[TRIANTAFYLLIDES, P., STAVRINIDES, MALACHTOS, JJ.]

SIDDIKA MEHMET KOCHINO AND OTHERS,

Appellants–Defendants,

v.

DERVISHE IRFAN,

Respondent–Plaintiff.

(*Civil Appeal No.* 5006).

Wills and Succession Law, Cap. 195—"*Estate*" *and* "*Immovable Property*" *in paragraph* (*a*) *and* (*b*) *respectively, of section* 5 *of the Law—Do not include immovable property outside Cyprus—Succession to such property not regulated by Cap.* 195 (supra)—*Construction of the expression* "*Immovable Property*" *in the definition of* "*Estate*" *in section* 2 *of the said Cap.* 195.

Succession—Intestate succession—Intestate domiciled in Cyprus possessed of immovable property in England—Succession thereto not regulated by Wills and Succession Law, Cap. 195.

Conflict of Laws—Succession—Intestate Succession—Intestate domiciled in Cyprus possessed of immovable property in England—Succession thereto—Not regulated by Wills and Succession Law, Cap. 195—*Section* 5(*a*) *of the Law.*

The late Hussein Irfan, who at the time of his death was domiciled in Cyprus, died intestate possessed of movables and immovables in Cyprus, of two houses in London and of money deposited at an English Bank. He left a widow and brothers and sisters. In proceedings instituted by the widow (the respondent in this appeal) against the brothers and sisters (the appellants in this appeal) for the division of the estate, the trial Court held that immovable property in London, consisting of the said two houses, was exempted from being brought into account in relation to the division of the estate to be found in Cyprus.

Section 5 of the Wills and Succession Law, Cap. 195 reads as follows:

"5. This Law shall regulate –

(a) the succession to the estate of all persons domiciled in the Republic;

(b) the succession to immovable property of all persons not domiciled in the Republic."

The claim of the respondent-widow in the estate of her deceased husband in Cyprus was governed by s. 44* of Cap. 195; and she could only be held bound to bring into account the two houses in London if it was found that the provisions of s. 5 of Cap. 195 regulated intestate succession in relation also to immovable property outside Cyprus.

Upon appeal counsel for the appellants contended that since the "estate" is defined in section 2 of Cap. 195 as meaning "the movable property and immovable property of which a person dies possessed", section 5(a) should, in a case in which the deceased was domiciled in Cyprus, be construed as regulating the succession to all his immovable property irrespective of whether it is to be found in Cyprus or abroad.

Held, (1) it would obviously lead to absurdity if the expression "immovable property" in s. 5(b) of Cap. 195 were to be construed as comprising, also, immovable property abroad, because then section 5 would inevitably have to be regarded as regulating, also, the succession to immovable property abroad of persons who, at the time of their death, were *not* domiciled in Cyprus, and irrespective of whether they had died here or abroad. So, in section 5(b) the expression "immovable property" should be construed as comprising only immovable property in Cyprus.

(2) Our approach to the correct manner of construing section 5(a) of Cap. 195 has to be such as to be, also, compatible, with the relevant principles of Private International Law to the effect that intestate succession to immovables is governed by the lex situs, no matter what the domicil of the deceased may have been. The notion of "estate" in the said section 5(a) cannot, therefore, be treated as including immovable property outside Cyprus; and the expression "immovable property" in the definition of "estate" in section 2 of Cap. 195 cannot be construed, in relation to the meaning of the term "estate" in section 5(a), as comprising immovable property outside Cyprus. Consequently Cap. 195 does not regulate succession in respect of such immovable property, and, in particular, in a case where there is involved the application of section 44(b) of Cap. 195 in relation to an intestacy.

* Quoted at p. 244 *post*.

(3) Since section 5(a) cannot be construed as being applicable to immovable property outside Cyprus, it follows that the estate of the deceased here, which, by virtue of section 44(b) is to be equally divided between the respondent-widow and the appellants, as the heirs of the deceased, cannot comprise the two houses in London; consequently, the said houses are not to be taken into account in determining the respondent's share under the relevant provisions of Cap. 195; and so, in claiming her share of the estate of her deceased husband in Cyprus the respondent does not have to bring such houses, or their value, into account. (pp. 245-250 *post*).

Appeal dismissed.

Cases referred to:

Re Rea, Rea v. *Rea* [1902] 1 Ir. R. 451;

Balfour and Others v. *Scott*, 2 E.R. 1259;

MacDonald v. *MacDonald* [1932] S.C. (H.L.) 79 at pp. 84, 85;

Harrison v. *Harrison* [1872] 8 Ch. App. 342;

Clarke v. *Clarke*, 44 Law. Ed. 1028.

