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Court : House of Lords

Decided On : Jun-28-1932

Judge : Lord Tomlin, Lord Warrington of Clyffe, Lord Thankerton, Lord Tomlin

Appeal No. : [1932] UKHL 3

Appellant : Macdonald

Respondent : Macdonald

Judgement :

LORD TOMLIN.-In this case a domiciled Scotsman died on the 23rd of May 1911, and his estate included land in each of the Provinces of British Columbia, Manitoba, and Saskatchewan in the Dominion of Canada, and also a mortgage on land in Canada. The deceased was survived by a widow, a son, and a daughter.

The appellant is the daughter of the deceased, and was fifteen years old at her father's death. The respondent is the widow of the deceased and executrix-nominate under his holograph will, which was dated the 27th of June 1898, and was recorded in the Sheriff Court Books of the Commissariot of Aberdeen on the 13th of July 1911. The respondent was confirmed executrix-nominate to the deceased, conform to confirmation in her favour granted by the Sheriff of Aberdeen on the 15th of July 1911. By his will the deceased bequeathed to the respondent, as his universal legatee, the whole means and estate of every description of which he died possessed, but under burden of her maintaining,

suitably to their stations in life, the children of the marriage until each of them was able to mountain himself or herself.

On the 17th of September 1930 the appellant raised an action against the respondent of count, reckoning, and payment, claiming her share of legitim out of the estate of the deceased. In condescendence 4, after referring to the Canadian land as being possessed by the deceased at his death, the appellant averred with reference to such land as follows:-

"Such estate, according to the law of the Provinces of British Columbia, Manitoba, and Saskatchewan, in which Provinces the said estate was situated, vests in the owner's personal representatives, and is dealt with and distributed among them as personal estate to which, as such personal representatives, they are beneficially entitled."

Upon this statement of the law of the said provinces the appellant maintained that the value of the land in the said provinces fell to be added to the deceased's moveable estate in estimating the fund from which legitim was payable, and she asked for a proof of her averments of the said foreign law. The respondent, on the other hand, averred on record as follows:-

"The pursuer's averments regarding the law of the Provinces of British Columbia, Manitoba, and Saskatchewan are irrelevant. In any event, by the law of those provinces, the distinction between real and personal estate is recognised. Land in the said provinces is real estate and its owner can devise it by will. The devolution of real and personal property upon intestacy is now the same, but the character of the property (qua real or personal) as in the hands of the intestate remains unaltered. Further, upon his death, the whole property of the deceased vests in his personal representatives or administrators merely for administrative purposes."

The record also contained reference to the mortgage on Canadian land, but it was conceded by the respondent that this must be taken into account in estimating the legitim fund.

After a debate in the Procedure Roll, the Lord Ordinary (Lord Murray), before answer, allowed a proof in regard of the law of British Columbia, Manitoba, and Saskatchewan. At the conclusion of his opinion Lord Murray said this (1931 S. C., at p. 647):-

"As regards the law of Canada, accordingly, I do not feel able, without further information as to its provisions and their effect, to deal with the question of relevancy on the record as it now stands, and I shall, accordingly, before answer, allow a proof in regard to the law of Canada, but limited to the matter of the landed estate."

Upon a reclaiming note taken by the respondent against the judgment of the Lord Ordinary, the Second Division by a majority (the Lord Justice-Clerk dissenting) recalled the interlocutor of the Lord Ordinary and sustained the second plea in law of the respondent, that the appellant's averments with regard to the law of British Columbia, Manitoba, and Saskatchewan were irrelevant, and should not be remitted to probation.

Lord Hunter in his opinion said (1931 S. C., at p. 649):-

"The pursuer does not aver that land is moveable estate by the law of Canada. Such an averment would probably, if made, be properly treated as self-contradictory. It is a well-recognised principle of private international law, and is therefore part of the law of Scotland, that succession to land, and indeed to all subjects regarded as immoveable in the country where they are situated, is determined by the law of that country. The pursuer does not allege that by the law of Canada she would be entitled to any part of the Canadian landed estate, or that the owner of it would not be entitled to dispose of it by will as he might see fit. I think the pursuer's contention proceeds upon a failure to recognise the fundamental proposition that the succession to Canadian land is governed by Canadian law."

