[ZEKIA, P., TRIANTAFYLLIDES, JOSEPHIDES, JJ.]

ANDREAS DEM. KARAOLIS,

Appellant-Defendant,

v.

THE ESTATE OF THE DECEASED CHRISTODOULOS (*alias* TOWLIS) SAVVAS KARAOLIS, BY ITS ADMINISTRATOR HARILAOS D. DEMETRIADES, ADVOCATE,

Respondent-Plaintiff.

(*Civil Appeal No.* 4468)

Appeal—Finding of Trial Court in Civil action—Finding against weight of evidence—Issue as to soundness of mind and capacity of transferor of immovable property—Judgment of trial Court set aside and judgment given by Court of Appeal—Courts of Justice Law, 1960, *section* 25 (3)—*Civil Procedure Rules, Order* 35, *rule* 8.

Evidence in civil cases—Evidence of experts (medical specialists) and of laymen—Incompatibility of—Unsoundness of mind—Amount of weight to be given to the opinion of medical specialists as to the probable capacity of a person vis-a-vis *direct and positive testimony as to the actual capacity of a person at the crucial period.*

Immovable property—Transfer of by way of gift—Capacity of transferor—Whether transferor of unsound mind on the date of transfer.

The appellant appeals against the judgment of the trial Court annulling the transfer of half a share in a house and garden in the village of Vassilia made by an old man to his grandson by way of gift, on the ground that the old man was of unsound mind on the date of transfer.

The transfer at the District Lands Office was effected on the 11th March, 1960, by a certain Christodoulos *alias* Towlis Savva Karaolis, (referred to in the following judgment as the "old man") who instituted the present action personally two months later and died some ten months after the transfer. The proceedings were carried on by his personal representative who is the respondent in this appeal.

The action was instituted against the present appellant as the first defendant and his parents as the second and third defendants. By his action the plaintiff claimed that the transfer of the property in question should be cancelled on the ground that—

(*a*) at the time of the transfer the old man was of unsound mind and incapable of carrying out any valid legal transaction ; and

(*b*) in the alternative, that the said transaction was invalid because it was effected as a result of undue influence by the appellant and/or his parents.

The Full Court of Kyrenia, after hearing evidence on both sides, found that no undue influence had been exercised on the old man but on the question of the soundness of his mind the Court found as a fact that at the time of the transfer the deceased was of unsound mind suffering from *senile dementia* of an advanced degree.

The property transferred is half a share in a village house and half a share in a garden of two donums and one evlek with some 123 fruit-bearing trees, all situate in the village of Vassilia.

Held, (1) in this case we have two classes of evidence on different planes, that is to say, that of the appellant and his witnesses which applies to the crucial period of making the transfer, that is to say, actual transactions with the old man and his conduct and condition at the actual time of the transfer. On the other hand we have the evidence for the respondent, that is to say, the evidence of the two specialists on which the trial Court solely relied, which is addressed to the old man's conduct and condition at other times, that is to say, subsequent to the date of transfer. It seems to us that a disproportionate amount of attention has been given by the trial Court to the medical evidence which bears rather on the probable capacity of the old man than on his actual capacity as exhibited in his acts.

(2) On the evidence of the layman, which was accepted by the trial Court as true, the verdict was not only contrary to the evidence but it should have been the other way, in favour of the appellant.

(3) On the evidence before them the trial Court ought to have found that at the time when the old man made the transfer was cabable of understanding it and of forming a rational judgment as to its effect on his interests ; and on this ground the trial Court ought to have dismissed the plaintiff's claim.

(4) For these reasons, in exercise of the powers conferred on this Court under the provisions of section 25 (3) of the Courts of Justice Law, 1960, and Order 35, rule 8, of the Civil Procedure Rules, we allow this appeal, set aside the judgment of the District Court and give judgment for the first defendant-appellant with costs here and in the Court below.

Appeal allowed. Judgment of the District Court set aside. Costs, both here and in the Court below, awarded to appellant.

Per curiam : We are of the view that a trial Court should not give undue weight to the opinion of medical specialists as to the probable capacity of a person in preference to direct and positive testimony as to actual capacity at the crucial period, that is, the actual transactions, conduct and condition at the material time, especially, as in this case, when the specialists did not have the opportunity of examining the person concerned before the lapse of 18 days after the transfer.

