1988 October 15

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

GEORGE P. CACOYIANNIS IN HIS CAPACITY AS:

1. ADMINISTRATOR OF THE ESTATE OF THE LATE COSTAS A. PATIKIS,
2. DULY AUTHORIZED REPRESENSTATIVE OF THE GENERAL PARTNERSHIP A. G. PATIKIS & CO. UNDER LIQUIDATION AND OF EACH ONE THE GENERAL PARTNERS THEREOF,
3. DULY AUTHORIZED REPRESENTATIVE OF ANNA ANAGNOSTOPOULOU (NOW MALAVAKI), AND GEORGHIA ANAGNOSTOPOULOU (NOW CHRISTODOULOPOULOU),

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE DIRECTOR OF THE DEPARTMENT OF LANDS AND SURVEYS,

Respondents.
(Case No. 799/85).

Legitimate interest—Transfer of property by administrator of an estate to legatees of the deceased under the will—Registration fees paid under the Department of Lands and Surveys (Fees and Charges) Law, Cap. 219, section 7 and Schedule to section 3, Chapter 3, para. (e), as amended by sections 3 and 5 of Law 31/76—As under the aforesaid provisions the fees are payable by the legatees, the only persons possessing legitimate interest to challenge the relevant decision are the legatees.

Fees—Distinction between fees and charges.

Taxation—Fees—Distinction between fees and charges—Immovable property—Registration fees—The Department of Lands and Surveys (Fees and Charges) Law, Cap. 219, section 7 and Schedule to section 3 Chapter 3, para.(e), as amended by sections 3 and 5 of Law 31/76—The "fees" payable thereunder are not fees stricto sensu, but a form of taxation.

Words and Phrases—"Heir" in the Wills and Succession Law, Cap. 195.

Words and phrases: "Heir" in the Administration of Estates Law, Cap. 189.

Wills and Succession—The Wills and Succession Law, Cap. 195, sections 46 and 49 and First Schedule—Intestacy—The persons belonging to the second class—Descendants of the brothers and sisters of the deceased—They are entitled to inherit only if their ancestors, being the brother or sister of the deceased, predeceased the deceased.

Wills and Succession—Will—What is the nature of a will and when it takes effect.

Wills and Succession—Immovable property of deceased—Vests in his personal representatives, who, however, hold it in trust for the beneficiaries—It vests in the beneficiaries upon actual transfer to them—Any registration fees payable in respect of such transfer under Cap. 219, as amended, are not levied for the acquisition of the beneficial title, but for the registration of the title—Therefore, the law governing such fees is the law in force at the time of such transfer, and not that in force at the time of the deceased's death.

Immovable property—Registration fees—The Department of Lands and Surveys (Fees and Charges) Law, Cap. 219, section 7 and schedule to section 3, Chapter 3, para. (e), as amended by sections 3 and 5 of Law 31/76—Legatees under the deceased's will, who are not among the lawful heirs of the deceased, should pay registration fees calculated on the market value of the land at the time of the deceased's death—The law governing the fees is the law in force at the time of the transfer—The fact that if the gift had been made inter vivos, the fees would have been calculated on a different basis, because the legatees were the deceased's nieces, is irrelevant—In this case the legatees could not be considered as heirs, because at the time of the testator's death, his sister i.e. the mother of the legatees was still alive.

Constitutional Law—Equality—Constitution Art. 28—Taxation—The State is allowed to choose objects, persons, methods and rates of taxation—Gift of immovable property inter vivos and legacy of immovable property—Registration fees—Different fees payble in the first case from those payable in the second—Differentiation reasonable.

The facts of this case are briefly as follows:

Applicants 3 are legatees under the will of Costas Patikis. They are the daughters of his sister. When the testator passed away on 16.1.74, his sister was still living. The immovable properties comprised in the legacies

were transferred in the name of applicants 3 on 16.10.84. The Director of the Department of Lands demanded £4,165 by way of transfer fees.

Section 7 of Cap. 219 radically amended by Law 31/76. At the time of the transfer, it read:

"7. No fee is levied or taken on the basis of Chapter 3 of the Schedule for the registration of immovable property

(a) acquired by a lawful heir of a deceased person, either by intestate succession or by testamentary succession;"

Chapter 3 of the Schedule to section 3 was amended by Law 31/76 by the addition of a new paragraph (e) to the effect that in case of transfer by reason of a will the fee is 5 per cent on the value of the land as assessed by the Director. Para. (e) was amended by Law 66/79 and 2/82, which provided that the 5 per cent will be calculated on the market value of the land on the date of the testator's death as such value will be assessed by the Registrar.

