[BOVILL, C.J. AND SMITH, J.]

BOVILL, C.J. & SMITH, J. 1887. January, 31.

MICHAIL POLYDORO AND OTHERS *Plaintiffs,*

v.

HADJI GAVRIL HADJI GEORGHI *Defendant.*

WILL—POWER TO MAKE—BEQUEST OF MORE THAN ONE-THIRD OF ESTATE OF TESTATOR—VIZIERIAL ORDER OF 7 SEPHER 1287—GIFT INTER VIVOS.

The Vizierial Order of 7 Sepher, 1287 (Leg. Ott., Vol. 1, p. 40), relating to the inventories to be made of the estates of deceased Christians, provides that where a person of sound mind makes a document, in presence of credible witnesses, which is authenticated by a Patriarch, Metropolitan or Bishop, or one of their representatives, allotting his estate amongst his heirs or other persons, and " has separated and delivered to each of them his share," such documents after they have been proved or established by evidence shall be taken into consideration by the Judges of the Sheri Court or other officials ; and no inventory of such property shall be necessary, but the property, whether moveable or immoveable, " is abandoned and caused to remain in the hands of the persons concerned as stated in the documents."

HELD : That this provision confers no enlarged testamentary powers on Christian subjects of the Porte but refers to gifts made by a person before death and perfected by delivery.

APPEAL from the District Court of Nicosia.

The plaintiffs were the husband and next of kin of Hariclea Loizo, deceased, and the defendant the executor of a will made by her by which the bulk of her property was left to his infant daughter.

The claim was to set aside the will on the ground that the deceased was of unsound mind, and also on the ground that under the Ottoman Law a person cannot dispose by will of more than one-third of his estate.

The District Court found that the deceased was of sound mind at the time she made the will, and that a Vizierial order of 7 Sepher, 1278, entitled a Vizierial order concerning the inventory of successions excepting those of the Island of Crete (Leg. Ott., Vol. 1, p. 40) has conferred upon Christians an unlimited power of bequeathing property by will, and judgment was accordingly given for the defendant.

The plaintiffs appealed.

Burke for the appellants.

Collyer, Q.A., for the respondent.

The arguments of counsel sufficiently appear from the judgment of the Supreme Court which was as follows:

By this action it is sought to upset a testamentary disposition made by one Hariclea Loizo, deceased, of her property, and this testamentary disposition is attacked on several grounds which for convenience sake we may state somewhat summarily to be: first, that the deceased was not of sound mind when she made the testamentary disposition of her property which she has purported to make; and, second, that she had no legal power to make such a testamentary disposition of her property. With regard to the first of these points, we do not think that the evidence bears out the contention that the deceased was insane when she made this will. The evidence, no doubt, goes to shew that she had not been considered a woman of strong intellect, but it does in our opinion show that, even if she were a woman of somewhat eccentric or strange manner, she knew perfectly well what she was doing when she made this will, and the act itself seems to us to have been one prompted by natural affection and not of itself suggesting insanity on the part of the deceased. It is however said that many years ago the deceased was declared by the Cadi to be of such weak mind that he considered her incapable of managing her own affairs, and in support of this, an Ilam is put in from which it would appear that in the year 1279 some sort of enquiry was made by the Cadi into the state of the testatrix' mind and that he appointed a guardian to manage her affairs until such time as she should become capable of managing them for herself. We should in any case be extremely reluctant to hold that this decision of the Cadi rendered this woman incapable of exercising her legal rights after a lapse of about 25 years and at a time when, as it appears to us, there is no substantial reason for saying that she was not of sound mind, and, looking to the terms of the Ilam, we do not consider that we are in any way bound so to hold. It appears from the evidence that the guardian appointed by the Cadi never took up his duties, that the deceased shortly afterwards married, and that she has carried on a business on her own account, brought actions in her own name, and, in fact, acted as a person perfectly competent to manage her own affairs. The District Court having had this evidence before them, have decided in favour of the deceased's sanity and we see no reason to say that their decision on this question of fact is wrong.