Cases referred to :

Aitken and Another v. *McMeckan* (1895) A.C. 310.

Appeal.

Appeal against the judgment of the District Court of Kyrenia (Evangelides & Savvides, D.JJ.) dated the 9th September, 1963, (Action No. 195/60) whereby a transfer of half a share in a house and garden made by an old man to his grandson (the appellant-defendant) was annulled on the ground that the old man was of unsound mind on the date of the transfer.

G. Ladas, for the appellant.

G. Constantinides with *A. Christofides*, for the respondent.

Cur. adv. vult.

ZEKIA, P. : The judgment of the Court will be delivered by Mr. Justice Josephides.

JOSEPHIDES, J. : In this case the trial Court annulled the transfer of half a share in a house and garden in the village of Vassilia made by an old man to his grandson by way of gift, on the ground that the old man was of unsound

mind on the date of transfer. The grandson now appeals, *inter alia*, on the ground that—

> " the trial Court erroneously decided that the deceased Christodoulos Karaolis, late of Vassilia, was a person of unsound mind and incapable of contracting on the 11th March, 1960, on the hypothetical evidence of experts who examined him on the 29th March, 1960 and the 9th May, 1960, in preference to the evidence of independent and trustworthy witnesses who testified as to the behaviour of that person on the very day and time of the transaction and whom the Court believed."

The transfer at the District Lands Office was effected on the 11th March, 1960, by Christodoulos *alias* Towlis Savva Karaolis (to whom we shall refer as " the old man "), who instituted the present action personally two months later and died some ten months after the transfer. The proceedings were carried on by his personal representative who is the respondent in this appeal.

Eighteen days after the transfer, namely, on the 29th March, 1960, the old man, who was aged about 90, was examined for the first time by Dr. G. S. Mavrantonis, a mental specialist, at the request of his son-in-law Michael Terlikkas, who has been the moving spirit in the present case. Some six weeks later, namely, on the 9th May, 1960, the old man was again examined by Dr. Mavrantonis and by Dr. A. Mikellides, the Government mental specialist. Soon after, according to Terlikkas, the old man, being illiterate, affixed his mark on the retainer of his advocate in the present case and the action was instituted in the District Court of Kyrenia on the 13th May, 1960, in the name of the old man.

On the 16th June, 1960, on his application, Terlikkas was added as second plaintiff as the next friend of the old man (first plaintiff). During June, 1960, the old man was seen by his family doctor, Mr. O. Ellinopoullos for bowel trouble. A summary of the medical evidence, as well as of the other evidence, will be given later in this judgment.

The old man eventually died on the 6th January, 1961, and, as already stated, the proceedings were carried on by his personal representative, Mr. Charilaos Demetriades, the doyen of the Kyrenia Bar, who was appointed by consent of the parties.

The action was instituted against the present appellant as the first defendant and his parents as the second and third defendants. By his action the plaintiff claimed that the transfer of the property in question should be cancelled on the ground that—

(*a*) at the time of the transfer the old man was of unsound mind and incapable of carrying out any valid legal transaction ; and

(*b*) in the alternative, that the said transaction was invalid because it was effected as a result of undue influence by the appellant and/or his parents.

The Full Court of Kyrenia, after hearing evidence on both sides, found that no undue influence had been exercised on the old man, but on the question of the soundness of his mind the Court found as a fact that at the time of the transfer the deceased was of unsound mind suffering from *senile dementia* of an advanced degree. In reaching that conclusion the trial Court relied solely on the evidence of the two mental specialists. The Court did not believe the evidence of the appellant and his parents nor did it rely on the evidence of the protagonist in the case, Terlikkas, nor on that of his wife (daughter of the deceased), or any of their witnesses regarding the mental condition and alleged delusions of the deceased. The Court, however, accepted as true the evidence of six witnesses called by the appellant but it did not consider that their evidence was incompatible with the evidence of the two specialists.

It is, we think, convenient to give here a summary of the relevant evidence in this case.

The deceased has four children, namely, Zoero ; Elpida (P.W. 9), wife of Terlikkas ; Savvas, who died in 1958 leaving a widow, Cleopatra ; and Demosthenis, aged about 50, the appellant's father.