Having analysed the aforesaid provisions of the Wills and Succession Law, Cap. 195 the Court concluded that the legatees were not among the lawful heirs of the deceased, because, at the time, of the latter's death, their mother (the sister of the deceased) was still alive. The fact that she died prior to the time of the said transfers did not transform the applicants into heirs of the deceased. As the property of the deceased vests in his personal representatives and not in the beneficiaries of the will and as the registration fees under Cap. 219, as amended, are not levied for the acquisistion of the beneficial title upon the death of the deceased, but for the actual registration of the property in the legatee's name, the law applicable is that in force at the time of the transfer. Had the same property been gifted inter vivos, the fees for the registration would have been governed by section 3(b)(iii) as a gift from a relative to a relative within the third degree of kindred. Section 3(b)(iii), however, is not applicalbe in this case, because the distinction between a gift inter vivos and a legacy is clear. Moreover, the difference between the fees payable in the first case from those payable in the second case is reasonable and, therefore, does not infringe the principle of equality.

In the light of the above the Court dismissed the recourse of applicants 3. Applicants 1 and 2 were not considered as having a legitimate interest. The reason is sufficiently indicated in the hereinabove headnote.

Recourse dismissed.
No order as to costs.

Cases referred to:

Elia Hotel Apartments Ltd. and Another v. The Municipality of Polis Chrysochou (1988) 3 C.L.R. 1529;

Constantinides v. E.A.C. (1982) 3 C.L.R. 798;

Apostolou and Others v. The Republic (1984) 3 C.L.R. 509;

Lami Groves Ltd. v. The Republic (1986) 3 C.L.R. 2378;

Hara Hotels v. The Republic (1987) 3 C.L.R. 618;

Loizou v. Sewage Board of Nicosia (1988) 1 C.L.R. 122;

M.J. Louisides and Sons Ltd. v. The Minicipality of Limassol (1988) 3 C.L.R. 1017;

Lanitis and Another v. Republic (1985) 3 C.L.R. 2541;

Beddington and Another v. Bauman and Another [1903] A.C. 13;

Llanover (Baroness) In re: Herbert v. Freshfield, 72 L.J. Ch. 729;

Whitehead v. Taylor [1839] 10 A. and E. 210, E.R. (K.B.) p.81;

Millington-Ward v. Roubina (1970) 1 C.L.R. 88;

Mikrommatis v. The Republic, 2 R.S.C.C. 125;

Republic v. Arakian and Others (1972) 3 C.L.R. 294;

Papaxenophontos and Others v. The Republic (1982) 3 C.L.R. 1037;

Antoniades and Others v. The Republic (1979) 3 C.L.R. 641.

Recourse.

Recourse against the decision of the respondents to charge and collect from applicant the sum of £4,165 by way of transfer fees for the transfer and registration of the immovable properties previously registered in the names of A.G. Patikis & Co. and the late Costas A. Patikis into the names of the legatees.

G. Cacoyiannis, for the applicant.

A. Evangelou, Senior Counsel of the Republic, for the respondents.

Cur. adv.vult.

STYLIANIDES J. read the following judgment. The applicants by means of this recourse seek:

"A. Declaration that the act or decision of the Respondent to charge and collect from the Applicant on behalf of Anna Anagnostopoulou (now Malavaki) and Georghia Anagnostopoulou (now Christodoulopoulou) both of Athens, (who are sisters and are hereinafter called the legatees) CY£4,165 (CY£4,150 on 6.8.1985) and CY£15 on 10.8.1985) by way of transfer fees for the transfer and registration of the immovable properties previously registered in the names of A.G. Patikis & Co. and the late Costas A. Patikis (hereinafter called 'the deceased') unto the names of the legatees as part of the division, distribution, transfer and registration unto the names of the persons entitled thereto of all the immovable properties registered in the said partnership A.G. Patikis & Co. and the deceased, is null and void and of no effect whatsoever."

The facts of the case, over which there is no dispute, are as follows:

Costas A. Patikis, Greek national of Cyprus residence and domicile, hereinafter referred "the deceased", passed away on

16th January, 1974, leaving his sister Styliani Anagnostopoulou (nee Patiki) and the son of his predeceased brother Takis Patikis - Athos T. Patikis - as his lawful heirs.

