1979 April 12

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

ZOE L. ANTONIADES AND ANOTHER,
Appellants-Defendants,

v.

IRIS SOLOMONIDOU,
Respondent-Plaintiff.

(*Civil Appeal No.* 5379).

Will—Effect—An ambulatory instrument—It speaks from death of the testator—Law applicable thereto is the law in force on the death of the testator—Wills and Succession (Amendment) Law, 1970 (*Law* 75/70), *enacted prior to death of testator but after execution of will, applicable in this case—Wills and Succession Law, Cap.* 195.

Will—Construction—Principles applicable—Testator's intention—Disposable portion—Legacy to wife—The whole property "of which I can dispose by will"—Intention of testator was to leave to the wife all the property which the law in force at time of his death allowed him to dispose of by will—Section 41(2) *of the Wills and Succession Law, Cap.* 195 *as amended by Law* 75/70.

Will—Validity—Testamentary capacity—General principles—Burden and standard of proof—Undue weight should not be given to opinion of medical specialists in preference to positive testimony as to actual capacity of testator at the crucial period—Relevant findings of trial Court fully warranted by the evidence before it.

Statutes—Operation to a will previously made—Wills and Succession Law, Cap. 195 *section* 41(2) *as amended by Law* 75/70.

Wills and Succession Law, Cap. 195 (*section* 41(2) *as amended by Law* 75/70)—*Applicable to a will made prior to its enactment.*

Costs—Probate action—No wrong exercise of discretion by trial Judge in ordering payment of costs out of estate—Costs of appeal—Appellants successful as regards main aspect of appeal—Respon-

dents failing in their cross-appeal—Ordered to pay costs of appeal and cross-appeal.

A testator by his will, executed on the 11th September, 1970, gave to his wife the whole of his movable and immovable property of which he could "dispose by will". Upon his death he was survived by his wife and his sister ("the respondent"), who challenged the validity of the said will on the ground that the testator was not of sound mind, memory and understanding, that at the time of the execution of the will he did not know and approve its contents, and that it was executed under the undue influence of his wife ("appellant 1"). Furthermore, it was claimed that, if the will was found to be valid, the testator could dispose by it of only half of his estate.

The testator suffered infraction of the myocardium in 1969 and two attacks of stroke on 23.3.1970 and 31.5.1970. He died on March 23, 1972. Dr. Frangos, a family friend, who, with the exception of appellant 1, was the only witness who had the opportunity to have frequent contact with the testator stated that the condition of the testator around the time of the will, before and after the execution of same, was very normal and that the testator was responsible for all his acts.

The trial Court found that the legislative provisions applicable to the will, which was a valid will, were those in force at the time of the death of the testator and that by means of the will the testator disposed of only one half of his estate and that, as a result, half of it belonged, according to the will, to appellant 1, the wife of the testator, while the remaining half devolved, by operation of law, on the heirs of the testator in case of intestacy, namely in equal shares to his wife and to his sister, the respondent. The trial Court, after accepting the evidence of Dr. Frangos, further found that the will of the testator was valid in that at the material time he was of sound mind, memory and understanding.

The trial Court then proceeded to order that all the costs of the action should be paid out of the estate of the deceased testator.

The executor of the will and the wife of the testator appealed claiming that on a true constuction of the will and on the strength of the legislative provisions applicable at the time of the death

of the testator it should have been held that he had validly disposed, by means of his will, of the whole of his estate in favour of his wife as the sole beneficiary, and that regarding the costs of the action the trial Court erred in ordering that they should be paid out of the estate; and the respondent cross-appealed challenging only that part of the judgment of the trial Court by means of which it was held that the will of the deceased was valid, because he was of sound mind, memory and understanding.

The relevant legislative provisions were sections 41 and 36 of the Wills and Succession Law, Cap. 195, which so far as relevant read as follows:

"41. (1) Save as in section 42 of this Law provided, where a person dies leaving—

.....

(b) a spouse or a father or a mother, but no child nor descendant thereof, the disposable portion shall not exceed one-half of the net value of his estate;

.....

(2) Where a person has purported to dispose by will of a part of his estate in excess of the disposable portion, such disposition shall be reduced and abated proportionally so as to be limited to the disposable portion.

36. Every will shall be construed, with reference to the estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will".

Section 41 was amended prior to the death of the testator by Law 75/70, which added the following proviso to subsection (2) of section 41:

"Provided that no such reduction and abatement shall be made where a person dies leaving a spouse but neither child nor descendant of a child, nor a father, nor a mother, and the part of his estate disposed of by will in excess of the disposable portion, which may be the whole of the statutory portion, is bequeathed to the surviving spouse".

Held, (1) *on the law applicable to the will in question*: That a "will speaks from death" and must be so construed with

reference to the estate of the deceased, unless the contrary intention appears (see section 36 of Cap. 195); that section 41 of Cap. 195 regulates only the power to dispose by will whereas section 36 of the same law was intended to give effect to the basic principle that a will is an "ambulatory instrument"; that though no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication, in view of the ambulatory nature of a will it cannot be said that Law 75/70 is rendered applicable retrospectively to the will of the testator in the present case, because such Law is applicable to the said will as the law in force at the time when the will takes effect, since prior to the death of the testator the will had no force or effect as a document disposing of his property; and that, therefore, the trial Court correctly found that the law applicable to, and governing the disposable portion in this case was the law in force on the date of the death of the testator.