Appeal.

Appeal by defendants 2, 3, 5, 6, 7, 8 and 9 against the judgment of the District Court of Nicosia (Stavrinakis and Stylianides, D.JJ.) dated the 19th June, 1971, (Action No. 5369/70) whereby immovable property in London, consisting of two houses, was held to be exempted from being brought into account in relation to the division of the estate to be found in the Republic of Cyprus of the late Hussein Irfan, who died intestate.

A. Dana with *S. Hilmi* (*Miss*) and *M. Akil*, for the appellants.

E. J. Cohn with *A. Triantafyllides* and *H. D. Yilmazoglou*, for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by:-

TRIANTAFYLLIDES, P.: The appellants appeal against the judgment of the District Court of Nicosia by means of which immovable property in London, consisting of two houses, agreed to be worth £16,000, was held to be exempted from being brought into account in relation to the division of the estate to be found in the Republic of Cyprus (to be referred hereinafter only as "Cyprus") of the late Hussein Irfan, who died intestate on January 28, 1969.

At the time of his death the deceased was domiciled in Cyprus.

The respondent is the widow of the deceased and she brought an action against the administrators of the estate of her husband and the appellants, who are his brothers and sisters; in such action she claimed:–

"(a) A declaration that she is entitled to one half share in the Cyprus estate, with the English movable assets added to it, irrespective of the two houses she inherits under the English Law;

(b) A declaration that the plaintiff does not have to account to the defendants for the statutory legacy she takes from the deceased's English immovable estate under the English Law, or, bring the same into the Cyprus estate in order to be entitled to her one half share in the Cyprus estate.

(c) A further declaration that the plaintiff's one half share in the Cyprus estate under the Cyprus Laws is not reducible or abatable by the amount of the statutory legacy she takes from the deceased's English estate under the English Laws."

The appellants counterclaimed for a declaration that for the purpose of determining the value of her share in the whole of the estate of the deceased—(which is, admittedly, in view of the intestacy, the one half)—the respondent should bring into account the two aforementioned houses in London.

The estate in Cyprus consists of movables and immovables, and at the time of his death the deceased had, in addition to his two houses in London, money deposited at an English bank, which after his death was brought to Cyprus by the administrators and was blended with the rest of his estate here. On the other hand, the two houses in London have been transferred in the name of the respondent.

In arguing this appeal before us counsel for the appellants did not challenge the finding of the trial Court that the said two houses devolved on to the respondent, under English law, as the lex situs; nor did he contend that the respondent was bound in any case to bring into account, for the purposes of the distribution of the estate of the deceased, the two houses in London. He submitted, however, that the respondent is

bound to bring into account these two houses, or their value, if she claims any part of the estate in Cyprus; in other words, that it is up to her to elect either to retain the houses and renounce any share in the estate in Cyprus or to claim her full share in the estate, including the estate in Cyprus, and, in such a case, to bring into account the houses in London.

The claim of the respondent to a share in the estate of her deceased husband in Cyprus is governed, in the circumstances of the case before us, by section 44 of the Wills and Succession Law, Cap. 195, which, in its material part, reads as follows:-

"44. Where a person dies leaving a wife or husband, such wife or husband shall, after the debts and liabilities of the estate have been discharged, be entitled to a share in the statutory portion, and in the undisposed portion if any, as follows, that is to say -

(a) .....

(b) no child nor descendant thereof, but any ancestor or descendant thereof within the third degree of kindred to the deceased, such share shall be the one-half of the statutory portion and of the undisposed portion;

(c) .....

(d) .....

Provided that where the deceased has left more than one lawful wife, the share given to the wife under the provisions of this section shall be divided equally between such wives."

Section 2 of Cap. 195 defines the "statutory portion" as that part of the movable and immovable property of a person which cannot be disposed of by will; the "disposable portion" is that part of the movable and immovable property of a person which can be disposed of by will; and the "undisposed portion" is the whole, or a part, as the case may be, of the disposable portion which has not been disposed of by will.

In the present case, as the deceased died intestate, his widow —the respondent—is entitled, under section 44(b) of Cap. 195, to the one half share of his estate; and she can only be held bound to bring into account the two houses in London, or their value, if it is found that the provisions of Cap. 195 regulate intestate succession in relation also to immovable property outside Cyprus.

Section 5 of Cap. 195, as modified by virtue of Article 188 of the Constitution, reads as follows:–

" 5. This Law shall regulate –

(a) the succession to the estate of all persons domiciled in the Republic;

(b) the succession to immovable property of all persons not domiciled in the Republic."