He disposed his property by will, dated 16th December, 1968. By the said will he devised and bequeathed the whole of his estate in Cyprus - after deduction therefrom of a small legacy, to which I need not refer, the costs of the administration, the estate duty, etc. - to the following persons:

(a) To his niece Anna Anagnostopoulou 35%
(b) To his niece Georghia Anagnostopoulou 35%
(c) To his nephew Athos T. Patikis 30%

Anna and Georghia Anagnostopoulou are the daughters of his sister Styliani Anagnostopoulou.

He nominated therein Sir Panayiotis L. Cacoyiannis executor and in case of his demise, or incapacity for any reason, or cause George P. Cacoyannis - (see Will - Exhibit "D").

The named executor, Sir P.L. Cacoyiannis, applied for probate of the will in the District Court of Limassol.

Athos T. Patikis contested the validity of said will by Action No. 834/74.

On 5th April, 1974, Sir P.L. Cacoyannis was appointed executor of the will pendente lite, under the provisions of section 20 of the Administration of Estates Law, Cap. 189.

On 19th September, 1974 the said executor addressed to the Land Registry Office the appropriate notice under the provisions of section 7 of Cap. 189.

On 28th May, 1975, sister Styliani Anagnostopoulou died.

On 30th December, 1977, following the determination of Ac-

tion No. 834/74, the said will of the deceased was proved and probate thereof was granted by the District Court of Limassol to Sir Panayiotis L. Cacoyiannis, who, however, before completing the administration, died on 9th December, 1980. On 21st March, 1981 the administration of the property was granted to George P. Cacoyiannis.

Upon his death, the deceased was the owner in his own right and/or as one half partner in A.G. Patikis & Co. under liquidation of considerable immovable property in the area of Limassol.

On 16th October, 1984, G.P. Cacoyiannis in his capacity as administrator of the estate of the deceased and as attorney of Anna Anagnostopoulou (Malavaki), Georghia Anagnostopoulou (Christodoulopoulou), both of Athens, and the partners of A.G. Patikis & Co. - Georghios V. Patikis, Stergios V. Patikis and Marika V. Patiki of Athens - applied that the immovable property of the dissolved partnership A.G. Patikis and the immovable property which is registered in the name of those entitled thereto and the legatees/heirs according to the partnership shares and their rights by succession and legacy. The shares are set out with particularity therein and all necessary documents and the respective title deeds were attached.

The shares sought by that application to be registered in the name of Anna Anagnostopoulou, Georghia Anagnostopoulou, and Athos T. Patikis are as per the above referred will.

With regard to the registration fees he attached an opinion of a legal consultant to the effect that no fees should be paid; in order to avoid delay he expressed his willingness to pay any fees the Director might decide under protest and with full reservation of the relevant rights of the interested parties to challenge the legality of payment of such fees before the appropriate Court.

The Director took the sub judice decision, under the Department of Lands and Surveys (Fees and Charges) Law, Cap. 219, section 7 and Schedule to section 3, Chapter 3, paragraph (e), as

amended by sections 3 and 5 respectively of the Department of Lands and Surveys (Fees and Charges) (Amendment) Law of 1976, (Law No. 31/76).

There was no quarrel with regard to the market value of the immovable property in question on 16th January, 1974.

No fees were demanded, or collected for the registration in the name of the other legatee - Athos T. Patikis as he was a lawful heir of the deceased testator; the legatees - nieces were not considered heirs of the deceased, as their mother was alive at the time of the death of the de cujus.

The amount was paid. The registrations were effected.

Hence this recourse.

This recourse was taken by:

1. The administrator of the estate of the late Costas A. Patikis.

2. The general partnership A.G. Patikis & Co., under liquidation and of each one of the general partners thereof; and

3. Anna Anagnostopoulou (now Malavaki) and Georghia Anagnostopoulou (now Christodoulopoulou).

The act challenged refers only to applicants No. 3, the sisters Anna Anagnostopoulou and Georghia Anagnostopoulou, the legatees of the will of the late Costas A. Patikis.

The Law under which the decision was taken provides expressly that the fees for registration are payable by the persons in whose name the registration is to be effected.

The duty of the administrator of the estate is to carry out the provisions of the will according to law and consequently to take the necessary steps for the registration of the property in the name

of the legatees, but the payment of the registration fees is not included in the payments he is bound to do under the Administration of Estates Law, Cap.189 and in the present case, having regard to the contents of the will, no such obligation exists under the will.