As to the question whether the deceased had power by law to make the testamentary disposition of her property which she has purported to make, this is a somewhat

more difficult question. There appears to us to be no room for doubt that, according to the laws of the Ottoman Empire, any subject of the Porte who is sui juris may dispose by will of one-third of his estate. The provisions of the law as to wills are not contained in the Nizam but in the Sacred Law, and we know of no modern law conferring on any subjects of the Porte, whether Moslem or Christian, any larger powers of testamentary disposition.

The will or testamentary disposition under consideration in this action is, somewhat to our surprise, sought on the one hand to be upset and on the other hand to be upheld, under the provision of the Vizierial order of 7 Sepher, 1278, which was issued for regulating the taking of inventories of estates of deceased Christian subjects of the Porte and does not appear to us to have been intended in any way to define how a will is to be made, or by whom it can be made, or to add to, or take away from, the powers of testamentary dispositions sanctioned by the Moslem Law.

The object of this Vizierial order is to determine on what occasions the Judges of the Sheri Court are to intervene for the purpose of making inventories of the estates of deceased Christian subjects of the Porte. It commences by stating, that where the heirs of a deceased Christian are adults, the Court is not to interfere except the heirs seek the assistance of the Court; but that, if any of the heirs are minors, the Court is of its own motion to proceed to the making of an inventory—the reason for this being stated in the text—"because the dignity of His Imperial Majesty renders it his duty to watch over the interests of minors." The order then proceeds to give directions as to the appointment of guardians, perception of fees, and other matters not material for us to dwell upon, and having broadly stated, that an inventory is to be made whenever infants are interested in the estate of a deceased Christian, it continues with the proviso which is relied on by both parties in this action. For the plaintiff it is contended, that under this proviso no Christian subject of the Porte can make a disposition of his property binding on his heirs, excepting it be made in strict conformity with the formalities mentioned in this proviso, amongst which formalities it is contended is included actual delivery before death to the donee of the property disposed of. On the other hand, the defendant contends that the intention and effect of the proviso is to give to Christian subjects of the Porte the right to make a will bequeathing not merely a third of their property, which is the only testamentary power allowed to other subjects of the Porte, but the whole of it to whomsoever they please, either to their heirs or to

strangers, and it is argued that the words which would appear at first sight to imply a necessity for delivery, in fact mean only that the testator is to designate and appropriate or allot the property disposed of for the benefit of the legatee without actually handing it over to him. It would be indeed strange, if a Vizierial order issued for the protection of infant heirs could be held to have in this slipshod manner conferred on their ancestors the power to deprive them of the inheritance which the laws of the Empire secure to them.

Were it in our opinion necessary to give effect to either of these contentions, the result in either case would be equally surprising to us. Either contention results in the suggestion that the established law of the Empire as to the power of testamentary disposition is to be radically altered—the one side says diminished and the other enlarged—by a proviso in a Vizierial order which professedly has nothing to do with the subject of testamentary disposition at all, and it would require much stronger wording than we find in this proviso to persuade us, that it was either the intention of the legislator, or the effect of the law as it stands, to alter the pre-existing law as to the power of testamentary disposition enjoyed by any subject of the Porte.

We have obtained all such assistance as we think necessary to arrive at a correct understanding of the original text of the law, and we will endeavour, without pretending to make an exactly literal translation of it, to give as correct a paraphrase as we can.

We have already stated our view of the effect of the earlier part of the order. The proviso, in our opinion, should be read as follows:

Provided that where the deceased shall before his death have bequeathed a third of his estate to specified influential persons, such a bequest shall be regarded as valid according to the Sheri law after his death. And not only that, but where the deceased being of sound mind shall by a valid document, made in the presence of witnesses worthy of credit and legalized by a Patriarch, Metropolitan or Bishop, or by a representative of one of them, have allotted his estate amongst his heirs or other persons, and shall have separated his share, and handed it over to each of them, such documents shall be taken into consideration by the Judge of the Sheri Court and other officials, after they have been proved and established by evidence. No inventory of such an estate is necessary but the property whether moveable or immoveable is abandoned, and caused to remain in the hands of the persons concerned, as stated in the said documents.

