclusive. Such inference was, as he observed, at least " blurred ". After observing towards the end of his Report that there appeared to have been no motive proved for a fictitious sale the Referee concluded his Report as follows: " Even if the most favourable interpretation to the theory of simulation were to be given to the evidence it would appear more likely that this simulation, if it existed, was a relative one intended only to hide, in whole or in part, a contract of donation under the appearance of a contract of sale. In this hypothesis the plaintiffs' demand should have been formulated much differently." It is to be noted, as already observed, that the learned Referee not only failed to reach or state any conclusion of fact upon what he said was the most important matter, namely whether payment had been made and if so how, but it is also to be observed that nowhere in his Report is there any statement on his part of the view which he took of the credibility of any of the witnesses before him.

Before the case came back to the civil court of first instance elaborate written submissions were prepared both by the plaintiffs and defendants. More important, however, the plaintiffs then proceeded to put in evidence certain material to which they referred at no little length in the course of their submissions. This material, which was referred to in the submissions and has been referred to thereafter in the case as Exhibit J, consisted of sworn evidence taken by a legal referee upon the application (as their Lordships understand) of the first plaintiff for the equivalent of letters of administration to her father's estate. On that occasion Michael, and his sister and brother Mary and Antonio, gave evidence which is recorded. It is unnecessary to recite at any length what is actually to be found in Exhibit J. It may however be stated that although Michael was consistent in his suggestion that there had been a sale to him and his brother and sister of the villa for £800 satisfied out of undistributed profits of the alleged partnership nevertheless he went on to state that in fact he never had withdrawn any sums at all from the bank " to pay anything, because everything was in the hands of Joseph." He added that one or twice " he did pay the mason with his own money not, that is, with money that Joseph had given him ". What is more, Michael, in the course of his evidence, stated, as regards the partnership, that all the brothers were partners including therefore the two above-mentioned Felice and Gerardu. It may finally be observed that Antonio in his recorded evidence stated that he did not know how much was the sale price of the villa because he (Antonio) used to leave everything in the hands of his brothers Michael and Joseph.

It is plain that the contradictions between the evidence of Michael as given before the legal Referee in this case and as recorded in the Exhibit J (and the same observation applies to the evidence of the defendant Antonio) are very marked and relevant. What is more, as will later appear, the Court of Appeal placed a great deal of reliance on these contradictions in arriving at the conclusion which they did in favour of the plaintiffs. It was a point much stressed by Mr. Wells before the Board that the evidence in Exhibit J ought not to be relied upon by way of impeaching the credibility of what had been said by the witnesses before the legal Referee since no opportunity had been afforded of putting the exhibit to these witnesses. In support of this submission Mr. Wells relied upon Section 585 of the Maltese Civil Procedure Code which provides that before impeaching the credit of a witness by evidence that he has made at other times statements inconsistent with his present testimony, the alleged statements, with the circumstances accompanying them, must be related to him and, if the statements are in writing, they must be shown to him, so that he may be able to say whether he did in fact make such statements and, if so, may be allowed to explain them. It is however quite apparent from the defendants' submissions before the civil court of first instance that no objection whatever was taken to the submission of Exhibit J to the learned judge nor was any application made to recall the witnesses Michael and Antonio for the purpose of asking them to explain their statements in Exhibit J. It is true that the defendants did seek to call evidence by way of rebutting certain evidence further given by the first plaintiff after the date of the legal Referee's report: but this evidence was not of great significance, relating only to an alleged balcony on the villa and the learned judge in fact dispensed with the necessity on the defendants' side of calling such evidence. Nor, as it appears, was any point taken either before the judge of first instance or before the Court of Appeal that the material in Exhibit J could not properly be used to counteract what Michael and Antonio had said before the legal Referee. In the circumstances and notwithstanding the terms of the section which their Lordships have quoted, it is in their Lordships' view quite clear that the defendants must be taken to have waived any right to invoke the section and that it is now far too late for the defendants to seek to exclude from the consideration of the Board the effect of what is to be found in Exhibit J. or to object to the use made of that exhibit by the Court of Appeal.

The judgment of the civil court of first instance was dated the 29th January, 1960. The learned judge adopted the report of the legal Referee and stated his own conclusions very shortly. In effect they followed those of the legal Referee. " All the circumstances ", said the learned judge after referring

briefly to the issues in the case, " . . . can in the court's opinion only lead to the conclusion that the deed impugned is affected by relative simulation in that the contracting parties wanted to do and agree on something which, however, they wanted to hide under the appearance of a contract of sale as would happen, for example, in a deed of simulated donation."