(2) That the construction of the will of the testator by the trial Court was erroneous as being inconsistent with the correct application of the amending provision introduced by means of Law 75/70 as well as with the expressed clear intention of the testator to leave to appellant 1, his wife, all his movable and immovable property which he could dispose of by his will; that this meant very clearly that he intended to leave to his wife all the property which the law allowed him to dispose of by will; that as at the time of his death it was rendered possible for his will to take effect in such a way that the whole of his property could be disposed of by it in favour of his wife, as the sole beneficiary, effect had to be given by the trial Court to the clearly expressed intention of the testator; that the trial Court placed too much reliance on the literal interpretation of the will of the testator in the present case by stressing the words "which I can dispose of by will" and by relating them only to the notion of disposable portion as defined in section 41(b) of Cap. 195; and it omitted to give due effect to the amendment which had been introduced by the proviso to subsection (2) of section 41; that the trial Court ought to have put itself in the testator's place and should have sought to discover the testator's intention "on broad general lines"; that, therefore, the whole of the estate of the testator was disposed of by his

will, with his wife, appellant 1, as the sole beneficiary; and that, accordingly, the appeal must be allowed.

(3) *On the cross-appeal, after stating the principles governing testamentary capacity vide pp.* 458-62 *post:*

That the law presumes sanity and so no evidence is required to prove the testator's sanity if it is not impeached; that it is the duty of the executors or any other person setting up a will, to show that it is the act of a competent testator and, therefore, where any dispute or doubt exists as to the capacity of the testator his testamentary capacity must be established and proved affirmatively; that the trial Court relied on the evidence of Dr. Frangos who has said in evidence that he knew the deceased for over twenty years, both as a friend and as his family doctor; that though undue weight should not be given to the opinion of medical specialists about the probable capacity of a person in preference to positive testimony as to his actual capacity at the crucial period a perusal of the evidence of Dr. Frangos can leave no doubt that, at all material times the deceased testator was of sound testamentary capacity; that, therefore, the relevant findings of the trial Court were fully warranted by the evidence which it rightly accepted as reliable; and that, accordingly, the cross-appeal must be dismissed.

(4) That, as regards the appeal of the appellants against the order of the trial Court that the costs of the trial should be borne out of the estate, this Court has not been satisfied by counsel for the appellants that this was the result of a wrong exercise of the relevant discretionary power of the trial Court; and that, therefore, that part of their appeal will be dismissed; that the costs of the appellants in this appeal and in the cross-appeal should be borne by the respondent because the appellants succeeded in their appeal as regards its by far main aspect, namely that of the true effect of the will in relation to the disposition of the whole property by means of it, and the respondent has failed in her cross-appeal.

Appeal partly allowed; cross-appeal dismissed.

Cases referred to:

Re Whitby, Public Trustee v. *Whitby and Others* [1944] 1 All E.R. 299;

Beddington and Another v. *Baumann and Another* [1903] A.C. 13 at p. 16;

West v. *Gwynne* [1911] 2 Ch. 1 at p. 15;

Croxford v. *Universal Insurance Company, Limited, Norman* v. *Gresham Fire and Accident Insurance Society, Limited* [1936] 2 K.B. 253 at p. 281;

Carson v. *Carson and Stoyek* [1964] 1 W.L.R. 511 at p. 516;

In re Baroness Llanover, Herbert v. *Freshfield* (2) [1903] 2 Ch. 330 at p. 335;

Hasluck v. *Pedley* [1874–75] Law Rep. 19 Eq. 271 at p. 274;

Constable v. *Constable*, 48 L.J. Ch. 621 at p. 622;

Perrin and Others v. *Morgan and Others* [1943] 1 All E.R. 187 at p. 190;

Re Cohn (deceased) National Westminster Bank Ltd., v. *Cohn and Others* [1974] 3 All E.R. 928 at p. 930;

Blathwayt v. *Lord Cawley and Others* [1975] 3 All E.R. 625 at p. 641;

Banks v. *Goodfellow* [1861–1873] All E.R. Rep. 47;

Boughton and Another v. *Knight and Others* [1861–1873] All E.R. Rep. 40;

Battan Singh and Others v. *Amirchand and Others* [1948] 1 All E.R. 152 at pp. 155–156;

In re Nightingale, Deceased; *Green and Another* v. *Nightingale and Others* (*No.* 2) (1975) 119 Sol. J. 189;

Karaolis v. *Estate of Karaolis* (1965) 1 C.L.R. 24 at pp. 33–34;

Moumdjis v. *Michaelidou and Others* (1974) 1 C.L.R. 226.

Appeal.

Appeal by defendants against the judgment of the District Court of Limassol (Stylianides, P.D.C. and Hadjitsangaris, S.D.J.) dated the 9th December, 1974, (Action No. 1930/72) whereby the will of the late Louis Antoniades was declared valid and grant of probate was granted to the executor.