Lord Ormidale concurred with Lord Hunter.

The Lord Justice-Clerk, after referring to the case of The Marquis of Breadalbane's Trustees and other cases, in which, in questions of jus relict or legitim, leaseholds and mortgages or bonds abroad forming part of the estate of a deceased domiciled Scotsman had been held to be proper to be brought into account, concluded his opinion with these words:-

"Inasmuch, then, as the pursuer in this case has distinctly averred that the money invested by her father in Canadian land goes, as a matter of succession, in accordance with the law of Canada, to his personal representatives, I am of opinion, in consonance with the decisions which I have cited, that if these averments are proved, the estate in question is subject to the pursuer's claim of legitim. I think, therefore, that the pursuer's averments of Canadian law are relevant to the issue, and that the Lord Ordinary's decision is correct."

From the judgment of the Second Division the appellant appealed to your Lordships' House.

When the matter was opened your Lordships took the view that it was not proper that your Lordships should be asked to determine the matter upon a hypothetical statement of Canadian law which might or might not be accurate. An adjournment was therefore given to enable counsel to consider whether they could agree to a minute setting out the relevant provisions of the Canadian law. Ultimately such a minute was agreed, the parties renouncing any further probation. Upon this footing the matter proceeded and was debated before your Lordships.

The effect of the relevant Canadian law as appearing from the agreed minute may, I think, be summarised in the following way. In each of the three provinces English law has been made applicable, in British Columbia in 1858, in Manitoba in 1864, and in Saskatchewan in 1870, and as so applied remains applicable except so far as varied by the statutory enactments of the respective provinces.

The statutory enactments in force at the death of the deceased in the several provinces were to the following effect:-(1) In British Columbia the Court is empowered in the case of a person dying intestate as to his real estate to manage and sell such real estate through an official administrator or the personal

representative of the intestate, the proceeds of any sale being held in trust for the persons entitled under the intestate by descent. Full testamentary power of disposition is vested in owners of real estate, and, upon death intestate, real estate descends subject to a share to any surviving widow or widower in the following order: (a) to lineal descendants and those claiming by or under them per stripes, (b) to the father, (c to the mother, and (d) to certain collateral relatives. Widow's dower is extended to land to which the husband dies beneficially entitled for an equitable interest or an interest partly legal and partly equitable. (2) In Manitoba there is full power of testamentary disposition in regard to real estate, but, whether the power be exercised or not, real estate in which no other person has a right by survivorship vests on death of the owner in his personal representative in the same manner as personal estate. On intestacy the real and personal estate descends beneficially in the same way, e.g., if there be a widow and children surviving, one-third goes to the widow and the remaining two-thirds to the children in equal shares. In the administration of the assets of a deceased person the land is to be administered in the same manner, subject to the same liabilities for debts, costs, and expenses, and with the same incidents, as if it were personal estate, but nothing in the statute by which this provision was enacted (Statutes of 1906, cap. 21) altered or affected the order in which real and personal assets respectively were then applicable in or towards payment of funeral or testamentary expenses, debts or legacies, or the liability of land to be charged with the payment of legacies. (3) In Saskatchewan full power of testamentary disposition exists. On intestacy real estate and personal estate devolve beneficially in the same way, e.g., if the intestate leaves a widow and children, his real and personal estate goes as to one-third to his widow and the remaining two-thirds to his children in equal shares. The widow of a man who dies leaving a will, by the terms of which the widow would, in the opinion of the judge before whom the application is made, receive less than if he had died interstate leaving a widow and children, may apply to the Supreme Court for relief, and upon any such application the Court may make an allowance to the widow out of the estate.

There are therefore substantial differences in the three systems of law, but, in my opinion, for the purposes of this case, these differences are immaterial. The notable features in regard to each of these systems are (1) that in each case there

is free testamentary disposition, in Saskatchewan affected indirectly, no doubt, by the Court's and to order an allowance to the widow out of the estate; and (2) that, however the respective devolutions on intestacy of real estate and personal estate may coincide or approximate, no one of the systems affects to alter the rule that succession to land is regulated by the lex rei sit.

