

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF CYPRUS

UNIVERSITY OF LONDON
W.C.1.
- 7 FEB 1961
INSTITUTE OF ADVANCED
LEGAL STUDIES

B E T W E E N

ZALIBE VELI OF POLIS CHRYSOCHOU
suing as next friend and natural
guardian of her minor children
ISMAIL and NAHITE NEVZAT ISMAIL
EFF (Plaintiffs)

Appellants

50933

- and -

1. SEVIM ISMAIL OF CHRYSOCHOU
2. KATRI ISMAIL OF CHRYSOCHOU
3. MENSUR ISMAIL OF NICOSIA
AUDIT DEPARTMENT
4. EMINE ISMAIL OF CHRYSOCHOUS
5. HANIFE HUSNU OF CHRYSOCHOU
(Defendants)

Respondents

CASE OF THE APPELLANTS

Record

20 1. This is an Appeal from a judgment of the Supreme Court of Cyprus dated the 14th January 1959 by which judgment the Supreme Court of Cyprus set aside a judgment of the District Court of Paphos dated the 27th June 1958 in favour of the Appellants that the Appellants were entitled to succeed to the property of Ismail Katri Bey without bringing into account the movable and immovable property received by their father from their grandfather Ismail Katri Bey. P.38 P.14

30 2. The question in issue arises on the counterclaim of the Respondents and is as to whether the Appellants in reckoning their share in the estate of their P.4 lines 20 to 41

Record

grandfather Ismail Katri Bey are bound to bring into account the movable and immovable property received from him by their father Nevzat Ismail during his lifetime or not.

P.6 lines 1 to
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3. The said Ismail Katri Bey died in the year 1954 and his lawful heirs are the first four Respondents (who are his surviving children) the fifth Respondent (who is his widow) and the Appellants who are the only children of his son the said Nevzat Ismail who died in the year 1953 and so predeceased him.

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P.3 lines 5 to
16 and P.4
lines 6 and 7

4. The estate of the said Ismail Katri Bey is distributable in accordance with the provisions of Cap 220 The Wills and Succession Law and the question in issue depends upon true construction of certain of its provisions.

P.12 lines 20 to
23

5. The Appellants' father received from his father the said Ismail Katri Bey by way of advancement or under marriage contract movable and immovable property to the value of £1,650.

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P.6 lines 1 to 4

6. The first Respondent Sevim Ismail received from his father the said Ismail Katri Bey by way of advancement or under marriage contract movable or immovable property to the value of £1,200. No other heir received anything from the said Ismail Katri Bey during his lifetime.

P.6 lines 4 to 9

7. This action was commenced by the Appellants on the 20th October 1956 and by the writ of summons in this action the Appellants claimed :-

P.1

(1) An order that the first four Respondents bring into hotchpot whatever they received from their deceased predecessor the said Ismail Katri Bey during his lifetime or that they be excluded from taking any share in the inheritance of the said deceased.

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(2) Alternatively a declaration by the Court that they are not entitled to take any share in the estate of the deceased Ismail Katri.

(3) That the Respondents be ordered to give an account of the mesne profits and all crops and Income derived and enjoyed by them from the said estate since the death of the deceased.

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P.2 lines 24
to 37

(4) The costs and expenses of the present action.

8. The Appellants delivered a Statement of Claim in this action on the 10th December 1956.

P.P.3 and 4

9. The Respondents delivered a Statement of Defence and Counterclaim in this action on the 12th January 1957 and by their Counterclaim claimed that the Appellants in case they claim any share by inheritance on the property left by the deceased, they should be ordered to bring into hotchpot the property their deceased father had received by way of dowry or marriage portion or by way of advancements.

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P.4

10. The Appellants delivered a Reply and Defence to Counterclaim in this action on the 21st January 1957.

P.5

11. When the action originally came on for trial before the District Court at Paphos (Zenon P.D.C. and Attalides D.J.) on the 16th March 1957 the parties agreed the facts stated in paragraphs 5 and 6 hereof as to the property received from the said Ismail Katri Bey during his lifetime and that the only question left for the decision of the Court is the question set forth in paragraph 2 hereof.

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P.6 lines 1 to 20

12. At the trial no evidence was adduced by either side and the arguments were addressed to the legal results of the facts which had been admitted.

P.P.7 to 11

13. It is provided by Cap 220 (The Wills and Succession Law).

By Section 44.