Therefore, applicants 1 and 2 have no legitimate interest to raise this recourse and have no locus standi.

The fees in this case are not "fees" stricto senso but a form of taxation.

A "fee" is generally defined to be a charge for a special service rendered to individuals by some public authority and is supposed to be based on the expenses incurred in rendering the service, though in many cases the costs are arbitrarily assessed.

A "tax" is a compulsory exaction of money by public authority for public purpose enforceable by law and is not a payment for services rendered.

The reason for the payment in the case of fees is the special benefit accruing to the individual; in the case of tax, the particular advantage, if it exists at all, is an incidental result of state action.

(See Elia Hotel Apartments Ltd. and Another v. The Municipality of Polis Chrysochou, (1988) 3 C.L.R. 1529; *Alecos Constantinides v. The Electricity Authority of Cyprus (1982) 3* C.L.R. 798; *Apostolou and Others v. The Republic* (1984) 3 C.L.R. 509; *Lami Groves Ltd. v. The Republic* (1986) 3 C.L.R. 2378; *Hara Hotels v. Republic* (1987) 3 C.L.R. 618; *Meropi Michael Loizou v. Sewage Board of Nicosia* (1988) 1 C.L.R. 122; *M.J. Louisides & Sons Ltd., v. The Municipality of Limassol,* (1988) 3 C.L.R. 1017. See, also, *Fritz Fleiner - Administrative Law, 8th Edition, Greek translation by G. Stymphaliades,* pp. 391-392).

In *Lanitis & Another v. Republic* (1985) 3 C.L.R. 2541, Malachtos J., at p. 2546 said:

"As stated in section 3 of the Department of Lands and Surveys (Fees and Charges) Law, Cap. 219, fees are charged in respect of the various matters set out in the Schedule to the Law. In paragraph 3(b)(v) of the Schedule, as amended by section 2 of Law 66 of 1979, it is provided that fees for registration of title by transfer payable by the person to be registered upon gift other than by parent to child or by relative to relative, up to the third degree, or by spouse to spouse; as in the present case, the fee reckoned on the market value to be determined by the Director.

It can reasonably be inferred from the wording of the Schedule that the fee payable in the case in hand cannot be considered as being charged for services rendered but it is a kind of tax payable to the revenue of the State."

The matter of fees and charges for the transfer and registration of property, inter alia, are governed by the Department of Lands and Surveys (Fees and Charges) Law, Cap. 219, which was enacted on 17th February, 1954. Section 7 thereof ran as follows:

"7. No fee or annual charge shall be levied or taken upon the registration of a title to immovable property acquired by inheritance."

On 13th November, 1970, the aforesaid section 7 was repealed and substituted by section 6 of the Amending Law No. 81/1970. The new statutory provision reads:

"7. Εν περιπτώσει κτήσεως ακινήτου ιδιοκτησίας διά κληρονομικής διαδοχής ουδέν τέλος επιβάλλεται ή εισπράττεται επί τη βάσει του παρόντος Νόμου πλην του τέλους αιτήσεως και του τέλους πιστοποιητικού εγγραφής."

("7. No fee shall levied or taken on the basis of the present

Law in the case of acquisition of immovable property by succession except fee for the application and fee for the certificate or registration.")

It is pertinent to state at this point that the expression "κληρονομική διαδοχή" includes both testate and intestate succession.

Section 4 of the Wills and Succession Law, Cap. 195 provides that succession to an estate may be either by will or by the operation of law or by will and by the operation of law.

The Amending Law, Law No. 31/76, brought two radical changes:

(a) Section 7 of the basic Law was repealed and substituted by section 3, the material part of which reads:

"7. Ουδέν τέλος επιβάλλεται ή εισπράττεται βάσει του Κεφαλαίου 3 του Πίνακος διά την εγγραφή τίτλου ακινήτου ιδιοκτησίας.

