1981 September 24

[L. LOIZOU, HADJIANASTASSIOU AND A. LOIZOU, JJ.]

NIKI IOANNOU AND OTHERS,
Appellants-Plaintiffs,

v.

MARCOS MARCOU,
Respondent-Defendant.

(*Civil Appeal No.* 5500).

Will—Effect—Construction—Principles applicable—Testator's intention—Legacy to wife—"All my movable and immovable property"—Testator leaving no child or descendant thereof or father or mother—Amendment of Law between date of execution of will and date of testator's death—Effect of amendment on above legacy—In all the circumstances wife entitled to whole of estate as sole beneficiary—Section 41 *of the Wills and Succession Law, Cap.* 195 *as amended by section* 2 *of Law* 75 *of* 1970.

On June 10, 1965 the deceased Theocharis Christou ("the deseased") made a will* leaving all his estate to his wife and appointing the respondent-defendant as his executor. The deceased died on the 18th March, 1974, without revoking or amending his said will, leaving as his only heirs his wife and the appellants-plaintiffs. Under section 41 of the Wills and Succession Law, Cap. 195, as it stood at the time of making the will, a person dying leaving a spouse or father or mother but no child or descendant thereof could not dispose by will more than half of the net value of his estate and any disposition in excess of the disposable portion ought to be reduced and abated proportionately so as to be limited to the disposable portion. In 1970 the said section 41 was amended by section 2 of Law 75 of 1970 by the addition of a proviso thereto the effect of which was the

* The will is quoted in full at pp. 352-53 *post* and the relevant clause reads as follows:

"2. I give and bequeath absolutely to my wife Maria Theocharous nee Michael Faride of Nicosia all my movable and immovable property situated in Cyprus".

abolition of the provision relating to the reduction and abatement in the case of a person who dies leaving a spouse but no child or descendant of a child and no father or mother and part of the estate in excess of the disposable portion, which could be the whole estate, was left to the surviving spouse.

In an action by the nephews and nieces of the deceased for an order that the estate be distributed in accordance with the provisions of the above law the trial Court, being satisfied that having regard to the clear and unambiguous language of the will and the strong words used in connection with the bequest of the whole of the estate to the wife, inspite of the limitations of the law as it stood before it was amended, the clear intention of the testator was that his wife should take everything to the exclusion of everybody else, and that after the amendment of the law any alteration of the will was superflous and as a will does not confer any rights until after the testator's death, dismissed the action. Hence this appeal which was argued on the sole point of the effect, if any, of the amendment of the law between the date of the will and the date of the death of the testator:

Held, that a will unless a contrary intention appears therein must 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 (see, also, section 36 of Cap. 195); that the intention of the testator as declared by him and apparent in the words of the will, if consistent with the law, shall prevail; that, therefore, in all the circumstances, the wife of the deceased is entitled to the whole of his estate as sole beneficiary under his will; accordingly the appeal must fail (pp. 354–56 post).

Appeal dismissed

Cases referred to:

Hodgson v. *Ambrose* [1870] 1 Doug. K.B. 337; 99 E.R. 216;

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

Perrin and Others v. *Morgan and Others* [1943] 1 All E.R. 182 at p. 190;

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

Antoniades and Another v. *Solomonidou* (1980) 1 C.L.R. 441.

Appeal.

Appeal by plaintiffs against the judgment of the District Court of Nicosia (Stavrinakis, P.D.C. and Artemides, D.J.) dated the 25th September, 1975 (Action No. 5018/74) whereby their claim for a declaration against the validity of the will of the late Theocharis Christou was dismissed.

A. Triantafyllides, for the appellants.

C. Myrianthis with *D. Georghiades*, for the respondent.

Cur. adv. vult.

L. Loizou J. read the following judgment of the Court. This is an appeal against the judgment of the District Court of Nicosia dismissing plaintiffs' claim in Action No. 5018/74. By the said action, the plaintiffs—appellants in this Court—who are the nephews and nieces of the late Theocharis Christou, against the defendant—respondent in the appeal—as executor of the will of the said deceased prayed for a declaration against the validity of the will, an order restraining the defendant from in any way dealing or interfering with the estate, an order appointing the plaintiffs or any one of them as administrators of the estate and an order for the distribution of the estate in accordance with the provisions of the Wills and Succession Law, Cap. 195 (hereinafter to be referred to as the Law).

There was no dispute at all as to the facts so much so that neither party called any evidence.

