

Osman Effendi Khalil Bartlett and another - - - - *Appellants*

v.

Abdel Hamid Effendi Khehil Bartlett and others - - - - *Respondents*

FROM

HIS BRITANNIC MAJESTY'S SUPREME COURT FOR EGYPT.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 22ND DECEMBER, 1924.

Present at the Hearing :

LORD SUMNER.

LORD WRENBURY.

LORD CARSON.

[*Delivered by* LORD SUMNER.]

This is an appeal from a judgment of His Majesty's Supreme Court for Egypt at Cairo, by which it was declared that the will of Mahomed Khalil Bartlett was valid in form and substance; that only the beneficiaries named in it were entitled to the estate, and that the appellants, defendants below, were not beneficially entitled to any share in the estate.

The testator, a Moslem British subject domiciled in Egypt, died on the 28th September, 1918, leaving Behana Hanem Bartlett, his mother, him surviving. She died in 1919, leaving two sons, the defendants in this action. Mahomed Khahil Bartlett was a man of considerable property, both moveable and immoveable, principally the latter and all in Egypt. He made a will in English form, of which he named his brothers, the present appellants, executors, and by it he left all his property to his widow and children. The plaintiffs in the present action are his surviving children. The executors duly proved the will and obtained probate in His Majesty's Provincial Court at Cairo on the 12th October, 1918. Like the testator, all the parties concerned are Moslems.

The beneficiaries under the will subsequently commenced proceedings in the Mixed Court of Cairo for partition of the estate and, the present appellants having there advanced a claim to share in it personally, an interlocutory judgment was given referring the parties to the Court competent to deal with the estate, that is, the Court from which the present appeal comes, in order that it might decide the rights of the parties. For this purpose the present respondents brought their action claiming the before-mentioned declarations, which were made in the judgment under appeal, and the present appellants counter-claimed a declaration, that they were each entitled to one eighteenth part of the estate, which counterclaim the learned Judge dismissed. Their ground of claim was that, by the Moslem law of inheritance, the mother of the deceased testator, who survived him, was entitled to one sixth share of his estate, and that by Moslem law the right of inheritance is distinct and independent of any right to testamentary disposition. The reply admitted this statement of the Moslem law, nor, apart from the grounds hereinafter discussed, has the defendants' right to succeed to their mother's share in the proportions claimed been contested either here or below. The defendants maintained and the plaintiffs denied that, by virtue of the proviso to Art. 90 of the Ottoman Order in Council, 1910, which is applied to Egypt by the Egypt Order in Council, 1915, the testator could not dispose by his will of the mother's heritable share and that, *pro tanto*, his will was inoperative. The Article in question is as follows :

“ PART IV.—CIVIL MATTERS.

“ 90. Subject to the provisions of this Order, the civil jurisdiction of every Court acting under this Order shall, as far as circumstances admit, be exercised on the principles of and in conformity with English law for the time being in force.

“ Provided that in all matters relating to marriage, inheritance or other questions involving religious law or custom, the Court shall in the case of persons belonging to non-Christian communities recognize and apply the religious law or custom of the person concerned.”

The learned Judge of the Supreme Court for Egypt at Cairo expressed the grounds of his decision by referring to a judgment which he had previously pronounced, in a suit brought to obtain a declaration that the will of Behana Hanem Bartlett was void, not being a valid testamentary disposition according to Moslem law. In that case he expressed himself as follows :—

“ The Court, having found that the testatrix was of sufficient mental capacity to make a will, is now called upon to decide the important point of law on the pleadings in this action, which allege that, even if the testatrix was of sound mind and possessed of testamentary capacity, she was bound to make her will in accordance with the Moslem law, she being a Moslem, although a British subject.—Plaintiff's counsel bases his argument mainly on the construction of section 90 of the Order in Council, 1910, which he submits makes it obligatory on every British subject, who is a member of a non-Christian community, to make his will in accordance with his religious law or customs, and that he has absolutely no option of making it in accordance with the law of England. The Court cannot entertain such argument.

“ My opinion is that the section of the Order in Council merely enjoins the Courts of this country to recognize and apply religious law and customs when it is desired by a party having the right to move the Court to that effect, and whose affairs are being subject to judicial investigation, and has no intention of interfering with the right of a British subject to make his or her will in conformity with the privileges given under the Wills Acts and Lord Kingsdown’s Act, which seems to me to be so clearly established that any interference with it by an Order in Council would be a repugnancy within the meaning of the Foreign Jurisdiction Act and quite *ultra vires*.”

In his judgment now under appeal the learned Judge further adds :—

“ I am clearly of opinion that the testator, having been a British subject, had every right to make his will in conformity with the provisions of the Wills Act, and no Order in Council can take away such privilege. . . . This Court is equally certain that Art. 77 of the Egyptian Civil Code lays down in the simplest terms the law of real property as it affects strangers, whether as testators or intestates, and no necessity arises in Egypt for applying the law of *lex situs* as it might be in other countries.”