The plaintiffs duly appealed from the rejection of their claim by the civil court and the judgment of the Court of Appeal is dated the 27th June, 1960. The learned judges of the Appellate Court took, and took very strongly, the view that in all the circumstances of the case absolute simulation had been clearly established on the plaintiffs' side. It was objected by Mr. Wells that the court had not paid proper regard to the fact that in a case of this kind the onus of proof must lie fairly and squarely upon the plaintiffs. In their Lordships' opinion however there is no good ground for this submission. " This court ", said the judgment, " after carefully examining the evidence including the documents produced after the petition was filed feels inclined to hold as it in fact holds that the reply to that question [whether there was really a sale transaction] must be a negative one the court having kept well in view the rule that the burden of evidence rests on the plaintiffs and that the evidence must be sound and convincing." Mr. Le Quesne analysed for the Board the reasons on which the Court of Appeal founded their decision but their Lordships do not think it necessary to go elaborately through all of them. It is plain that first and foremost the learned judges came to the conclusion on all the evidence (including the inferences properly to be drawn from Exhibit J) that the circumstances in which the sale and the price was supposed to have been agreed upon were (in their words) " simply incredible ". It is also quite plain that they were unable to accept the view—for reasons to which their Lordships have already themselves alluded—that the story of the partnership and the accumulation of undistributed profits could be accepted. They were particularly moved in this respect by the statement of Michael in Exhibit J that two other brothers in addition to himself, Joseph and Antonio had been the partners. They further alluded with force to the circumstance that the form of the Instrument itself was singularly inept if it was meant to record a satisfaction on Joseph's part of so much of the undistributed profits alleged to be due to Michael and Antonio. They drew attention to the fact that, as might be deduced from the evidence as a whole, no kind of reason was ever put forward for Joseph having decided as he did and when he did to make this alleged sale at so low a price to his brothers and sister. They referred to another incident which had been proved before the legal Referee by Joseph Pavia, namely, that on one occasion he (Pavia) was asked by Michael to inquire of Father Antonio Abela whether he (Michael) would be making a false oath were he to state on oath that the villa was his. It had been admitted by Michael that this question had in fact been asked and Michael remembered apparently that Father Antonio had then told him that if he had not paid any money for the villa he would be making a false oath if he alleged that it belonged to him. As regards the numerous documents produced by Antonio the learned judges of the Court of Appeal went so far as to state that the evidence of Michael that he had taken money for construction of the boat-houses, etc. from cash which he had at home and from his account with Barclays Bank was " a shameless contradiction " with what Michael had testified in Exhibit J.

From what their Lordships have said it will be apparent that the learned judges of the Appeal Court took a very strong view indeed both that the transaction was itself a fiction and also that much of the evidence given by the defendants to support it should not be accepted. It was therefore put in the forefront of his argument by Mr. Wells that the Court of Appeal were really usurping the functions of the court of first instance and that they were not, as an Appellate Court, justified in arriving at conclusions of fact so contrary to those which (as he said) had been reached by the legal Referee and the civil court of first instance.

As their Lordships have already indicated, the matter is one of considerable difficulty and one that has caused their Lordships no little anxiety. The questions involved are, after all, essentially questions of fact: and on those