It has been the contention of counsel for the appellants that since the "estate" is defined in section 2 of Cap. 195 as meaning "the movable property and immovable property of which a person dies possessed", section 5(a) should, in a case in which the deceased was domiciled in Cyprus, be construed as regulating the succession to all his immovable property irrespective of whether it is to be found in Cyprus or abroad.

In our view it is useful to approach the question of the construction of paragraph (a) of section 5 by examining, first, the meaning of "immovable property" in paragraph (b) of the same section:

We think that it would obviously lead to absurdity if we were to construe the expression "immovable property" in paragraph (b) as comprising, also, immovable property abroad, because then section 5 would inevitably have to be regarded as regulating, also, the succession to immovable property abroad of persons who, at the time of their death, were *not* domiciled in Cyprus, and irrespective of whether they had died here or abroad. So, in paragraph (b) the expression "immovable property" should be construed as comprising only immovable property in Cyprus.

There has to be examined next whether, the expression "immovable property" in the definition of "estate" in section 2 of the same Law should be construed, in relation to the meaning of the term "estate" in paragraph (a) of section 5, as comprising immovable property outside Cyprus.

Cap. 195 has repealed, and replaced, the Wills and Succession Law, 1895 (Law 20/1895); section 4(1) of Law 20/1895 corresponds to section 5 of Cap. 195 and it read as follows:–

" 4.(1) This Law shall regulate,

(a) The succession to property of all persons domiciled in Cyprus;

(b) The succession to immovable property of any person not domiciled in Cyprus."

In section 2 of Law 20/1895 "property" was defined as meaning "movable property and immovable property as hereinafter defined" and "immovable property" was defined as meaning "immovable property situate in Cyprus of the following categories: (1) Mulk. (2) Vakouf property held as Ijarétein, where there are heirs upon whom the property would devolve".

It could be argued that the omission from the definition of "immovable property" in section 2 of Cap. 195 of the expression "situate in Cyprus", which was to be found in the definition of "immovable property" in section 2 of Law 20/1895, was intentional in order to extend the notion of immovable property, for the purposes of Cap. 195, so as to cover, also, immovable property outside Cyprus.

Such a view, however, would not only be incompatible with the presumption that the legislator could not have intended to override basic principles of Private International Law—to which we refer later on in this judgment—but it is, also, found to be untenable when one considers the exact nature of the definition of "immovable property" in section 2 of Cap. 195, which is as follows:-

" 'Immovable property' includes -

(a) land,

(b) buildings and other erections, structures or fixtures affixed to any land or to any building or other erection or structure,

(c) trees, vines and any other thing whatsoever planted or growing upon any land and any produce thereof before severance,

(d) springs, wells, water and water rights whether held together with, or independently of, any land,

(e) privileges, liberties, easements and any other rights and advantages whatsoever appertaining or reputed to appertain to any land, or to any building or other erection or structure,

(f) an undivided share in any property hereinbefore set out;"

The above definition is the same as the definition of "immovable property" in the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, which, undoubtedly, was intended to apply only to immovable property in Cyprus; and it is, indeed, quite significant that both Cap. 195 and Cap. 224 came into force together on the same date, namely September 1, 1946.

Moreover, the definition of "immovable property" in Cap. 195 is couched in such terms that it cannot be applied generally to immovable property outside Cyprus; since the concept of what is immovable property differs from country to country it is not possible for it to coincide always with the detailed contents of the definition of "immovable property" in section 2 of Cap. 195, which is framed in such a special manner as to fit, in particular, the immovable property rights that exist under the law of Cyprus.

Our approach to the correct manner of construing section 5(a) has to be such as to be, also, compatible with the relevant principles of Private International Law which are part of the law of Cyprus, in so far as they form part of the Common Law in England.

It is, first, useful to bear in mind that, as it is stated in Dicey and Morris on The Conflict of Laws, 9th ed., p. 31, the question whether interests in property are interests in movables or immovables must be determined in accordance with the lex situs.

Also, in Cheshire's Private International Law, 9th ed., p. 513, it is stated that though most foreign countries have adopted the "principle of unity of succession", by virtue of which questions relating to intestacy or to wills are governed by the personal law of the deceased, irrespective of the nature of the property, the Common Law has, on the contrary, adhered consistently to the "principle of scission", under which the devolution of immovables on death is governed by the lex situs, and not by the law of the domicil of the deceased, as is the case with movables; accordingly, when the owner of immovables dies intestate, the order of descent or distribution prescribed by the lex situs is applied by the English Courts no matter what his domicil may have been (and see, also, in this respect, *Re Rea*, *Rea* v. *Rea*, [1902] 1 Ir. R. 451).