In Bell's Principles of the Law of Scotland, (10th ed.) section 1582, legitim is explained in these terms:-

"Legitim or Bairn's Part-(a) Legitim, which is generally stated as a share of the goods in communion belonging to the children on dissolution of the marriage, is more correctly a right of succession to a share of the father's moveable estate, vesting in the children ipso jure on their father's death, but expiring with a predecease of the children, and not transmissible in that event to their heirs."

Now in my judgment, upon this statement of the nature of legitim, it would be enough to dispose of this appeal to say that legitim is confined to moveables, and that in none of the three provinces of Canada in question is land physically or in the eye of the local law other than immoveable, and that such land is therefore incapable of being treated by Scots law as moveable. It is, however, I think desirable, having regard to the decided cases to which your Lordships' attention has been called, to identify more precisely the principle which determines whether a particular foreign asset is one to be brought into account for the purpose of legitim.

From the nature of the case legitim, which may be regarded as part of or at any rate as affecting the Scots law of succession, cannot for that reason, in my view, be extended to touch foreign assets other than those which devolve according to the lex domicilii. The English law classifies property as real property or personal property. The terms moveable and immoveable are not technical terms in English law when it is not regarding the law of a foreign country. The Scots law distinguishes between property which is heritable and property which is moveable, and, except to this extent, does not any more than the English law recognise for internal purposes the antithesis between moveable and immoveable. But each system, when brought into contact with a foreign system, does, in accordance with

the principles of what is called private international law, recognise the antithesis for the purpose of applying the rule of comity that, in matters of succession, moveables devolve according to the law of the domicile of the deceased and immoveables devolve according to the lex rei sitae.

Thus English law regards leaseholds in England belonging to a domiciled foreigner as immoveables (see Freke v. Lord Carbery and Duncan v. Lawson), heritable bonds in Scotland belonging to a domiciled Englishman as immoveable (see Jerningham v. Herbert), and mortgages on English lands belonging to a domiciled foreigner as immoveables (see In re Hoyles). The English view is that the law of the asset's situation must determine whether it is moveable or immoveable, but that, when that has been determined, then to the matter of succession the lex rei sit governs immoveables and the lex domicilii governs moveables (see In re Berchtold, Berchtold v. Capron [1923] 1 Ch 192). In this respect the Scots law does not appear to differ (see Downie v. Downie's Trustees).

All lands and all houses are necessarily immoveable, says Story (Story's Conflict of Laws, (8th ed.) paragraph 447). It might perhaps be possible for the lex rei sit to provide that, for the purposes of succession, land should be deemed to be treated as moveable and devolve according to the lex domicilii. Whatever might be the effect of such a provision, it is difficult to see how, short of that, foreign land could ever become moveable in the eye of the local law.

In regard to interests linked with the physically immoveable, such as mortgages on real or heritable estate or leasehold interests, the law of the situation must determine whether they fall into the category of moveables or into that of immoveables. When this has been ascertained, their devolution in succession will also have been determined. If immoveables, they will devolve in accordance with the local law. Where a foreign asset is immoveable by nature or in the contemplation of the lex rei sit, a claim to render it subject to the legitim of Scots law is really a claim that it should devolve contrary to the lex rei sit, and cannot, I think, be supported consistently with the principles of private international law.

It may well be doubted whether such decisions as Marquis of Breadalbane's Trustees and Monteith v. Monteith's Trustees were well decided, not so much

because they proceeded upon any wrong principle, as because they were based upon insufficient information as to the English law. If the same questions again arise they will require reconsideration.

If the considerations which I have indicated as the true ones are applied to the facts of this case, the result must, I think, be that the claim to legitim in respect of the Canadian land must fail.

I accordingly move your Lordships that the appeal be dismissed with costs.

LORD WARRINGTON OF CLYFFE.-I have read and considered the opinion which has just been read by my noble and learned friend on the woolsack, and also that about to be read by my noble and learned friend Lord Thankerton, and I concur therein; but I desire to add my concurrence with the principles of law expressed by Lord Hunter in the passage read by my noble and learned friend Lord Tomlin. Those principles seem to me to be decisive of the present case.

LORD THANKERTON.-I agree entirely with the opinion that has been expressed by the noble Lord on the woolsack, but I desire to add some observations on the question of principle which involved in the present appeal, and to deal with the Scottish cases on the subject.