questions it is undoubtedly true that a conclusion was reached by the Court of Appeal which, to say the least, was at variance with the conclusion of the court below and of the legal Referee. On the other hand, it is true to say that the civil court of first instance and the legal Referee never found as a fact that what the defendants had stated was true. They had in effect confined themselves to the conclusion that, assuming everything in the plaintiffs' favour, still only a case of relative simulation could be established: more particularly the learned Referee, who had seen the various witnesses, forbore from expressing any view upon their credibility, and he also (more unfortunately, as their Lordships venture to think) forbore from expressing any conclusion upon the questions of fact which he had (rightly) regarded as so important, namely, whether the alleged purchase price had in fact ever been paid and, if so, by what means. In the most unusual circumstances of the case, therefore, it was, in their Lordships' view, clearly open to the Court of Appeal, as it was their duty, to draw by way of conclusion of the matter, proper inferences of fact from all the material before the Court including Exhibit J, bearing, however, always in mind (as their Lordships think they did) that the burden of proof lay upon the plaintiffs. This, then, being the nature of the case as it presented itself to the Appellate Court, ought this Board now to say that the Court erred in the inference which it drew? As their Lordships have already intimated, the facts and circumstances affecting the inpugned transaction (so far as they were ever proved) were clearly such as to raise grave doubts of its genuineness. Their Lordships venture again to refer to such matters as the contrast between the description of the condition of the premises and their condition in fact, to the amount of the purchase price and to the manner in which, apparently, it was arbitrarily fixed by Joseph Abela. Their Lordships also refer again to the remarkable fact that, in spite of the obligation apparently cast clearly upon Antonio Abela to contribute to the expense of all work still to be done upon the premises, Antonio in his evidence made it plain that he had never in fact provided any money at all for such purpose. They note also the point (emphasised by the Court of Appeal) that as regards the lettings which without serious doubt had been made by Joseph to the Pavias of parts of the premises, Antonio had agreed with Joseph Pavia, though not with his brother Michael, that the rents for such lettings had been consistently paid to Joseph until the end of his life. Their Lordships further find themselves in agreement with the Court of Appeal rather than with the learned Referee in thinking that the absence, according to the evidence, of any reason or explanation for the action of Joseph in suddenly presenting his brother (or his brothers and sister) with his proposal for entering into the deed of sale is a matter tending rather against than in favour of the genuineness of the deed. Their Lordships advert also, as did the Court of Appeal, in this connection to the fact that according to the evidence as it was first submitted to the learned Referee—though it was later qualified—Joseph upon his death was possessed of little or no property at all.

In the circumstances so far stated it would, in their Lordships' opinion, be impossible to hold that any tribunal was not well justified in finding as a fact, by inference, that the plaintiffs had made good their case. But it was submitted by Mr. Wells that it was no less competent for the Board to draw its own inferences from the sum of the facts proved and that, so doing, the Board should hold that the plaintiffs had not made good their case. And in addition to the matters to which their Lordships have just referred there must be added the numerous written receipts in the name of Michael Abela which at least (as it was strongly and naturally submitted) *ex facie* show that Michael had over a substantial period acted as owner (or at any rate part owner) of the premises. The argument based upon these documents is beyond doubt serious. The Court of Appeal disposed of the argument in forceful language when they stated (as already observed) that the evidence of Michael Abela to the effect that he had paid out substantial moneys of his own (as the documents showed upon the face of them that he had) was in " shameless contradiction " with Michael's evidence as provided in Exhibit J; and when they further expressed the view that the documents had been produced " not to enlighten but to mislead the Court ". These are strong terms indeed. Nevertheless it is the fact that the documents were—inexplicably—produced

not by Michael Abela (who, in his evidence, did not allude to them but who did say that he was unable to write) but by his brother Antonio; and it is also the fact that only a small proportion of the documents can be shown with any kind of certainty to relate to the subject-matter of the alleged sale and further that in Exhibit J Michael is recorded as having sworn that in fact he made substantially no payments out of his own resources in reference either to the subject-matter of the alleged sale or to the boat-houses in which he was apparently, if somewhat obscurely, concerned.

The case is one in which, as their Lordships have already more than once observed, there is an altogether remarkable paucity of evidence upon all the most significant questions involved in the case but in which there is, at the least, the strongest impression conveyed by the circumstances already noticed emerging from the terms of the document itself that the true transaction certainly was not that which those terms would lead a reader to suppose. Although therefore their Lordships do not deny the obligation which, in such a case as the present, lies upon them to examine closely the material available and to form an opinion upon the inferences properly to be drawn therefrom they nevertheless would not find it to be their duty to disavow the conclusion similarly drawn as an inference of fact by the Court of Appeal of the country where the relevant events occurred unless upon close consideration of all the facts and arguments they felt satisfied that they disagreed with the Appellate Court's conclusion. Upon a careful review of all the evidence and arguments their Lordships are not so satisfied, but think rather that the Court of Appeal was well justified in the decision which they reached.

Their Lordships will accordingly humbly advise Her Majesty to dismiss this appeal. The appellants must pay the costs of the appeal.

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In the Privy Council

MICHAEL ABELA AND OTHERS

v.

MARIA FELICIA CREMONA AND ANOTHER

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