It is useful to note, too, that in the said textbook it is stated (at p. 514) that with regard to wills relating to immovables the

rule of the Common Law is that "it is the lex situs, and the lex situs exclusively, which decides whether the testator has capacity, whether the appropriate formalities for the making or for the revocation of a will by a later will have been observed, whether the testator has an unlimited or only a restricted power of disposition, and whether the interest devised is essentially valid"; and that "the law of the testator's domicil has no effect upon these matters, whether the subject-matter of the will is a freehold or a leasehold interest".

A case which has, to a certain extent, some similarity to the present case, and provides an illustration of the application of the principles already referred to above, is *Balfour and Others* v. *Scott*, 2 E.R. 1259, where it was held that if a Scotchman dies intestate, having his domicil in England, his whole personal estate both in Scotland and in England shall be distributed according to the law of England; and that an heir to whom his heritable or real estate in Scotland descends shall not be obliged to "collate" (or bring into hotch pot) such heritable estate, inasmuch as the title of the heir to a share of the intestate's personal estate accrues by the law of England.

Reference may, also, be made to the decision of the House of Lords in *MacDonald* v. *MacDonald*, [1932] S.C. (H.L.) 79 where (at pp. 84, 85) Lord Tomlin said the following:-

> " In regard to interests linked with the physically immoveable, such as mortgages on real or heritable estate or leasehold interests, the law of the situation must determine whether they fall into the category of moveables or into that of immoveables. When this has been ascertained, their devolution in succession will also have been determined. If immoveables, they will devolve in accordance with the local law. Where a foreign asset is immoveable by nature or in the contemplation of the lex rei sitæ, a claim to render it subject to the legitim of Scots law is really a claim that it should devolve contrary to the lex rei sitæ, and cannot, I think, be supported consistently with the principles of private international law."

In relation to the above extract from the judgment of Lord Tomlin it may be stated, by way of explanation, that "legitim" is the legal share of a father's free movable property due, by Scots Law, on his death to his children (see Jowitt's Dictionary of English Law, p. 1076).

It is, also, of some interest perhaps, to refer to the case of *Harrison* v. *Harrison*, [1872–73] 8 Ch. App. 342, in which the relevant part of the headnote reads as follows:–

"A testator domiciled in England died possessed of personal estate and also of real estates in Scotland. His will purported to deal with the Scotch real estates, but was inoperative to pass them, and they descended to the Scotch heir. A suit having been instituted for the administration of the testator's estate against the executors, one of whom was the Scotch heir, he elected to take the descended estates in opposition to the will, and gave up the legacy which had been bequeathed to him by the will:–

Held, first, that the liability of the Scotch real estates to the payment of debts, as between the heir and the pecuniary legatees, must be determined by the law of Scotland, and not by the law of the country where the testator's estate was being administered:

Secondly, that as the law of Scotland threw the general debts primarily on the personal estate, and did not permit them to fall, directly or indirectly, on the real estate until the personal estate was exhausted, there could be no marshalling in the English Court against the Scotch heir in favour of the pecuniary legatees:"

In the United States, too, it appears from the textbook by Goodrich on The Conflict of Laws (1964), p. 323, that in case of intestacy the succession to land is governed in accordance with the law prevailing at the place where it is located (see, also, *Clarke* v. *Clarke*, 44 Law. Ed. 1028).

In the light of all the foregoing, we have to hold that the notion of "estate" in section 5(a) of Cap. 195 cannot be treated as including immovable property outside Cyprus; and, consequently, Cap. 195 does not regulate succession in respect of such immovable property, and, in particular, in a case where there is involved the application of section 44(b) of Cap. 195 in relation to an intestacy.

Since section 5(a) cannot be construed as being applicable to immovable property outside Cyprus, it follows that the estate of the deceased here, which, by virtue of section 44(b) is to be equally divided between the respondent and the appellants, as the heirs of the deceased, cannot comprise the two houses in

London; consequently, the said houses are not to be taken into account in determining the respondent's share under the relevant provisions of Cap. 195; and so, in claiming her share of the estate of her deceased husband in Cyprus the respondent does not have to bring such houses, or their value, into account.

As a result this appeal has to be dismissed.

Regarding its costs we order that the costs of one advocate on each side should be paid out of the estate of the deceased.

Appeal dismissed. Order for costs as above.