G. Cacoyiannis, for the appellants.

G. Ladas with *G. Constantinides*, for the respondents.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment of the Court. By an action, No. 1930/72, filed in the District Court of Limassol by the respondent, Iris Solomonidou, as plaintiff, there was challenged the validity of the will of the late Louis Antoniades, who died on March 23, 1972; the respondent is the sister of the deceased, who died without having been survived by any parent and having left no children.

The defendants in the said action, and appellants in the present appeal, are the wife of the deceased, Zoe Antoniades, and the executor of his will, Loizos Theocharides.

The will in question is dated September 11, 1970, and was deposited with the Probate Registrar on May 24, 1972, by the office of counsel for the appellants who prepared it himself on the instructions of the deceased and kept it in safe custody until his death.

The said will reads as follows:–

"ΔΙΑΘΗΚΗ

'Η τελευταία διαθήκη ἐμοῦ τοῦ ΛΟΥΗ ΛΕΩΝΙΔΑ ΑΝΤΩΝΙΑΔΗ, ἐκ Λεμεσοῦ τῆς Νήσου Κύπρου, γενομένη ἐν Λεμεσῷ ταύτην τὴν 11ην τοῦ Σεπτεμβρίου, 1970.

1. Διὰ ταύτης μου ἀνακαλῶ πᾶσαν προγενεστέραν μου διαθήκην.

2. Δίδω καὶ κληροδοτῶ εἰς τὴν σύζυγον μου Ζωὴν Λούη 'Αντωνιάδου, ἅπασαν τὴν κινητὴν καὶ ἀκίνητον μου περιουσίαν, ὁπουδήποτε εὑρισκομένην, ἣν δύναμαι νὰ διαθέσω διὰ διαθήκης ἐλευθέραν φόρου κληρονομίας (estate duty) ἢ ἄλλης ἐπιβαρύνσεως.

3. 'Εν τῇ διαθήκῃ μου ταύτῃ, αἱ λέξεις 'ἀκίνητος περιουσία' καὶ 'κινητὴ περιουσία' θὰ ἔχωσι τὴν αὐτὴν ἔννοιαν καὶ σημασίαν ὡς αἱ λέξεις 'ἀκίνητος περιουσία' καὶ 'κινητὴ περιουσία' ἀντιστοίχως, ὡς ἐν τῷ περὶ Διαθηκῶν καὶ Διαδοχῆς Νόμῳ Κεφ. 195.

4. Διορίζω τὸν Λοΐζον Θεοχαρίδην φ/δι Marina Hotel, 'Αμμόχωστος, ἐπ' ἀδελφῇ γαμβρὸν τῆς συζύγου μου, 'Εκτελεστὴν τῆς Διαθήκης μου ταύτης, ἄνευ ἀμοιβῆς.

'Ο Διαθέτης,
('Υπ.) Λούης Λεωνίδα 'Αντωνιάδης

'Υπεγράφη ὑπὸ τοῦ εἰρημένου Λούη Λεωνίδα 'Αντωνιάδη

ἐκ Λεμεσοῦ, ἐνώπιον καὶ παρουσίᾳ ἡμῶν πάντων παριστα-
μένων ταυτοχρόνως οἵτινες ἐνώπιον καὶ παρουσίᾳ αὐτοῦ,
τῇ αἰτήσει του καὶ παρουσίᾳ ἀλλήλων, θέτομεν τὴν ὑπογρα-
φὴν ἡμῶν ὡς ἐπιβεβαιωταὶ μάρτυρες.

1. (Ὑπ.) Δρ. Αἰμίλιος Α. Φράγκος.
2. (Ὑπ.) Κρίστης Γ. Γεωργαλλίδης.
3. (Ὑπ.) Θ. Γ. Μεταξᾶς."

("WILL

This is the last will of me, LOUIS LEONIDA ANTONIADES, of Limassol in the Island of Cyprus, executed in Limassol this 11th day of September, 1970.

1. I hereby revoke any previous will of mine.
2. I give and bequeath to my wife Zoe Loui Antoniadou the whole of my movable and immovable property, wherever situated, of which I can dispose by will, free of estate duty or of any other charge.
3. In this will of mine the words 'immovable property' and 'movable property' will have the same meaning and effect as the words 'immovable property' and 'movable property', respectively, in the Wills and Succession Law, Cap. 195.
4. I appoint Loizos Theocharides c/o Marina Hotel, Famagusta, my wife's brother-in-law, as Executor of this Will of mine, without remuneration.

The Testator,
(Sgd) Louis Leonida Antoniades

It has been signed by the said Louis Leonida Antoniades, of Limassol, before and in the presence of all of us, being simultaneously present, who before and in his presence have, on his request and in the presence of each other, signed as attesting witnesses.

1. (Sgd) Dr. Emilios A. Frangos.
2. (Sgd) Kristis G. Georghallides.
3. (Sgd) Th. G. Metaxas.")

By the aforesaid action the validity of the will of the deceased testator was impeached on the ground that it was not a valid will in conformity with the law from the point of view of the

necessary formalities, that the testator was not of sound mind, memory and understanding, that at the time of the execution of the will he did not know and approve its contents, and that it was executed under the undue influence of his wife, appellant 1. Furthermore, it was claimed that, if the will was found to be valid, the testator could dispose by it of only half of his estate.