The clause concludes with directions that, if the property consists of immoveables, it is absolutely essential that the formalities requisite for the transfer of land shall have been complied with.

The early part of this clause deals with bequests of a third to influential persons. We are informed that by this is meant bequests for undefined religious or charitable purposes, and though we are not called upon to give any decision on the meaning of these words, as the testamentary disposition in the present case is manifestly not in favour of specified influential persons, we may mention that, as at present advised, we are much inclined to suppose that such is the meaning of the expression. A careful consideration of the Turkish text leads us to the conclusion that so far as these charitable bequests are concerned the proviso comes to an end in stating that they are to be regarded as valid according to the Sheri law, and that the latter part of the proviso, stating that no inventory is necessary, has no reference to them.

The second part of the proviso appears to us most clearly to refer not to a will but to a gift or gifts of the deceased's property, made by himself to the objects of his bounty during his lifetime and perfected by actual delivery, and it says that where a deceased person has distributed his property in that way and has recorded the method of distribution in a valid document, legalised by a dignitary of the Christian church, effect is to be given to what is stated in such documents when they are proved and established by evidence, and in such case no inventory need be made. The Turkish words signifying that gift, and delivery of the property given, are necessary are very strong indeed, and we are assured that the framer of the law would have found it difficult to make them stronger, had he desired to do so. In the Greek and French translations of the text the document, which is in the Turkish called a sened, is described as a will "διαθήκη" or "testament," and this has led to an assumption that a new power of making wills is conferred on Christians. The Turkish text, however, which immediately before speaks of a bequest (vasiyet) to notables, (the word bequest being translated in French testament, and in Greek διαθήκη), in the latter part of the clause speaks of a sened, and after saying that when by such a sened the deceased shall have allotted his property, it goes on to say "when he shall have separated the share and handed it over to each one," and we are informed that there is no room whatever for doubt as to the meaning of the word which we here represent by the English "hand over." We are informed that it cannot mean merely "setting apart" or "specifically appropriating," and even

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if the Turkish word were susceptible of such a meaning its juxtaposition with another Turkish word clearly meaning "setting apart" or "separating" would be most remarkable, and later on the Turkish text says that when a man's property has been distributed in this way the property is "abandoned" and "caused to remain in the hands of" the persons concerned as stated in the sened. By "abandoned" is apparently meant not taken into account by the Court, and why it should be enacted that property is "caused to remain in the hands of" the donee if he is not actually in possession of it it is difficult to say. It is suggested that the expression "cause to remain" is used because the Court is directed not to take possession of the property, so that it never is in the hands of the Judge for him to hand over, and is consequently regarded as being in the possession of the person for whom it is stated in the sened to be intended. If the other words of the clause necessitated such a construction this might be possible; but to justify this view, we first have to hold that a word plainly signifying actual delivery is not intended to bear that meaning. If we reject that contention and give the first word its plain meaning, the expression "cause to remain" becomes peculiarly appropriate, and is exactly the word which would be used by a person attempting to state his meaning accurately.

Beyond this, that a gift inter vivos is the transaction referred to in this proviso is rendered more certain by the final direction which says, that, if the property is immoveable it is absolutely essential that the requisite formalities for its transfer shall have been complied with. The tense of the verb employed would of itself make it almost certain that the law means that it is absolutely necessary that the immoveable property shall have been formally transferred with all necessary formalities during the life of the deceased; indeed every clause points to the conclusion that what is referred to is a gift and delivery by the deceased during his lifetime to the object of his bounty.

We have above stated that the proviso, so far as it deals with bequests to notables, only directs that they are to be considered as valid. The words "tels documents" which occur in the French text and "τοιαῦτα ἔγγραφα" which occur in the Greek, are translation of words in Turkish which literally translated mean "the said seneds" and as a sened is mentioned in no part of the clause except in connexion with the transaction which we hold to be a gift inter vivos it is certain that the documents which are to be acted on when proved, are only these seneds recording the particulars of the gift. We may also mention that there is nothing in the text which necessitates that a bequest to

notables shall be in writing, while according to the ordinary law of the Empire there is no doubt that a will may be nuncupative, so that it appears very clear that the direction that no inventory need be made, applies only to the second case dealt with in the proviso, and not to the case of a bequest for undefined charitable uses.