The relevant facts are as follows:

The deceased made a will on the 10th June, 1965, leaving all his estate to his wife Maria Theocharous and appointing as executor the defendant. He died on the 18th March, 1974, without revoking or amending the said will, leaving as his only heirs his wife and the plaintiffs.

The relevant section of the Law at the time of the making of the will was s. 41. Under the provisions of the said law, as it then stood, a person dying leaving a spouse or a father or a mother but no child or descendant thereof could not dispose by will more than half of the net value of his estate and any disposition in excess of the disposable portion ought to be reduced and abated proportionately so as to be limited to the disposable portion.

In 1970, s. 41 of the Law was amended by s. 2 of Law 75 of 1970 by the addition of a proviso thereto the effect of which was the abolition of the provision relating to the reduction and abatement in the case of a person who dies leaving a spouse but no child or descendant of a child and no father or mother and the part of the estate in excess of the disposable portion, which could be the whose estate, was left to the surviving spouse.

It is pertinent to set out the will in question. It reads as follows:

"Η τελευταία ΔΙΑΘΗΚΗ έμοῦ τοῦ ΘΕΟΧΑΡΗ ΧΡΙΣΤΟΥ έκ Κάτω Λακατάμιας νῦν Λευκωσίαν, γενομένη σήμερον τὴν 10ην ἡμέραν τοῦ μηνὸς Ἰουνίου, 1965.

1..... Διὰ τῆς παρούσης μου ἀνακαλῶ πᾶσαν προγενεστέρως ὑπ' ἐμοῦ γενομένην διαθήκην.

2..... Δίδω καὶ κληροδοτῶ ἀπολύτως εἰς τὴν σύζυγόν μου Μαρίαν Θεοχάρους τὸ γένος Μιχαὴλ Φαρίδη ἐκ Λευκωσίας πᾶσαν τὴν κινητὴν καὶ ἀκίνητον περιουσίαν μου εὑρισκομένην ἐν Κύπρῳ.

3..... Διορίζω ἐκτελεστὴν τῆς Διαθήκης μου ταύτης τὸν ἐκ Καϊμακλίου ὁδὸς Μαραθῶνος No. 3, Μάρκον Χρ. Μάρκου.

(Ὑπ.) Θεοχάρης Χρίστου
10.6.65.

Ὑπεγράφη ὑπὸ τοῦ ρηθέντος Θεοχάρη Χρίστου ἐκ Κάτω Λακατάμιας νῦν Λευκωσία, ἐν ὄψει καὶ παρουσία ἡμῶν πάντων παρόντων ταυτοχρόνως, οἵτινες ἐν ὄψει καὶ παρουσία του, κατ' ἐντολήν του καὶ παρουσία ἀλλήλων ὑπογράφομεν τὰ ὀνόματά μας ὡς ἐπιβεβαιωταὶ μάρτυρες.

(Ὑπ.) Βάσος Βιτσαΐδης,
Χ'' Γιωρκάτζη 11, Ἀγ. Παῦλος.

Ἀνδρέας Μάρκου.
Ἀρεδιοῦ".

("This is the last will of Theocharis Christou of K. Lakatamia now Nicosia made today the 10th day of June, 1965.

1. By the present I revoke every will previously made by me.

2. I give and bequeath solely to my wife Maria Theo-

charous née Michael Faride of Nicosia all my movable and immovable property situate in Cyprus.

3. I appoint as executor of my will Marcos Chr. Marcou of Kaimakli, Marathon Str. No. 3.

(Sgd) Theocharis Christou
10.6.65

Signed by the said Theocharis Christou of K. Lakatamia now Nicosia in our presence, all being present at the same time, who in his presence, on his instructions and in each other's presence signed our names as attesting witnesses.

Vassos Vitsaides
Hji Yorkadji 11, Ay. Pavlos

Andreas Markou
Aredhiou")

At the hearing of the case before the trial Court learned counsel for the appellants abandoned all prayers contained in the writ of summons and the statement of claim except the one relating to the distribution of the estate under the provisions of the law; and this was the only issue that the trial Court had to decide.

The case for the appellants was that the relevant law in putting into effect the will is the law in force at the time of the execution of the will and not the law in force at the time of death but conceded that this would depend on the intention of the testator.

On the part of the respondents, on the other hand, it was contended that the law applicable in putting into effect the will should be the law in force at the time of the death of the testator as the will is purported to be made at the time of his death and this in view of the provisions of s. 36 of the Law.