The trial Court found that the will was duly executed and that it had been positively proved that the formalities prescribed by law were complied with; it held that the testator knew, understood and approved the contents of his will and it rejected the contention of the respondent that such will was the product of undue influence.

After it had found that the will was valid it went on to hold that by means of it the testator disposed of only one half of his estate and that, as a result, half of it belonged, according to the will, to appellant 1, the wife of the testator, while the remaining half devolved, by operation of law, on the heirs of the testator in case of intestacy, namely in equal shares to his wife and to his sister, the respondent.

The trial Court proceeded to order that all the costs of the action should be paid out of the estate of the deceased.

The appellants have appealed claiming that on a true construction of the will and on the strength of the legislative provisions applicable at the time of the death of the deceased it should have been held that he had validly disposed, by means of his will, of the whole of his estate in favour of his wife as the sole beneficiary, and that regarding the costs of the action the trial Court erred in ordering that they should be paid out of the estate inasmuch as the respondent had failed as regards all the grounds of invalidity of the will which she had put forward, except in relation to the issue of whether the testator could have disposed of not only half but of the whole of his estate by means of his will.

The respondent has cross-appealed challenging only that part of the judgment of the trial Court by means of which it was held that the will of the deceased was valid, because he was of sound mind, memory and understanding; the parts of the judgment of the trial Court, relating to the due execution of the will from the point of view of the necessary legal formalities and

to the issue of undue influence have not been attacked before us by the respondent by means of a cross-appeal or otherwise.

As already stated the will was executed on September 11, 1970, and, as the relevant legislation stood at the time, it is beyond dispute that the disposable portion of the estate of the testator, of which he could have disposed by means of his will, was only half of it.

The relevant legislative provision is section 41 of the Wills and Succession Law, Cap. 195, the material parts of which read as follows at the time of the execution of the will:

"41. (1) Save as in section 42 of this Law provided, where a person dies leaving—

.....

(b) a spouse or a father or a mother, but no child nor descendant thereof, the disposable portion shall not exceed one-half of the net value of his estate;

.....

(2) Where a person has purported to dispose by will of a part of his estate in excess of the disposable portion, such disposition shall be reduced and abated proportionally so as to be limited to the disposable portion."

Section 42, which is referred to in the opening part of section 41, above, is not relevant for the purposes of the present proceedings.

Prior, however, to the death of the testator on March 23, 1972, there was enacted, on October 23, 1970, the Wills and Succession (Amendment) Law, 1970 (Law 75/70), which added the following proviso to subsection (2) of section 41, above:

" 'Provided that no such reduction and abatement shall be made where a person dies leaving a spouse but neither child nor descendant of a child, nor a father, nor a mother, and the part of his estate disposed of by will in excess of the disposable portion, which may be the whole of the statutory portion, is bequeathed to the surviving spouse'."

The trial Court held that the legislative provisions applicable to, and governing, the disposable portion are those in force on the date of death, unless otherwise expressed in the will; in other

words, the law to be applied, in this respect, is the law in force at the time of the death of the testator, because that is the time when his will became operative.

It is useful to refer, on this point, to section 36 of Cap. 195, which reads as follows:

> "36. Every will shall be construed, with reference to the estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

This provision of ours corresponds, very closely, to section 24 of the Wills Act, 1837, in England, which reads as follows:

> "Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

We agree with the trial Court that as a result of the above quoted legislative provisions, both here and in England, a "will speaks from death" and must be so construed with reference to the estate of the deceased, unless the contrary intention appears therein (see, in this respect, *inter alia*, Halsbury's Laws of England, 3rd ed., vol. 39, p. 1012, para. 1533).

In Williams and Mortimer on Executors, Administrators and Probate, 1970, it is stated (at p. 749) that "Under the Wills Act 1837, a will speaks as if it had been executed immediately before the testator's death" and there is referred to, in relation to this proposition, section 24 of the Wills Act, 1837, which has already been quoted in this judgment.

A case illustrating the application of section 24 of the Wills Act, 1837, in England–and of the corresponding section 36 of our Cap. 195—is that of *Re Whitby, Public Trustee* v. *Whitby and others*, [1944] 1 All E.R. 299; the headnote of its report reads as follows:

> "A testator, by the first codicil to his will, gave to the appellant, E.R., with certain exceptions, 'all the residue of my personal chattels as defined by the Administration of Estates Act, 1925, s. 55(1) (x).' The testator had a collec-

tion of unmounted cut diamonds which he kept at his bank. The point at issue was whether cut diamonds fell within the word 'jewellery' or, if not, were they 'articles of personal ornament.' By the fourth codicil to his will, the testator said 'I exclude from the bequest of all the residue of my personal chattels ... bequeathed to E.R. all articles of jewellery and other chattels belonging to me and which are now deposited at the Manchester Safe Deposit Co., and I bequeath the said articles of jewellery and other chattels and effects to my trustees to be held by them as part of my residuary estate.' The question was whether or not the testator had by the use of the word 'now' shown a sufficient contrary intention to exclude the operation of the Wills Act, 1837, s. 24, which provides that a will speaks from the death of the testator:–

HELD: (i) the unmounted cut diamonds were covered by the use of the word 'jewellery' contained in the Administration of Estates Act, 1925, s. 55(1)(x).