It will have been gathered from what we have here said, that we do not think any new or unusual testamentary powers are conferred on Christians in the somewhat extraordinary manner in which it is suggested they have been; indeed, when we have said that the transaction referred to in the text, which is to be supported by a sened made in presence of witnesses and legalised by a dignitary of the Christian church is a gift inter vivos, and not a will, we have said all that need be said as to the contention raised under this proviso for our decision.

We have somewhat minutely considered the meaning of the clause under which the contention has arisen, as it appears to us that it may be useful, even though it be not necessary, for the purpose of disposing of this action, if we state what we at present consider to be the true meaning of the clause in question. We believe that it means simply that property bequeathed for undefined charitable or religious purposes is to be handed over to the persons named to receive it, and that where a man shall by gift inter vivos have disposed of all his property and shall have recorded the particulars of the gift, the destination of the property and other details, in a formal document, made in the presence of witnesses, and legalised by a dignitary of the church, the Cadi is excused from making an inventory of the deceased's property even though there be infant heirs. This in our opinion is a reasonable and consistent reading of the Vizierial order, and it necessitates no straining of the words used. We say it is reasonable and consistent because the object of the order appears to us to be to necessitate the making of inventories where there are infant heirs. Every man by the law of the Empire having power to dispose by will of one-third of his property, nothing is said, as nothing need be said, about property disposed of by will in the ordinary manner; but to avoid the doubts which appear to exist in the Moslem Law as to when a bequest for charitable purposes is good, and when not, a distinct provision is put in, which, as we have already stated, we understand to mean that property bequeathed for undefined charitable purposes is to be made over to the persons named as the recipients of it. The proviso then goes on to say that where a man shall during his lifetime have so disposed of his property that an inventory of it, or what is equivalent to an inventory, is actually in existence, there is no necessity for the Judge of the Sheri Court to

make one. The proviso does not appear to us to confer any new or extraordinary powers on Christians; it rather has the opposite effect, of rendering gifts of property invalid when the donor dies leaving infant heirs, unless the particulars of such gifts are recorded in the manner prescribed in the Vizierial order. We are not called upon to decide, and we do not express any opinion, on the question whether this proviso authorises a Christian to make a gift of his property otherwise than in conformity with the Moslem Law, but we see nothing to justify the conclusion that this proviso would enable a man to make a donatio mortis causa of more than one-third of his property. All these latter observations however have but little to do with the case before us, and as we have said, they are stated only for convenience, and we do not wish to pledge ourselves to the entire accuracy of what we thus state, although we have much confidence in its correctness.

For the reasons stated we consider that the testatrix in this case had power to make a will disposing of one-third of her property, and we are of opinion that to that extent the will is good, but that it cannot operate to pass more than one third, except with the consent of the heirs; and as they all request that the will may be set aside in toto we presume that they will wish it restricted to a disposition of not more than one-third of the property. We foresee that on this view of the matter many questions may arise as to the distribution of this estate which have not been discussed or attempted to be discussed; and we must leave it to the learned counsel conducting the case to say, whether they are content to take a judgment declaring that the will is good so far only as affects one-third of the estate. It appears to us that all other questions may readily be settled, and, if the parties are content that it should rest there, our judgment will be as above stated. As to the costs, we think that, as neither party is entirely successful, it is somewhat hard to saddle either with the entire costs, but we think that it is the defendant's contention which has led to the necessity of litigation, and we shall therefore give the plaintiffs their costs of appeal, but shall leave each party to pay his own costs in the Court below and the judgment of that Court will be varied to answer this judgment.

If a judgment on further details is required from us we will of course allow the case to stand over in order that it may be ascertained what points need a judicial decision, but in any case the basis of our judgment will be that the will is good so far only as concerns one-third of the estate, and costs up to the present date must be borne in the manner already stated.

Appeal allowed.