The appellant is aged 23 and he has two sisters, aged 19 and 20. The trial court, before whom the appellant gave evidence, said in their judgment that " he is a young man who gave us the impression of being backward, weak and without any will of his own. No question of dominating the will of anybody else ". It was the appellant's case that the old man, being his grandfather, made this gift to him out of love and affection. Indeed, the trial Court accepted as true the evidence of the two Mukhtars of the village—the Greek and Turkish Mukhtars—to the effect

that shortly before the old man transferred the property to the appellant he expressed his intention of doing so adding that he was pleased with his grandson and wished to make this transfer to the boy " so as not to cause him any injustice ".

The property transferred is half a share in a village house and half a share in a garden of two donums and one evlek with some 123 fruit-bearing trees, all situate in the village of Vassilia.

As already stated, the first mental examination of the old man was made by Dr. Mavrantonis 18 days after the transfer at the District Lands Office. Dr. Mavrantonis examined him again six weeks later (on the 9th May, 1960), when he was also examined for the first and last time by Dr. Mikellides. Both doctors were of opinion that at the time of their examination the old man was suffering from *senile dementia* of an advanced degree and that at the time he made the transfer he was incapable of carrying out any transaction. It will thus be seen that the substance of their evidence bears rather on the probable capacity of the old man than on his actual capacity at the time of the transfer. On the other hand, the evidence of the laymen called by the appellant, which was accepted by the trial Court as true, applies to the crucial period of the transfer, that is, to the conduct and condition of the old man at the time of the transfer. The following is the material evidence of the laymen called by the appellant :

Yiakoumis Savva Katiris, stated that he bought a small share of the old man in some trees in February 1960. According to this evidence, at first the old man was not willing to sell his share to the witness, who was co-owner of the trees, but eventually, one day in February 1960, as the witness was passing by, the old man said to him " we shall arrange it so that you will not have any trouble. Since my brothers have sold their share I shall sell mine ". They bargained and eventually they agreed on the sum of £1.500 mils. Some twenty days later, the old man sent for the witness who went to his house and the old man suggested that they should go to Kyrenia to effect transfer, adding that he was going to transfer some property to his grandson Andreas (appellant). This was the 10th March, 1960. The witness together with the old man went to the advocate's office of Mr. Christoforides in Kyrenia, where they spoke to Makis Christoforides, an advocate's clerk, and asked him to prepare a declaration

form. Makis did so but eventually informed them that as it was too late they had to go on the following day, the 11th March, 1960, which they did. This witness was present when the Land Registry Clerk asked the old man whether he was making a gift or selling the property to the appellant, and when he put several other questions to the old man.

Witness Makis Christoforides, advocate's clerk, aged 63, is a retired, experienced Lands Office clerk, who had worked as " declarations " clerk for 20 years in the Lands Office. He stated that he did not know the old man before the 10th March, 1960, and that on that day the old man accompanied by the appellant's mother and her brother went to his office. The witness spoke personally to the old man, asked him what was his name and his village and the reason of his visit to Kyrenia and the old man explained that he had gone to Kyrenia to transfer his garden to his grandson Andreas (appellant). On being asked by the witness where the garden was he said that it was at Vassilia and explained that he was making a gift of it to the grandson (appellant) whom he pointed out as sitting next to him in the car. The old man and the appellant remained in the car and the witness, having received the two title-deeds, proceeded to fill in the declaration form. He included in the form the garden only, as instructed by the old man. By the time he filled in the declaration form it was 12.10 p.m., and when he proceeded to the District Lands Office he was told that they were closed. He, thereupon, informed the old man and his companions that they should come on the following day, which they did. That was the 11th March, 1960. The witness told the old man to go to the Lands Office for the transfer and the old man then said to him, " I shall not give him the whole garden. I shall give to him half the garden and half the house ". The witness remarked, " but yesterday you said you would give the garden. Today why do you say half the garden ? " The old man answered that he had changed his mind and that he wanted to give to the appellant half the garden and half the house as he (appellant) was looking after him. The witness then read out the title-deeds to the old man who said that those were the properties which he wanted to give to the appellant. At that moment this witness was approached by witness Katiris, in connection with the transfer to him of the old man's share in certain trees. The witness asked the old man about this transaction and the latter confirmed it saying that he had sold his share to Katiris for £1.500 mils.