(ii) the use of the word 'now' in the fourth codicil indicated a sufficient contrary intention to exclude the operation of the Wills Act, 1837, s. 24."

The will in the present case is clearly distinguishable from that in the *Whitby* case, *supra*, because there is not to be found in it any word or expression indicating such an intention as would have as a result the exclusion of the operation of the provision in section 36 of Cap. 195 to the effect that with reference to the estate to which it relates it should be construed to speak and take effect as if it had been executed immediately before the death of the testator.

While on this point we should state that we do not agree with counsel for the respondent that, because of the existence in our own legislation—Cap. 195—of a provision such as section 41 there should not be attributed to section 36 of Cap. 195 the same effect as that which has been attributed in England to section 24 of the Wills Act, 1837.

In our view section 41 of Cap. 195 regulates only the power to dispose by will whereas section 36 of the same Law (like section 24 of the Wills Act, 1837) was intended to give effect to the basic principle that a will is an "ambulatory instrument".

In *Beddington and another* v. *Baumann and another* [1903] A.C. 13, the Earl of Halsbury L.C. stated the following (at p. 16):

> "Of course, the broad proposition which Cozens-Hardy L.C. lays down cannot be doubted: when you are dealing with a will you are dealing with an ambulatory instrument, and it operates nothing and can operate nothing till it becomes consummated by the death of the testator—it must wait till then. That is a principle which I think no one has controverted or can controvert—that it must speak from the date of the will, as the 24th section of the Wills Act says, in relation to the property of the testator, whether it is real or personal, or what comes within the 24th section by virtue of the interpretation clause, a power of appointment which may be in him at the time of his death."

Also, Lord Davey observed in the same case (at p. 19):

> "The will was an ambulatory document having no force or effect whatever until the death of the gentleman who made the will, ..."

We come, next, to the operation of Law 75/70:

Counsel for the respondent has argued that to treat Law 75/70 as applicable to the will involved in the present case would result in giving unwarranted retrospective effect to the said Law.

It is, indeed, a fundamental rule of both English law and of our own law in Cyprus "that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication" (see, in this respect, Maxwell on Interpretation of Statutes, 12th ed., p. 215, *West* v. *Gwynne*, [1911] 2 Ch. 1, 15, *Croxford* v. *Universal Insurance Company, Limited Norman Gresham Fire and Accident Insurance Society Limited* [1936] 2 K.B. 253, 281 and *Carson* v. *Carson and Stoyek*, [1964] 1 W.L.R. 511, 516).

In view, however, of the ambulatory nature of a will it cannot be said that Law 75/70 is rendered applicable retrospectively to the will of the testator in the present case, because, such Law is applicable to the said will as the law in force at the time when the will takes effect, since prior to the death of the testator the

will had no force or effect as a document disposing of his property.

It is useful to refer, in this respect, to *In re Baroness Llanover. Herbert* v. *Freshfield* (2), [1903] 2 Ch. 330, where Farwell J. said (at p. 335):

> "Now it is to my mind plain that a testator does not settle or dispose of any property by his will unless and until such will is brought into effectual operation by his death. To take Lord Davey's phrase in *Beddington* v. *Baumann* (1), 'A will is an ambulatory document, having no force or effect whatever until the death of the gentleman who made the will.' When an Act says that no person shall dispose by will of any property, it means an effectual disposition by the will and the death of the testator both coalescing. Further, the 24th section of the Wills Act, 1837, makes the will speak with regard to all real and personal property comprised in it at the death of the testator."

An illustration of the operation of a statute in relation to a will previously made is afforded by the application to wills already made of the subsequently to them enacted Apportionment Act, 1870:

In *Hasluck* v. *Pedley*, [1874–75] Law Rep. 19 Eq. 271, Sir G. Jessel M. R. said (at p. 274):

> "Then it is said that the Act does not apply to specific devises; but I am of opinion that specific devises are as much under this law as any others. The Act does not affect the meaning of the will; it only alters its legal operation. A devise of Blackacre, before the Act, carried the accruing rents: now it does not: not because the meaning of Blackacre has been altered, but because the legal effect of the devise is different."

In *Constable* v. *Constable*, 48 L.J.Ch. 621, Fry J. after referring with approval to the above dictum in the *Hasluck* case, *supra*, went on to state the following (at p. 622):

> "So here it appears to me that the bequest of the personal estate operated upon something which but for the Act it would not have operated upon, and inasmuch as the testator desired to deal with the rents accruing during twelve

months or until the execution of the settlement which should come to the trustees, because that I think is the real subject-matter of the bequest, the Act has altered the amount of rents coming to them. It may well be said that the will of the testator is not affected as regards construction by the Apportionment Act. Although that Apportionment Act having altered the rights under it, it has in effect produced a different result, the construction remains the same, to use the language of the Master of the Rolls, although the legal effect is different. It appears to me that is the true construction I ought to adopt, and I must make a declaration accordingly."

We, therefore, agree with counsel for the appellants that correctly the trial Court found that the law applicable to, and governing, the disposable portion in this case was the law in force on the date of the death of the testator.