44. Where a person dies leaving a wife or husband, such wife or husband shall, after the debts and liabilities of the estate have been discharged, be entitled to a share in the statutory portion, and in the undisposed portion if any, as follows that is to say -

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If the deceased has left besides such wife or husband -

(a) any child or descendant thereof, such share shall be the one-sixth of the statutory portion and of the undisposed portion, but if there be more children than five (whether they be living or represented by descendants) then it shall be a share equal to the share of one of such children;

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P.33 lines 27 to 34

(b) no child nor descendant thereof, but any ancestor or descendant thereof within the third

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degree of kindred to the deceased, such share shall be the one-half of the statutory portion and of the undisposed portion;

(c) no child nor descendant thereof, nor any ancestor or descendant thereof within the third degree of kindred to the deceased, but any ancestor or descendant thereof of the fourth degree of kindred to the deceased, such share shall be the three-fourths of the statutory portion and of the undisposed portion;

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(d) no child nor descendant thereof nor any ancestor or descendant thereof within the fourth degree of kindred to the deceased, such share shall be the whole statutory portion and the whole undisposed portion:

Provided that where the deceased has left more than one lawful wife, the share given to the wife under the provisions of this section shall be divided equally between such wives.

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By Section 45.

45. A wife or husband who becomes entitled to a share in the statutory portion or in the undisposed portion, shall not bring into account in reckoning such share any movable property or immovable property received from the deceased by virtue of a marriage contract.

By Section 46.

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:

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

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P.33 lines 35
to 43

By the First Schedule

Succession of the Kindred

<u>Class</u>	<u>Persons Entitled</u>	<u>Shares</u>
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.

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P.34 lines 1 to 12

By Section 49.

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.

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P.34 lines 13 to 23

By Section 51.

Any child or other descendant of the deceased who becomes entitled to succeed to the statutory portion, and to the undisposed portion if any, shall in reckoning his share bring into account all movable property and immovable property that he has at any time received from the deceased -

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- (a) by way of advancement; or
- (b) under a marriage contract; or
- (c) as dower; or
- (d) by way of gift made in contemplation of death:

P.34 lines 24 to 33

Record

Provided that no such movable property or immovable property shall be brought into account if the deceased has left a will and has made therein specific provision that such movable property or immovable property shall not be brought into account.

P.35 lines 1 to 5

14. The Appellants contended at the trial and respectfully submit that upon the true construction of Cap 220.

(1) The Appellants take not as representatives but in their own right and that the expression "per stirpes" merely regulates the rights inter se of descendants of a deceased child. 10

P.10 lines 1 and 2

(2) The word "share" as used in the statutory provisions denotes a proportion of the estate.

P.10 lines 13 and 14

(3) By Section 51 of Cap 220 the only persons liable to bring advances into hotchpot are those who received them.

P.9 lines 36 to 40

(4) That there are no reported decisions on the point, which depends upon the true construction of Cap 220 and that while decisions under other jurisdictions on similar provisions may afford guidance they are not directly relevant. 20

P.9 lines 5 to 39 and P.10 lines 3 to 22
P.11 line 3
P.14
P.P.7 to 14

15. Judgment was reserved by the District Court of Paphos on the 18th April 1958 and delivered on the 27th June 1958 and is set forth together with notes of the arguments in the record.

16. During the course of the judgment Zenon P.D.C. said after referring to section 49 of Cap 220 30

"We take the view that the interpretation of this section combined, is to the effect that the descendants living at the death of the deceased, of any of the deceased's legitimate children who died in his lifetime, inherit from the deceased in their own right, and not by representation of their deceased father. Only their share in the estate of the deceased is regulated by the words - per stirpes - as is clearly shown by Section 48, and the first Schedule to the Law, and, to be more clear in the present case we hold that the Plaintiffs inherit from their grandfather, Ismail Katri, in their own right, and not as representing

P.13 lines 38 to 43

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their predeceased father, and the share they shall take is the share their predeceased father would be entitled to in the estate of the deceased Ismail Katri. To our mind the expression per stirpes has nothing to do with the right of the persons to succeed in the property of the deceased but simply regulates their share in that property.

10 We would like to add that the wording of Section 51 strengthens our above view, as the wording is that the child or other descendant shall, in reckoning his share bring into account all movable and immovable property that he has at any time received from the deceased.