The witness then prepared a new declaration form for one half of the garden and one half of the house, and an application for a copy of the title-deed of the trees sold to Katiris, which the old man told him that he had lost. A few minutes later the witness accompanied the old man, the appellant, Katiris and the appellant's mother to the District Lands Office for the transfer.

The Lands Clerk Vasfi Ramadan, in the presence of this witness (Makis Christoforides) asked the old man why he had gone to the Lands Office and the old man said that he had gone there to transfer half the house and half the garden in the name of his grandson Andreas (appellant). On being further questioned by the Lands clerk Vasfi, the old man replied that he was transferring the property voluntarily as a gift. At the request of Vasfi the witness Christoforides read out the contents of the declaration form to the old man and Vasfi asked the latter whether those were the properties which he was transferring as a gift and the old man replied in the affirmative. The old man then affixed his mark and the appellant signed the declaration of transfer. A short time later witness Christoforides, having received a copy of the lost title-deed, went to his office and prepared the other declaration of transfer to Katiris. Meantime, the old man remained in the Lands Office. Christoforides returned, read out the declaration form to the old man, and the same procedure was followed as in the case of the transfer to the appellant.

The above evidence of Makis Christoforides is substantially corroborated by the evidence of the Lands Office declaration clerk Vasfi Ramadan. This is the material part of his evidence :

> "As far as I know they both understood what was said. We spoke in Greek. Had I suspected anything I would not have accepted the declaration. Had I thought that anybody did not understand the nature of the transaction I would have repeated what I said. If I suspected anything further I would have consulted the Chief Clerk. On the same day the same man made another declaration. A declaration of sale . . .. The seller was Towlis Savva Karaolis and the buyer Iacovos Savvas Katiris. The same procedure took place as the one that I described for the gift."

Both the declaration forms concerning the gift of the property to the appellant and transfer of the old man's

share to Katiris were produced in evidence before the trial Court and we had the opportunity of inspecting them. Both declaration forms are indorsed with a certificate by the Lands Clerk Vasfi Ramadan to the effect that the declaration of transfer was read to the transferor and the transferee who stated that they were known to each other and that they were the persons stated in the declaration, and they both signed in the presence of the Land Registry Clerk. The transfer in both cases was effected under the provisions of the Land Transfer Amendment Law, Cap. 234 (now Cap. 228).

Gendarmerie Constable 507, Theocharis Constantinou, stated in evidence that in March, 1960, he witnessed an incident at Vassilia village in which Terlikkas was trying to pull the old man out of a car, and he was told that the old man was going to Kyrenia to transfer some property in the name of his grandson (appellant). The witness asked the old man, in the presence of Terlikkas, where was he going and he replied that he was going to transfer property to his grandson. Thereupon, the witness told Terlikkas that, since the old man was going of his own free will, he (Terlikkas) should stop pulling the old man out of the car and shouting, otherwise the witness would report him for breach of the peace. Terlikkas then stopped interfering with the old man and the car left.

Dr. O. Efinopoulos stated in evidence that he had been the family doctor from 1945 to 1960 and that he examined the old man for the last time in June, 1960, that is, some three months after the transfer. The old man was in bed and the doctor asked him what was the matter with him and the old man replied that he had eaten apricots and that he was suffering from diarrhoea. The old man answered the doctor's questions although he was exhausted but had no temperature. As the doctor was carrying out his examination there was an argument outside the old man's house. The second defendant, who is the old man's son and the appellant's father, was being prevented from entering the house and the old man intervened and said that he should be allowed to come in as he was his son. The doctor then asked the others present to let the son come in and he did so. The old man understood what the doctor told him. Those present were arguing among themselves and the old man told them to be quiet and that he was not interested in their argument. According to the doctor the old man was in a position to have feelings and that this was shown by the fact that he said that they

should allow his son to enter. The doctor added, "had he said on that day that he wanted to give a piece of his property to his son I should have said that he could realise what he was doing". In the years 1959-60 the doctor saw him 5 to 6 times. Although the doctor never carried out a special examination of the old man's mental condition he was of opinion that at that time he had no outward manifestation of *senile dementia*, and from what the doctor gathered when he saw the old man he was "of opinion that he was quite all right mentally".