(α) κτηθείσης υπό νομίμου κληρονόμου αποθανόντος προσώπου, είτε δι' εξ αδιαθέτου διαδοχής είτε δι' εκ διαθήκης τοιαύτης·"

("7. No fee is levied or taken on the basis of Chapter 3 of the Schedule for the registration of immovable property

(a) acquired by a lawful heir of a deceased person, either by intestate succession or by testamentary succession,

(b) Chapter 3 of the Schedule to section 3 was amended by the addition of new paragraph (e) as follows:

"(ε) δυνάμει εκ διαθήκης διαδοχής, του τέλους υπολογιζομένου επί της αγοραίας αξίας ως αύτη ήθελεν εκτιμηθή υπό του Διευθυντού: 5 επί τοις εκατόν:

Νοείται ότι η υπό του Διευθυντού ούτως εκτιμηθείσα αγοραία αξία κοινοποιείται προς τον κληροδόχον ο οποίος κέκτηται δικαίωμα εφέσεως ασκουμένης, τηρουμένων των αναλογιών, κατά τον αυτόν τρόπον ως εάν ήτο έφεσις βάσει του άρθρου 80 του περί Ακινήτου Ιδιοκτησίας (Διακατοχή, Εγγραφή και Εκτίμησις) Νόμου"

By Law 66/79, which came into operation on 13th July, 1979, the whole Schedule to section 3 was repealed and replaced by a new one. Paragraph (e) to Chapter 3 of the new Schedule reads:

"(ε) δυνάμει εκ διαθήκης του τέλους υπολογιζομένου επί της αγοραίας αξίας ως αύτη ήθελεν εκτιμηθή υπό του Διευθυντού βάσει της εν τω Κεφαλαίω 17 Κλίμακος."

This paragraph was amended by section 4 of Law 2/82 by the addition of the words" on the date of the death of the testator" after the words "on the market value". That is, the market value shall be assessed as on the date of death of the testator. This, however, has a bearing on the reckoning of the fee payable and not the obligation to pay.

Law 15 of 1980 added a new Chapter 3A to the Schedule to section 3 of the Law. This sets out the fees payable for registration of leases, under Part IV of the Immovable Property (Tenure, Registration and Valuation) Law as it had been amended. It is noteworthy that for registration of transfer of real right (εμπράγματο δικαίωμα) acquired by lease or sub-lease paragraph (στ) provides:

"(στ) Δι' εκ διαθήκης διαδοχής προς μη κληρονόμον, του τέλους υπολογιζομένου επί της αγοραίας αξίας ως αύτη ήθελεν εκτιμηθή υπό του Διευθυντού, 5 επί τοις εκατόν:"

Counsel for the applicants contended that under section 7, as amended by Law 31/1976, the registration of title of immovable property acquired by a lawful heir of a deceased person, either ab

intestato or by will, is exempted from payment of fees. As the sister of the deceased and mother of the applicants who was living at the date of death - 16th January, 1974 - passed away on the 28th May, 1975, as from that date, her children, the applicants - Anna and Georghia Anagnostopoulou - became the lawful heirs of the deceased Costa A. Patikis. Thus on 2nd July, 1976, the date of the coming into operation of Law 31/1976, they were lawful heirs of the de cujus Costas A. Patikis and as the immovable property was acquired by testamentary succession, no fee is levied or taken under Cap. 219 and the Amending Laws 31/1976 and 66/1979 for the registration of title in their name. (See p. 6 of the legal opinion of the legal consultant - Exhibit "GG" - which is integral part of the recourse and the address of counsel.)

Succession is the transfer of the legal relations of defunctus to the heir or the coming into operation of the ambulatory document of the last will of a deceased.

Succession is an extension of the right of ownership of physical person upon his death.

The State, for the protection of a number of persons closely related to the deceased, has regulated the class of persons, the relationship and the portion each one is entitled to receive from the estate, if the deceased has not during his lifetime exercised the power of disposing of his property by will. A will is an instument whereby he controls the posthumous disposition of his property. The will of a testator of his kindred in blood. Succession refers to dead persons - the material time being the end of his life - and not to living persons - hereditas viventis non datur.

If a deceased person does not exercise during his lifetime the power of disposition of his property by will, the undisposed portion and the statutory portion devolve on his heirs according to the provisions of the Law in operation.

Heir is defined in both the Wills and Succession Law, Cap. 195 and the Administration of Estates Law, Cap. 189 to mean a

person who by operation of law succeeds to an estate.

The succession of the kindred is governed by section 46 of Cap. 195 and the first Schedule to the Law. It may be convenient to set out this section and section 49:

"46. Subject to the provisions of this Law as to the incapacity of persons to succeed to an estate and subject to the share of a surviving wife or husband of the deceased, the class of person or persons who on the death of the deceased shall become entitled to the statutory portion, and the undisposed portion if any, and the shares in which they shall be so entitled, if more than one, shall be as set out in the several columns of the First Schedule to this Law:

Provided that persons of one class shall exclude persons of a subsequent class."