20 If the Legislator wanted that grandchildren inheriting in the succession of their grandfather should bring into account movable and immovable property which the grandfather gave to their father during his lifetime, he would have clearly so stipulated. The wording used in the section 'he has received from the deceased' - means to our mind, the person who actually received any movable or immovable property from the deceased.

30 In order to complete the picture we think we should mention that in Section 44 (a) of Cap. 220, the following words appear - 'whether they be living or represented by descendants'. - but this expression appearing in that section, in our view, cannot destroy the combined effect of Sections 46, 49 and 51, so as to make us come to the conclusion that the plaintiffs do succeed in the property of their grandfather by representation of their predeceased father, and not in their own right.

40 We therefore hold that the plaintiffs are entitled to succeed to the property of Ismail Katri Bey without bringing into account the movable and immovable property received by their father during his lifetime from their grandfather Ismail Katri."

P.14 lines 1
to 38

17. The Respondents gave notice of appeal dated the 12th August 1958 against the said judgment of the District Court of Paphos and the Appeal was heard by the Supreme Court of Cyprus (Zekia and Zannetides J.J.) and the judgment of the Court was delivered on the P.15

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P.P.31 to 38	14th January 1959 by the Honourable Mr. Justice Zekia to the effect stated in paragraph 1 hereof.	
P.P.35 and 36	18. The Supreme Court of Cyprus based its judgment mainly on its view that the direction in the First Schedule to Cap 220 to the effect that descendants of a deceased child took per stirpes indicated that the Appellants took by representation and not in their own right and concluded that issue taking by representation were bound to account for the advances to their parent. The judgment drew a comparison with the provisions of the English Administration of Estates Act, 1925, and the Court indicated that in the absence of any express provision it would have applied the provision of Section 33 (1) of the Courts of Justice Law 1953 that "Equity always presumes that a father intends to preserve peace among his children by giving them portions as nearly equal as they may be rendered".	10
P.38 lines 19 and 20		
P.37 lines 6 to 46		
P.38 lines 1 to 8		
P.P.39 to 41	19. On the 5th February 1959 the Appellants presented a Petition to the Supreme Court of Cyprus for leave to appeal to Her Majesty in Council. On the 1st April 1959 the Supreme Court of Cyprus granted conditional leave to appeal and on the 4th July 1959 the Supreme Court granted final leave to appeal.	20
P.P.41 and 42		
P.42		
P.38 lines 19 to 21	20. The Appellants humbly submit that the order of the 14th January 1959 of the Supreme Court of Cyprus should be set aside and an order made allowing this Appeal with costs and restoring the judgment of the District Court of Paphos for the following among other -	30
P.14 lines 34 to 41		

REASONS

1. BECAUSE the Supreme Court of Cyprus was wrong in regarding the direction in the First Schedule to Cap. 220 that the descendants of a deceased child take per stirpes as indicating that such issue take by representation and not in their own right.
2. BECAUSE the said direction merely regulates the rights of such issue inter se. 40
3. BECAUSE the Supreme Court of Cyprus was wrong in regarding the Administration of Estates Act, 1925, as affording a guide to the true construction of Section 49 of Cap. 220.

4. BECAUSE the Supreme Court of Cyprus was wrong in regarding section 33 (1) of the Courts of Justice Law 1953 as being relevant to the construction of Cap. 220.
5. BECAUSE upon the true construction of Cap. 220 the word "share" where used in Part III of Cap. 220 denotes no more than a proportion of an estate.
- 10 6. BECAUSE Section 51 of Cap. 220 only requires descendants to account for property which they have themselves received from the deceased.
7. BECAUSE upon the true construction of Cap. 220 the Appellants are entitled to succeed to a share of the estate of their grandfather Ismail Katri Bey without bringing into account the movable and immovable property received by their father during his lifetime for their grandfather.
- 20 8. BECAUSE the Judgment and Reasons of the District Court of Paphos were right in law and the Judgment and Reasons of the Supreme Court of Cyprus were wrong in law.

JOHN MONCKTON.

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B E T W E E N

ZALIBE VELI OF POLIS CHRYSOCHOU
(suing as next friend and
natural guardian of her minor
children ISMAIL and NAHITE
NEVZAT ISMAIL EFF) Appellants

- and -

SEVIM ISMAIL OF CHRYSOCHOU
AND OTHERS Respondents

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