This, then, is the learned Judge’s ground for his decision, and it is important and far-reaching. He dismissed the contention that the defendants had estopped themselves from raising their claim by becoming and acting as executors of the will, and this contention has not been renewed before their Lordships. Two additional arguments have been advanced. The first, which is only a different way of stating the learned Judge’s view, is that, as regards Egypt, the *lex loci rei sitæ* and the law of the domicile is for a British subject domiciled in Egypt the law of England in virtue of the provisions of the Egyptian Mixed Civil Code, but that the Moslem law of inheritance forms no part of it. The second is that, upon the true construction of Art. 90 of the Ottoman Order in Council, the proviso does not extend to cases where the deceased proprietor has made a will, since the words “ and succession ” are not added to the word “ inheritance,” but that it refers only to that part of the law affecting an intestate’s property, which is concerned with immoveables.

The last contention may be conveniently disposed of first. It cannot be denied of the present action that it deals with “ matters relating to inheritance.” It is not a suit to propound a will, or to set aside a will, or to construe a will. As the pleadings above cited show, it is a suit in which one party affirms and the other denies a right of inheritance, which is essentially extra-testamentary. Their Lordships see no ground for a technical construction of the word “ inheritance,” which in this case is a general term, nor do they read it as exclusive of all rights that are not strictly rights to realty. Even if it were so, however, the defendants’ claim to a share of the deceased’s moveables would still be within the words “ other questions involving religious law or custom,” for the Moslem law on this subject is derived from the Koran, the Traditions and the Concordance among the Followers (*Ijma’ a-ul-Ummat*), and the deceased’s mother is one of the twelve “ sharers ” (*zav-il-furûz*) mentioned by the Prophet.

The learned Judge's view is evidently not one which depends merely on the form of the will, or on an obligation to make a will in Moslem form, if at all. It is that a British subject, who would otherwise be bound by Moslem law, can at his option, and to the prejudice of relatives, who have as such a right to inherit from him under the Moslem law, invest himself with a wider disposing power than the Moslem law gives him, by simply making his will under and in conformity with the Wills Act. He holds further that, if the Order in Council purports to require questions relating to inheritance to be decided in such a case according to Moslem law, it is repugnant to English law and is therefore invalid.

The reference made by the learned Judge is to section 12 (1) of the Foreign Jurisdiction Act of 1890, of which the material words are :—

“ If any Order in Council made in pursuance of this Act as respects any foreign country is in any respect repugnant to the provisions of any Act of Parliament extending to Her Majesty's subjects in that country . . . it shall be read subject to that Act . . . and shall, to the extent of such repugnancy, but not otherwise, be void.”

Their Lordships are unable to adopt the learned Judge's view or to hold that the appellants' construction of the Order in Council involves any repugnancy to any Act of Parliament. The enactment in question is the Wills Act, 1837, section 3, for Lord Kingsdown's Act does not appear to affect the matter. That section provides that—

“ It shall be lawful for every person to devise, bequeath or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate, which he shall be entitled to either at law or in equity at the time of his death, and which, if not so devised, bequeathed and disposed of, would devolve upon the heir-at-law . . . or upon his executor or administrator.”

There is nothing here to enable a person, who, by the law which binds him in his lifetime, holds his property with a strictly limited right of testamentary disposition, to dispense himself from that restriction and to dispose of his property by will without any limit at all, simply by making his will in the form prescribed by the Wills Act, and by purporting to make dispositions in it, contrary to and in excess of those, which the law then applicable permits to him. To the extent of one sixth of the moveables, they would not have devolved upon his administrator if there had been no will, and the same proportion of his real property would not have devolved upon his heir-at-law in the sense in which the Wills Act uses those words.

Such a construction sets aside the English rules, which apply the *lex loci rei sitæ* to dispositions of foreign immoveables and the law of the domicile to dispositions of foreign moveables, although they are at least as much part of the principles of the English law as are the provisions of the Wills Act. In effect, the provisions of the Egyptian Mixed Civil Code, Arts. 77 and 78, show that the *lex loci rei sitæ* and the law of the country of the domicile are, in the case of a British subject domiciled in Egypt, the

law. which the Crown has by Orders in Council prescribed for His Majesty's Courts in Egypt (*Casdagli v. Casdagli* [1919], A.C., at p. 156, per Lord Finlay, L.C.; *Sasson v. Sasson* [1924], A.C. 1007). Art. 90 of the Ottoman Order in Council lays down that law for present purposes clearly and consistently, viz., the principles of English law, not *in omnibus* but "as far as circumstances admit," with a further proviso in the nature of an exception similar to the rules established in British India, that Moslems and Hindoos shall enjoy and be bound by the law of their communities in matters such as the present. Their Lordships think that the whole question is really one of the construction of Art. 90, and that the proviso to that article, truly construed, preserved the mother's right and placed it beyond the reach of the testamentary disposition, which her son purported to make. They will humbly advise His Majesty that the appeal ought to be allowed, with costs here and below, that the judgment appealed against ought to be set aside, and that in lieu thereof declarations ought to be made as prayed in the counterclaim.

In the Privy Council.

OSMAN EFFENDI KHALIL BARTLETT AND
ANOTHER

vs.

ABDEL HAMID EFFENDI KHELIL BARTLETT
AND OTHERS.

DELIVERED BY LORD SUMNER.

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