"FIRST SCHEDULE

Succession of the Kindred

Class	Persons entitled	Shares
1. First Class	1. (a) Legitimate children of the deceased living at his death; and (b) descendants, living at the death of the deceased, of any of the deceased's legitimate children who died in his lifetime.	1. (a) In equal shares (b) in equal shares per stirpes.
2. Second Class	2. (a) Father, mother of the deceased living at his death (or if not living at his death, the nearest ancestor living at his death) and brothers and sisters of the full and half blood of the deceased living at his death; and (b) descendants, living at the death of the deceased, of any of the deceased's brothers or sisters who died in his lifetime."	2. (a) All in equal shares except that brothers and sisters of the half blood take half the share of a brother or sister of the full blood; (b) in equal shares per stirpes.

"49. Where in this Law it is provided that any class of persons shall become entitled to the statutory portion and the undisposed portion per stirpes, it means that the child of any person of the defined class who shall have died in the lifetime of the deceased and who, if he had survived the deceased, would have become entitled on the death of the deceased to a share in the statutory portion, and the undisposed portion if any, shall become entitled only to the share which the parent would have taken if he had survived the deceased."

These sections in plain unambiguous language enact that one class of persons, if living, excludes the lower class.

The first Schedule referred to above is under the heading "Succession of the Kindred"; and is framed in three columns. The first, under the heading "Class" divides the persons entitled to succeed to the estate of the deceased, into four classes. The second, under the heading "Persons entitled", places the heirs entitled to succeed, into those four classes, according to their degree of proximity of their relationship to the deceased. And the third column, under the heading "Shares", sets out the shares in which the heirs in each of the four classes, are entitled to succeed to the estate.

The second class contains the father, mother, brothers and sisters of the deceased, and likewise, makes a distinction between the heirs living at the time of the deceased's death, and the descendants of brothers and sisters who died in his lifetime.

In construing the statutory provisions applicable to the matter in hand, we must look for the intention of the legislator.

Reading section 46 in its context in the statute, together with the relevant Schedule, I have no doubt that the legislator intended that the respective rights of inheritance should be governed by the provisions in the First Schedule, depending on the class where each heir can be placed.

It is, I think, equally clear that the legislator intended that those falling in the second class of the same Schedule should be entitled to inherit; that the descendants of his predeceased brothers or sisters (falling in the second class of the same Schedule) should be entitled to inherit, per stirpes, the share of their predeceased ancestor.

The descendants of the deceased brother and sisters are entitled to inherit only if their ancestor died in the lifetime of the person to be inherited, the deceased. They are entitled to inherit only if their ancestors predeceased and if their ancestor survived the deceased, he is the heir, he is the person entitled on the death of the deceased to inherit.

The applicants in the present case, as their mother - sister of the deceased - survived the deceased, having died more than sixteen months after his death, were not and are not heirs of Costas A. Patikis. Upon the death of their mother they acquired the quality of her heirs, but they are not and could not be the heirs of the cujus. Legatees are not heirs in the sense of the Law.

Stroud's Judicial Dictionary, Volume 3, 3rd Edition, at p. 2148, states:

"PER STIRPES. (1) .....
(2) Where a distribution of property amongst a CLASS embracing descendants is to be per stirpes, the principle of representation will be applied through all degrees, children never taking concurrently with their parents..."

The language of section 46 and section 49 is so plain that excludes any other interpretation.

In view of the above, if the Law applicable is Law 31/1976, which is identical with Law 66/1979, the applicants are not exempted from payment of fees, as they were not lawful heirs of the deceased.

It was, further, contended that the Law applicable is the Law in operation on the date of death of the de cujus, that is the basic Law as amended by Law 81 of 1970.

On the death of a person his estate shall pass as a whole to one or several other persons - (see sections 3 and 4 of the Wills and Succession Law).

The question was raised when the immovable property was acquired by the applicants. The property was acquired by testamentary succession.

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 is a replica of section 24 of the English Wills Act 1837. A will is an ambulatory document having no force or effect, whatsoever, until the death of the gentleman who made a will. It operates nothing and can operate nothing until it becomes consummated by the death of the testator. (See *Bedington and another v. Baumann and another* [1903] A.C. 13; *Llanover (Baroness) In re; Herbert v. Freshfield,* 72 L.J. Ch. 729.)