Legitim is a right to a share of the movable estate of the parent as it stood in the person of the parent at the time of his or her death; the right vests a morte and is postponed to the rights of the deceased's creditors, but is preferable to that of the deceased's heirs, whether ab intestato or testamentary. In my opinion, it is correctly described as a legal right of succession.

The earliest case on this subject to which I need refers is Hog v. Lashley, which related to a claim of legitim out of Government annuities situated in England. The Court of Session, whose decision was affirmed without opinions in this House, upheld the claim. Lord President Campbell says (at p. 270):

"The Act itself, by which they (the Government annuities) were established, declares them to be personal estate, which seems to be decisive of the question. It gives them a certain quality which must attach upon them throughout."

It was argued that, even so, the rights of succession must also be decided by the lex rei sit, which did not recognise legitim, and not by the lex domicilii; but this argument was rejected.

The next case is that of Ross v. Ross, in which the Court held that bonds taken to heirs and assignees, secluding executors, being by the law of Scotland Sua natura heritable, could not be carried by the English testament of a domiciled Englishman. In the course of a joint opinion delivered by a majority of the judges, the following passage occurs (at p. 389):

"That there was a general distinction between personal and real property; and there could be no doubt that the question, Who is to take up the personal property? must be decided by the lex domicilii. But that this was altogether different from the question, By the law of what country, the nature of a property, the character of which was disputed, should be determined? which they thought must be decided by the law of the country where the subject is itself situated. Thus, if a person dies in England with a landed estate in Scotland, his heirs will be entitled to heirship moveables, if any such belonged to him in Scotland, although, by the law of England, they might be held to be part of his moveable estate. In like manner, negro slaves are considered as moveable property by the Scotch law; yet they would go with Jamaica estate, being considered as real by the law of that country: That, in short, the question, What forms a personal estate? is altogether different from the question, To whom does the personal estate devolve? and to their Lordship it appeared that the question, Whether the subject be personal or not? ought to be decided by the lex rei sit; and, therefore, that bonds, with clauses secluding executors, being heritable by the law of Scotland, could not be carried by an English testament."

The first Lord Meadowbank, who delivered a separate opinion to the same effect, said (at. 389):

"That is was quite clear that the succession to legitim was to be decided by the lex domicilii; but that the question, What was legitim, and what was not? must be decided by the lex rei sit."

These passages present a very clear statement of the principle, and any difficulty which arises in later decisions has been caused by forgetting the clear line of distinction between the two questions, and importing into the question of what the character of the subject is according to the lex rei sit the question of what the lex rei sit provides as to the devolution of the subject.

In Egerton v. Forbes no question was raised as to the character of the subject, which was admittedly moveable, but the question was whether the wife's right to a share of her mother's personal estate, which was situated in England, had vested in her before the husband's death so as to fall under his jug mariti. The distinction is pointed out between the beneficial right of succession to moveable estate, which is determined by the lex domicilii, and the forms by which that right may be made effective, which must be determined by the lex rei sit.

The case of Newlands v. Chalmers's Trustees, conforms to the principle. It was held that the rights of Scottish spouses, in reference to property falling to one of them by decease of a foreigner, is regulated by the law of Scotland; but the character of funds situated in a foreign country, as heritable or moveable, is to be determined by the law of that country; and it was therefore held that bonds bearing interest in the island of Jamaica, and falling by succession to a married woman in Scotland, being by the law of that island moveable, became part of the goods in communion, to the effect that the husband on her death was entitled to one-half thereof. I may note that the bonds referred to were personal bonds bearing interest, island certificates, and island paper. Lord Cringletie says (at p. 71):

"The basis of the jus mariti is, that the property is moveable; and the question is, was this an heritable right according to the law of the place where it was situated? and I think that it was not."