The trial Court then proceeded, however, to find that by means of the will there was not disposed more than one half of the net value of the estate of the deceased and it said, in this respect, the following:

"We examined the will. It is a short document. It was drafted with skill by a very experienced lawyer. Each word in it is well calculated. The language used is strictly legal. The drafter was so cautious as to provide that the meaning of the terms 'movable' and 'immovable' property bear the meaning attributed to them in the Wills and Succession Law. The material paragraph is paragraph 2. The testator thereby disposed of 'all his movable and immovable property wherever found, *which I can dispose of by will.*'

The definition of 'disposable portion' in section 2 of Cap. 195, is:-

'Disposable portion means that part of the movable and immovable property of a person which he can dispose of by will.'

From a mere comparison of the words in the will and the definition of disposable portion, it is abundantly clear that the testator disposed of all the disposable portion: No more and no less. The disposable portion, according

to section 41(1)(b) in the case of this testator who left a spouse, but no child, nor descendant thereof, cannot exceed one half of the net value of his estate. Law 75/70 did not amend this sub-section. It only amended sub-section (2) of section 41 by the addition of the proviso to which we have already referred. The disposable portion in the case of this testator was at the time of his death and continues to be for other similar case, the one-half of the net value of the estate of the deceased. This is the only construction which can be placed on this will."

We consider that the above construction of the will of the testator by the trial Court is erroneous as being inconsistent with the correct application of the amending provision introduced by means of Law 75/70 as well as with the expressed clear intention of the testator to leave to appellant 1, his wife, all his movable and immovable property which he could dispose of by his will. This meant, in our opinion, very clearly that he intended to leave to his wife all the property which the law allowed him to dispose of by will; and as at the time of his death it was rendered possible for his will to take effect in such a way that the whole of his property could be disposed of by it in favour of his wife, as the sole beneficiary, effect had to be given by the trial Court to the clearly expressed intention of the testator.

As it is stated in Halsbury's Laws of England, 3rd ed., vol. 39, p. 950, para. 1438, in relation to the function of a Court in construing a will, "the intention of the testator, as declared by him and apparent in the words of his will, has effect given to it, so far and as nearly as may be consistently with law".

In *Perrin and others* v. *Morgan and others*, [1943] 1 All E.R. 187, Viscount Simon L. C. said (at p. 190):

"My Lords, the fundamental rule in construing the language of a will is to put upon the words used the meaning which, having regard to the terms of the will, the testator intended. The question is not, of course, what the testator meant to do when he made his will, but what the written words he uses mean in the particular case—what are the 'expressed intentions' of the testator."

In the later case of *Re Cohn (deceased) National Westminster*

Bank Ltd. v. *Cohn and others*, [1974] 3 All E.R. 928, Lord Denning M.R. stated (at p. 930):

> "To my mind that is a wrong interpretation of the will. It is too literal an interpretation. As I read the will, the testator contemplated that Philip would survive his father, Albert. The testator never contemplated that Philip would die before Albert. So he never provided for that event. What then is the Court to do when an event occurs which the testator never had in mind and for which he never provided? Is it then to go by the literal meaning of the words? I think not. The Judge should put himself in the testator's chair and seek to discover the testator's intention—on broad general lines—without too much reliance on the letter."

In our view, likewise, the trial Court placed too much reliance on the literal interpretation of the will of the testator in the present case by stressing the words "which I can dispose of by will" and by relating them only to the notion of disposable portion as defined in section 41(b) of Cap. 195; and it omitted to give due effect to the amendment which had been introduced by the proviso to subsection (2) of section 41.

The trial Court ought to have put itself in the testator's place and should have sought to discover the testator's intention "on broad general lines", as indicated by Lord Denning in the passage quoted above from the *Cohn* case, *supra*.

Before concluding with this part of the judgment it is useful to quote, also, the following words of Lord Cross in *Blathwayt* v. *Lord Cawley and others*, [1975] 3 All E.R. 625 (at p. 641):

> "If the testator has said something clearly and unambiguously, one must give effect to it even though one may strongly suspect that he did not mean to say it."

For all the foregoing reasons we allow the appeal and we pronounce that the whole of the estate of the testator was disposed of by his will, with his wife, appellant 1, as the sole beneficiary.

We shall now deal with the cross-appeal:

It has been the contention of the respondent that the trial

Court was wrong in finding that the will of the testator was valid in that at the material time he was of sound mind, memory and understanding; in other words, that the deceased testator had the requisite testamentary capacity in this connection.

Section 22 of Cap. 195 provides as follows:

"22. No will made by any person who is not of sound mind or has not completed the age of eighteen years, shall be valid."

It is well established, also, by the general principles of law governing this aspect of the case that it is necessary, for the validity of the will, that the testator should be of sound mind, memory and understanding; in other words, that he should have sound disposing mind and sufficient capacity to deal with, and appreciate, the various dispositions of property to which he is about to affix his signature. In this respect the testator must not only be able to understand that he is, by his will, giving his property to one or more objects of his regard, but he must, also, have capacity to comprehend and to recollect the extent of his property and the nature of the claims of others whom by his will he is excluding from participation therein.

The testator's sound and disposing mind and memory must exist at the actual moment of execution of the will; but the measure of testamentary capacity need not be as complete at the time of execution as it was at the time of giving instructions for the will; and it would seem that when a will has been drawn up according to the instructions of a testator whilst he was of sound disposing mind a perfect understanding of all the terms of the will at the time of its execution may not be necessary.