Although doctor Ellinopoullos's evidence cannot be treated as the expert evidence of a mental specialist, nevertheless we are of the view that it is very strong evidence in favour of the sanity of the old man and his ability to transact business in June 1960, having regard to the fact that the doctor had known him as his patient for about 15 years and that he put to him several questions to which the old man replied rationally, and that it was the impression of the doctor that the old man was capable of understanding and that he knew what he was doing.

As already stated, the trial Court in their judgment said that, although they accepted as true all the evidence of the laymen called by the appellant, they did not consider that their evidence was incompatible with the evidence of the two specialists. With great respect we beg to differ. The case of *Aitken and another* v. *McMeekan* (1895) A.C.310 is, we think, to the point. At the trial of that case (a suit to revoke probate of a will) the jury found by majority that the testator was of unsound mind at the date of the execution of his will. The Privy Council, in their judgment delivered by Lord Morris, said (at page 310)

> "As the learned Chief Justice pointed out in his charge to the jury, and as their Lordships have already observed, the witnesses who spoke to occassions of incapacity were not transacting business with the testator, whereas those who did transact business with him were satisfied of his capacity. The two classes of evidence run on different planes. That of the defendants applies itself to the crucial period of the making of the will, while that of the plaintiff is addressed to the testator's conduct and condition at other times. The disproportionate amount of attention given to the medical evidence, which as above observed bears rather on the probable capacity of the testator than on his actual capacity as exhibited in action, was calculated to divert the attention of

the jury from the real issue. On these grounds their Lordships hold that the verdict is contrary to the evidence to such an extent as to call for a new trial."

We are of the view that a trial court should not give undue weight to the opinion of medical specialists as to the probable capacity of a person in preference to direct and positive testimony as to actual capacity at the crucial period, that is, the actual transactions, conduct and condition at the material time, especially, as in this case, when the specialists did not have the opportunity of examining the person concerned before the lapse of 18 days after the transfer.

Most of the witnesses, whose evidence we have summarised, speak not only of their opinion as to the capacity of the old man but also to conversations with him on the subject of the transfer in dispute and the transfer of the trees to Katiris, and to the actual transaction of business, that is to say, the agreement of the old man to sell his share in the trees to Katiris, his expression of intention to gift the property to the appellant and the transfer of the property at the Lands Office. Especially, the evidence of Makis Christoforides and Vasfi Ramadan, most important of all witnesses, is entirely inconsistent with an unsoundness of mind such as would render the old man incapable of understanding the nature of the transaction and of forming a rational judgment as to its effect on his interests.

In this case we have two classes of evidence on different planes, that is to say, that of the appellant and his witnesses which applies to the crucial period of making the transfer, that is to say, actual transactions with the old man and his conduct and condition at the actual time of the transfer. On the other hand we have the evidence for the respondent, that is to say, the evidence of the two specialists on which the trial Court solely relied, which is addressed to the old man's conduct and condition at other times, that is to say, subsequent to the date of transfer. It seems to us that a disproportionate amount of attention has been given by the trial Court to the medical evidence which bears rather on the probable capacity of the old man than on his actual capacity as exhibited in his acts.

On the evidence of the laymen, which was accepted by the trial Court as true, the verdict was not only contrary to the evidence but it should have been the other way, in favour of the appellant.

On the evidence before them the trial Court ought to have found that at the time when the old man made the transfer was capable of understanding it and of forming a rational judgment as to its effect on his interests ; and on this ground the trial Court ought to have dismissed the plaintiff's claim. For these reasons, in exercise of the powers conferred on this Court under the provisions of section 25 (3) of the Courts of Justice Law, 1960, and Order 35, rule 8, of the Civil Procedure Rules, we allow this appeal, set aside the judgment of the District Court and give judgment for the first defendant (appellant) with costs here and in the Court below.

In view of this conclusion we do not consider it necessary to deal with the other points raised in this appeal.

Appeal allowed. Order and judgment in the above terms.

*Appeal allowed. Judgment of the District Court set aside. Costs, both here and in the Court below, awarded to appel-*lant.