In Clarke v. Newmarsh the subject of the dispute was a legacy left by an English testator, and payable out of funds in England, the character of which was admittedly moveable by the law of England, and the issue was very similar to that in Egerton's case. But the case is interesting as illustrating clearly the distinction between the character of the subject and the right of succession to it in respect of the law by which the matter is to be determined. Alexander Trapaud, an

Englishman by birth, was Lieutenant-Governor of Fort Augustus from 1746 till his death in 1797. It is unnecessary to recite the facts on which the Court held that he had acquired a Scottish domicile of choice. In 1779 he married a Scotswoman, who survived him. In 1785 a legacy of 600 by a domiciled Englishwoman, whose will was in English form, was left to his wife. This legacy was not realised or in any way "reduced into possession" either by Trapaud or his wife, and on the latter's death, the legacy was claimed by the pursuer, as representing the wife, as against the defender, who represented the husband and claimed that the legacy had fallen under the jus mariti of the husband. An opinion was obtained from English counsel to the effect that, by the law of England, the legacy never having been reduced into possession became the absolute property of the surviving wife, and would have passed to her executors, to the exclusion of those of her husband. The decision was unanimously in favour of the defender, and I may quote the opinion of Lord Mackenzie, who says (at p. 500):

"The English law is to be referred to for the purpose of determining whether the character of a particular subject was heritable of moveable; but so soon as that is fixed, the law of Scotland decides what is the right of a husband, under a Scottish contract of marriage, in moveable effects which have accrued, during the marriage, to his wife."

This case shows that the question of who has the right to succeed by the lex rei sit is irrelevant to the question of the character of the subject.

So far, none of the case have related to rights in over land, but that aspect of the question in found in the case of Marquis of Breadalbane's Trustees, which related to two mortgages secured over real estate in England and two leaseholds in London. It was held that they were all subject to legitim and jus relict. The Court proceeded on an opinion of English counsel to the effect that they were all held to be personal estate by the law of England, and the decision of the Court was based on the cases of Newlands and Clarke v. Newmarsh, to which I have already referred. I doubt if either the question to English counsel or his reply was sufficiently accurate or clear, for the true issue is whether the subject is immoveable or moveable in character; but the Court undoubtedly intended to

conform to the principle.

I now come to the he case of Downie v. Downie's Trustees, which related to a claim for jus relict by a widow against her husband's trustees. Part of the husband's estate consisted of an Australian mortgage. The Court proceeded on an opinion of English counsel to the effect that, by the law of Australia, the contents of that mortgage were moveable in a question of succession, and held that the mortgage fell to be regarded as moveable. Lord President M'Neill says (at p. 1070):

"As to the sum invested on security in Australia, if it were similarly invested in this country it would be heritable, and the truster was domiciled in this country. But it was not invested here, but in Australia, and the principal has been recognised and settled that the character of the subject, whether heritable or moveable, depends on the law of the country where it is placed. That being ascertained, the right of participation in it must be regulated by the law of this country, in which it is to be distributed, and being fixed as moveable or personal estate by the law of Australia the widow is entitled to her share by the law of this country."

This decision is in exact conformity with the principle, but it relates to the class of rights which my noble friend has aptly described as interests linked with the physically immoveable, but which are not themselves immoveable by nature, and whose character must be determined by the lex rei sit.

Lastly, there is the case of Monteith v. Monteith's Trustees, in which it was held that mortgages over land in England, being personal by the law of that country, are to be taken into account in computing legitim. This decision proceeded on the acceptance by both parties that, according to the law of England, such a mortgage is moveable in character, the substantial dispute being as to whether the Titles to Land Consolidation Act, 1868, affected the question. This case, like the cases of Breadalbaneand Downie, appears to conform to the principle in view of the statement of the English law on which it proceeded; but I agree with the noble Lord that, on a recurrence of the same question, a fuller consideration on the law of England may lead to a different result.

But there can never be any similar difficulty as to land in a foreign country; land is by nature immoveable, and the enactment by that foreign country of a law that succession shall be administered by personal representatives or that the personal representatives shall succeed on intestacy-even if the personal representatives are the same as under Scottish law-can never change the fact that the succession is to a subject which is immoveable in character. Any fictional element of moveability which is attached to it for the purpose of identifying the persons entitled to succeed to it is incidental to determination of the rights of succession to land in the foreign country, and does not affect its character as immovable; it is therefore irrelevant to the present question. I have some doubt whether a provision of the lex rei sit that, for the purposes of succession, land should be deemed to be moveable and devolve according to the lex domicilii would have enabled the appellant to have claimed it as forming part of the and fund, but I desire to reserve my opinion on that point, which clearly is not available in the present case.

I therefore concur in the motion proposed.

LORD TOMLIN.-I am authorised to state that my noble and learned friends LORD MACMILLAN and LORD WRIGHT concur.