The gist of the argument of learned counsel for the appellants in support of their case was that the testator is presumed to know the law and, therefore, the deceased is presumed to have known, at the time of making his will, that by leaving everything to his wife in effect he was leaving to her three quarters of his estate the other one quarter going to his other heirs and that the testator, if he really intended to give his wife everything, he he might have made, after the amendment of the law, a codicil

reaffirming the will and since he failed to do so it can be inferred that his original intention remained unaltered.

The trial Court being satisfied that having regard to the clear and unambiguous language of the will and the strong words used in connection with the bequest of the whole of the estate to the wife, inspite of the limitations of the law as it stood before it was amended, his clear intention was that his wife should take everything to the exclusion of everybody else and that after the amendment of the law any alteration of the will was superfluous and as a will does not confer any rights until after the testator's death dismissed the action. Against that judgment the plaintiffs now appeal on various grounds.

The point on which this case was argued on appeal was the effect, if any, of the amendment of the law enacted between the date of the will and the date of the death of the testator.

The contention of learned counsel for the appellant, briefly, was that since at the time of the making of the will under the provisions of the law in force the part of the estate over and above the disposable portion would be reduced and abated for the benefit of the other heirs and since after the amendment of the law he did not do anything in relation to his will he must be presumed to have intended that his lawful heirs would get the one quarter of his estate and that, therefore, the law applicable should be the law in force at the time of making the will and not that in force at the time of his death.

In deciding this issue in the present case we consider it useful to refer to s. 36 of the Law to which reference has been made.

It 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".

Very similar to our s. 36 is s. 24 of the Wills Act, 1837, in England which reads as follows:

"Every will shall be construed, with reference to the real estate and the 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".

In Halsbury's Laws of England, 3rd ed., p. 1012, para. 1533 it is stated in relation to s. 24 of the English Act that a will unless a contrary intention appears therein must 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".

The above statutory provisions, however, as clearly stated therein, expressly relate only to the property comprised in the will with the result that if the thing given is generic, so that the descriptions made from time to time apply to different amounts of property of like nature or to different objects and the testator acquired further property of the same kind subsequent to the will, such property, unless a contrary intention appears, passes under the will.

But this question does not arise in the present case which, in our view, has to be decided solely with regard to the intention of the testator.

In Halsbury's Laws of England, 3rd ed., vol. 39, p. 950, para. 1438 where reference is made to the functions of the Court in construing a will it is clearly stated that "the intention of the testator, as declared by him and apparent in the words of the will, has effect given to it, so far and as nearly as may be consistent with law".

In the above paragraph reference is made to a case decided two centuries ago which was subsequently affirmed by the House of Lords. It is the case of *Hodgson* v. *Ambrose* [1870], 1 Doug. K.B. 337; 99 E.R. 216; Buller, J. had this to say in the course of his judgment: "There is no rule better established than that the intention of a testator expressed in his will, if consistent with the rules of law, shall prevail. That is the first and great rule in the exposition of all wills; and it is a rule to which all others must bend. It says, 'if consistent with the rule of law'; but it must be remembered, that those words are applicable only to the nature and operation of the estate or interest devised, and not to the construction of the words..... But the question, whether the intention be consistent with the

rules of law or not, can never arise, till it is settled what the intention was".

In *Beddigton and another* v. *Baumann and another* [1903] A.C. 13 the Earl of Halsbury L.C. said this (at p. 16): "Of course, the broad proposition which Cozens-Hardy L.J., 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.' "

In *Perrin and Others* v. *Morgan and Others* [1943] 1 All E.R. 182 Viscount Simon L.C., said (at p. 190):

> "My Lords, the fundamental rule in construing the nature 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 used meant in the particular case—what are the 'expressed intentions' of the testator".

And in the more recent case of *Blathwayt* v. *Lord Cawley and Others* [1975] 3 All E.R. 625 at p. 641 Lord Cross said the following:

> "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".

Before concluding this judgment we may usefully refer to a case decided by this Court quite recently and in which a very thorough and lucid review of the authorities on the subject, including the last three cases quoted above, is made. It is the case of *Antoniades and Another* v. *Solomonidou* (1980) 1 C.L.R., 441.

In the light of all the foregoing we find ourselves in full agreement with the conclusion reached by the trial Court that, in all the circumstances, the wife of the deceased is entitled to the whole of his estate as sole beneficiary under his will.

In the result this appeal is dismissed. With regard to costs we, same as the trial Court and for the same reasons, order that they be paid out of the estate.

Appeal dismissed. Costs out of the estate.