The will has to be probated. From and after the grant of probate the rights and liabilities attaching to the estate of the deceased (including the statutory portion and the undisposed portion) shall be deemed to have vested in the personal representative from the date on which the deceased died - (section 25 of the Administration of Estates Law, Cap. 189).

An executor derives title from the will, and the probate relates back to the moment of the testator's death. The assets of the estate vest in an executor from that moment. Though the executor de-

rives his title from the will and not from the probate, yet probate is the authenticated evidence of the executor's title - (*Whitehead v. Taylor* [1839] 10 A. & E. 210, 113 E.R. (K.B.) p. 81).

The executor as from the testator's death holds the immovable (and other) property of the deceased in trust for the beneficiaries and not personally - (*Aspasia Millington-Ward v. Chloi Roubina* (1970) 1 C.L.R. 88).

It is the duty of the executor to proceed and carry out the provisions of the will - section 41 of Cap. 189.

The question for the determination is not when the two legatees - applicants - became beneficially interested in the said immovable devised to them, but the Law applicable for the levy and payment of fees for the registration.

The material part of section 3 speaks that the acquisition of the beneficial interest by will the legatees - applicants, but a fee for the registration of title of immovable property by the Department of Lands and Surveys.

The proposition that the Law applicable should be the Law in operation as on the date that the will spoke and the legatees - applicants became beneficially interested in the immovables is untenable.

The request for the registration to the Lands Department was made in August 1984. The Law in operation on that date is the Law applicable.

Alternatively to the above, it was contended that since the legacy under the said will to the legatees was a legacy by an uncle (the deceased) to his two nieces, it amounted to a gift (not inter vivos but a gift taking effect upon the death of the deceased) from a relative to a relative within the third degree of kindred and the fees payable should have been calculated at 8% of the "value" as defined in section 2(1) of the Law, the value registered or recorded

in the books of the District Lands Office.

The Law makes definite expressed distinct provision for gift inter vivos and for registration of property acquired by will. Paragraph 3(b)(iii) of the Schedule to section 3 prescribes the fees payable by the person to be registered by virtue of declaration of transfer by gift, by relative to relative up to and including the third degree of kindred.

The intention of the legislator is clear. The applicants are not donees within the ambit of 3(b)(iii).

Further, it was submitted that the differentiation between the fees payable for the registration upon declaration of transfer by gift (inter vivos) and the provision for the fees for registration by virtue of succession is discriminatory, and infringes the principle of equality safeguarded by Article 28 of the Constitution.

The principle of equality, enunciated and safeguarded by Article 28 of the Constitution, was judicially considered the first in *Mikrommatis* case, 2 R.S.C.C. 125, a case concerning income tax; it was said:

> "In the opinion of the Court the term 'equal before the law' in paragraph 1 of Article 28 does not convey the notion of exact arithmetical equality but it safeguards only against arbitrary differentiations and does not exclude reasonable distinctions which have to be made in view of the intrinsic nature of things. Likewise, the term 'discrimination' in paragraph 2 of Articles 28 does not exclude reasonable distinctions as aforesaid."

The principle of equality was considered, ever since, in numerous cases including *The Republic (Ministry of Finance) v. Nishan Arakian and Others* (1972) 3 C.L.R. 294; *Papaxenophontos and Others v. Republic* (1982) 3 C.L.R. 1037.

In social and economic legislation the legislature is allowed

great latitude in making classifications. Moreover, absolute equality in taxation cannot be obtained and is not really required by the principle of equality. The State is allowed to choose objects, persons, methods and even rates of taxation - (*Serghios Antoniades and Others v.The Republic* (1979) 3 C.L.R. 641; *Apostolou and Others v. Republic* (1984) 3 C.L.R. 509).

A gift inter vivos and legacy are intrinsically different matters. The distinction between gift inter vivos and legacy is a reasonable one.

The differentation in the fees payable is not beyond the permissible margin of reasonable differentiation.

The applicants have not satisfied the Court that this part of the Law is beyond reasonable doubt, contrary to, or inconsistent with the provisions of Article 28 of the Constitution.

For all the aforesaid reasons, the recourse fails. The sub judice decision is confirmed under Article 146.4(a), but, in all the circumstances, I make no order as to costs.

Recourse dismissed.
No order as to costs.