The law presumes sanity; so, no evidence is required to prove the testator's sanity if it is not impeached. It is, however, the duty of the executors, or any other person setting up a will, to show that it is the act of a competent testator and, therefore, where any dispute or doubt exists as to the capacity of the testator his testamentary capacity must be established and proved affirmatively.

In this respect see Halsbury's, *supra*, pp. 855–857, paras. 1293, 1294, 1295, 1299, in particular.

One of the leading cases, on this aspect, is *Banks* v. *Good-*

fellow, [1861–1873] All E.R. Rep. 47, and I think it is sufficient, for the purposes of the present judgment, to quote the headnote of its report, which reads as follows:

> "For a testator to be capable of making a valid will he must be able to understand the nature of the act and its effects and the extent of the property of which he is disposing, and he must be able to comprehend and appreciate the claims to which he ought to give effect and the manner in which his property is to be distributed between them. The fact that the testator suffers from mental illness which does not interfere with the general powers and faculties of his mind, and, in particular, does not prevent his possessing the faculties mentioned above, so that there is no connexion between the illness and the will, will not render the will liable to be overthrown on the ground of the testator's incapacity. But when the fact that a testator has been subject to some form of mental illness is established a will executed by him must be regarded with great distrust and every presumption should in the first instance be made against it. The presumption against such a will becomes additionally strong where the will is an 'inofficious' one, i.e., one in which natural affection and the ties of near relationship have been disregarded."

In the later case of *Boughton and another* v. *Knight and others*, [1861–1873] All E.R. Rep. 40, the headnote of the report reads as follows:

> "Mental capacity is a question of degree, but the highest degree of capacity is required to make a testamentary disposition, inasmuch as it involves a larger and wider survey of facts than is needed to enter into the ordinary contracts of life. A sound mind in contemplation of law does not necessarily mean a perfectly balanced mind, and large allowance must be made for the difference of individual character, habits, and mode of living. It must not be assumed that because a man acts in unaccustomed ways he is, therefore, of unsound mind. The burden is on those propounding a will to satisfy the Court that when the will was made the testator was of sound and disposing mind."

In *Battan Singh and others* v. *Amirchand and others*, [1948]

1 All E.R. 152, Lord Normand, in delivering the judgment of the Privy Council in England, said (at pp. 155–156):

"A testator may have a clear apprehension of the meaning of a draft will submitted to him and may approve of it, and yet, if he was at the time through infirmity or disease so deficient in memory that he was oblivious of the claims of his relations and if that forgetfulness was an inducing cause of his choosing strangers to be his legatees, the will is invalid. In *Banks* v. *Goodfellow* (3) Cockburn, C.J. delivering the judgment of the Court said (L.R. 5 Q.B. 565):

It is essential to the exercise of such a power (scilicet, testamentary power) that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, and prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

In *Harwood* v. *Baker* (4) the same principle had been stated and it was observed that, when a testator suffering from a debilitating disease had made a will excluding from his bounty his near relations in favour of his wife, it was necessary to determine whether he was at the time capable of recollecting who those relations were, of understanding their respective claims on his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property. In *Sivewright* v. *Sivewright's Trustees* (5) Lord Haldane, with whom Lord Dunedin and Lord Buckmaster concurred, said (1920 S.C. 64):

The question whether there is such unsoundness of mind as renders it impossible in law to made a testamentary disposition is one of degree. A testator must be able to exercise a rational appreciation of what he is doing.

He must understand the nature of his act... if his act

is the outcome of a delusion so irrational that it is not to be taken as that of one having appreciated what he was doing sufficiently to make his action in the particular case that of a mind sane upon the question, the will cannot stand. But, in that case, if the testator is not generally insane, the will must be shown to be the outcome of the special delusion.

There is, of course, in the present case no question of insanity in the general or in the popular sense, but here the testator, who is proved to have been in the last stages of consumption and to have been reduced by disease to extreme weakness, has declared in his will that he had no relations anywhere, though if he had been of sound mind in the sense of the cases cited he must have known that the statement was untrue."

A very recent case on this topic is that of *In re Nightingale, Deceased; Green and another* v. *Nightingale and others* (*No.* 2), [1975] 119 Sol. J., p. 189; the report of this case reads as follows:

"In June 1972, the testator, who was suffering from cancer, had his right lung removed. He was a widower and his closest relation was the first defendant, his adopted son, whom he made the principal beneficiary under a will which he executed on 7 July 1972. On 16 August 1972, he executed a fresh will cutting out his adopted son from any benefit. Between the two dates on two occasions when the testator, who was struggling for breath, had attempted to sit upright, his son had pushed him gently back onto his pillows. The testator effected the change in his testamentary dispositions in the belief that his son in so doing was attempting to shorten his life. The testator died on 3 September 1972. The plaintiffs, who were named as executors in both wills, sought to establish the validity of the second will, whereas the first defendant contended that, when the second will was executed, the testator was no longer of sound mind, memory and understanding, and that he did not know and approve of its contents.

Goulding J. said that both wills were duly executed, and that in each case the testator knew and approved of the contents. In the case of the first will he was of testamentary

capacity. The question was whether he was no longer of testamentary capacity when he executed the second will. There were three possibilities: either the testator was right in his belief that his son was attempting to shorten his life, or the son's conduct was entirely innocent, and the testator, due to a defect of understanding or reasoning, misunderstood the incidents and fell into an irrational fear and suspicion of his son, or, thirdly, he was indeed mistaken but that mistake was not contributed to by any defect of mental power. This third possibility was the least likely. Medical evidence showed that there were two probable causes of mental derangement; a secondary cancer in the brain or a shortage of oxygen in the blood supply to the brain. There was no clinical evidence of the former. The latter remained a possibility, resulting in the testator's misinterpreting the evidence of his senses, but it should be pointed out that there was no evidence of any special failure of reasoning or understanding except that suggested. The burden of proof was on the plaintiffs to establish that the testator was of sound mind, memory and understanding when he executed the second will, and, having regard to the nature of the acts alleged, that burden was a heavy one. Not only the son's fortune but also his reputation was at stake. If the victim had only a short time to live it was unlikely that a responsible and respectable person would have attempted to murder him. In the result, on the balance of probabilities, the plaintiffs had failed to establish their case, and his lordship would accordingly pronounce in favour of the earlier will. Order accordingly."

It must, of course, be borne in mind that undue weight should not be given to the opinion of medical specialists about the probable capacity of a person in preference to positive testimony as to his actual capacity at the crucial period.

In Andreas Dem. Karaolis v. *The Estate of the deceased Christodoulos (alias Towlis) Savvas Karaolis, by its Administrator Harilaos D. Demetriades, advocate*, (1965) 1 C.L.R. 24, Josephides J. said, in this respect, (at pp. 33-34):

"The case of *Aitken and another* v. *McMeckan* [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 316):

> '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 occasions 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."

In the later case of *Moumdjis* v. *Michaelidou and others*, (1974) 1 C.L.R. 226, the *Karaolis* case, *supra*, was referred to with approval (at p. 236).

In the present case the trial Court stated the following in its judgment in relation to the issue of testamentary capacity of the deceased testator:

> "We heard and observed the witnesses. The testator suffered infraction of the myocardium in 1969 and two attacks of stroke on 23/3/70 and 31/5/70. The symptoms to which we have referred earlier were transient on both

occasions as the hemiplegia was due to neural shock. He was left with a weakness of the affected limb and some dysarthria but his mental faculties were not affected. For a short period, whilst in Limassol Hospital, in late March and early April, 1970, he was confused, disorientated and probably his mental faculty during that short period were not functioning properly. As the symptoms, however, were transient in a short time, he completely recovered.

We accept the evidence of Dr. Frangos who impressed us as a reliable and truthful witness. He was the only witness with the exception of the wife who had, as a family friend, the opportunity to have frequent contact with the deceased. He stated that the condition of our testator around the time of the will, before and after the execution of same, was very normal and that the testator was responsible for all his acts. It is true that he did not have any conversation with the deceased about his heirs, his sister and his godson and the extent of his property.

To whom would he leave his property?

The objects of his bounty were his wife and his sister. His property, judging from the inventory in Probate Application 93/72, is of not of great value. He could not be considered a rich man. He lived for a quarter of a century with his own wife. His sister is maintained by her husband, a retired bank employee. His affection naturally was or should have been towards his wife more than to his sister. The will is a short document. He knew and understood that he was executing a will whereby he was disposing of the property which he could dispose of by will, to his own wife. The posthumous disposition of his property was not a complicated affair. It was a very simple thought expressed in the will. It did not require a strong mind or memory to understand how he was disposing of his property. Probably he thought of it from the time he was stricken by disease, but he executed the will at the time he considered appropriate. On the totality of the evidence before us, we have reached the conclusion that the testator was of sound memory and understanding. We are satisfied that the testator knew, understood and approved, at the time of the execution of the will, the contents thereof."

Having perused the record we are duly satisfied that the relevant findings of the trial Court were fully warranted by the evidence which it rightly accepted as reliable and we, therefore, see no reason to interfere with its judgment.

The trial Court, as it is stated in the above-quoted passage from its judgment, relied on the evidence of Dr. Frangos, who who has said in evidence that he knew the deceased for over twenty years, both as a friend and as his family doctor; and a perusal of the evidence of Dr. Frangos can leave no doubt in our minds that, at all material times, including the period around September 11, 1970, when the will was executed and when the deceased gave instructions regarding the preparation of his will to counsel for the appellants, the deceased testator was, at the time, of sound testamentary capacity.

For all these reasons the cross-appeal has to be dismissed.

As regards the appeal of the appellants against the order of the trial Court that the costs of the trial should be borne out of the estate we have not been satisfied by counsel for the appellants that this was the result of a wrong exercise of the relevant discretionary power of the trial Court and we, therefore, dismiss that part of their appeal.

Regarding, however, the costs of the appellants in this appeal and in the cross-appeal we order that they should be borne by the respondent, because the appellants succeeded in their appeal as regards its by far main aspect, namely that of the true effect of the will in relation to the disposition of the whole property by means of it, and the respondent has failed in her cross-appeal.

Appeal partly allowed. Cross-appeal dismissed. Order for costs as above.