

74, 1935

No. 69 of 1934.

In the Privy Council.

ON APPEAL
FROM THE ROYAL COURT OF THE ISLAND OF JERSEY.

UNIVERSITY OF LONDON
W.C. 1.
7 - NOV 1958
INSTITUTE OF ADVANCED
LEGAL STUDIES

15146

BETWEEN CHARLES WILLIAM GILBERT, Attorney
of George James Gilbert - - (*Plaintiff*) APPELLANT

AND

FRANCIS HENRY CHING, Attorney of
John James Ching, principal heir of George
Edward Ching, his cousin - - (*Defendant*) RESPONDENT

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CASE FOR THE RESPONDENT.

RECORD.

1. This is an Appeal from a judgment of the 31st May 1933 of the
Heritage Division (Superior Number) of the Royal Court of the Island of
Jersey affirming a judgment of the 21st November 1932 of the Heritage
Division (Inferior Number) of such Court. In this case the above-named
George James Gilbert and John James Ching are respectively referred to as
"the Appellant" and "the Respondent."

pp. 13-15.

pp. 8-13.

2. The Appellant commenced the present action on the 6th October
1932 and claimed therein that the Respondent ought

20 "lui délivrer la juste part dudit Monsr. George James Gilbert, ès
qualités, de tous les héritages dont ledit feu Monsr. George Edward
Ching est mort vêtu et saisi ou qui sont subséquemment rentrés entre
les mains dudit Monsr. John James Ching en sa qualité de principal
héritier dudit feu Monsr. George Edward Ching par quelque voie que
ce soit : et pour cet effet voir appointer Arbitre pour partager lesdits
héritages selon droit et usage."

p. 8 (24-29).

RECORD.

3. The said George Edward Ching died in Australia on the 8th August 1907 and his last Will and testament dated the 19th June 1898 (omitting all formal parts) was as follows :—

p. 41 (19-22).

“ I give, devise and bequeath all the real and personal estate of which I shall be seized or possessed at my death to Elizabeth Hessey absolutely.”

p. 41.

On the 7th September 1909 by an Act of that date the Ecclesiastical Court of the Island of Jersey granted probate of the said Will and on the 9th October 1909 the Royal Court of the said Island by an Act of that date ordered the registration of the said Will. 10

p. 40

p. 41 (2 & 3).

“ le tout afin que ledit Testament tire son plein et entier effet en ce qui concerne les immeubles y légués selon sa teneur.”

The said Will despite the action referred to in paragraphs 5 and 6 below has never been set aside and remains duly recorded and in full force, as do the said Acts of the Ecclesiastical Court and the Royal Court.

4. The question for decision in this Appeal is whether or not the Heritage Division (Superior Number) of the Royal Court were right in affirming the Heritage Division (Inferior Number) of such Court in refusing further to entertain the present action in view of the provisions of Article 28 of the Law of 1851 relating to “ Testaments d’Immeubles ” which is as follows :— 20

“ Les actions touchant la validité des Testaments contenant des legs d’immeubles seront instituées à la Cour du Samedi et aussi les actions en partage des immeubles d’une succession, lorsque ces immeubles auront été légués en tout ou en partie par Testament.”

p. 10.

The Appellant by his pleas in the present action asserted that the Respondent is precluded by reason of a passage in the judgment of the Heritage Division (Superior Number) of the Royal Court given on the 5th May 1932 in a previous action between the Appellant and the Respondent from denying the right of the Heritage Division of the Royal Court to entertain this action. The Appellant did not, however, by his said pleas 30 assert that but for the alleged preclusion the Heritage Division would have had any such right.

pp. 29 & 30.

In the said previous action it was the Respondent who was successful (as appears in paragraphs 8, 9 and 10 below) and on the said 5th May 1932 judgment was in fact entered in his favour. It is submitted on behalf of the Respondent that the passage relied on by the Appellant relates only to one of the three grounds on which the Court was asked so to enter judgment, was *obiter*, of no legal effect, and in no way binding upon or prejudicial to the rights of the Respondent in the present action.

5. The action referred to in Paragraph 3 above (and hereinafter referred to as “ Action No. 1 ”) was one commenced by the Respondent against the above-mentioned Elizabeth Hessey in the Cour du Samedi of the Island 40

of Jersey within a year and a day of the above-mentioned Act of the Royal Court of the 9th October 1909, that is to say on the 24th September 1910. In Action No. 1 the Respondent claimed "de voir casser et annuler" the said Will of George Edward Ching in so far as it related to the real property thereby bequeathed on the grounds

RECORD.

p. 31.
p. 31 (23).

- (i) that the attesting witnesses to the Will had not the required *status* in that neither of them was a Notary Public; p. 31 (26-29).
- (ii) that the Will had not before execution been read over in the presence of the said George Edward Ching and the two attesting witnesses; and p. 31 (24-26).
- 10 (iii) that the said Elizabeth Hessey was at the material time the mistress of the said George Edward Ching with the result that a bequest to her of real property situate in the Island of Jersey was illegal and contrary to public policy according to the ancient laws and customs of Normandy (which prevail in the Island of Jersey save in so far as they have been varied or abrogated). p. 31 (31-38).

6. Later, upon it appearing

- (i) that one of the attesting witnesses to the said Will was in fact a Notary Public (although his attesting signature was not accompanied by his description as such); and p. 42 (34-37).
- 20 (ii) that the Will had in fact been read over in the presence of the deceased and the two attesting witnesses before it was executed (although the fact was not recited in the attestation clause), p. 42 (26-29).

and it being open to the said Elizabeth Hessey to submit with probability of success that the above-mentioned Law of 1851 had abrogated the old laws and customs upon which was based the ground referred to in paragraph 5 (iii) above (a submission which in an analogous case was held to be good in *Nicolle v. Nicolle* 1922 1 A.C.285), the Respondent instead of pursuing Action No. 1 compromised the same and purchased from the said Elizabeth Hessey for his own use and benefit the said real property as from the 25th December 1912 upon the terms that he

pp. 34-36.

- (A) personally undertook in the place of the said Elizabeth Hessey all liability in respect of the rentes, mortgages, dues and dower charged on the said property, and p. 37 (20 & 21).
- (B) out of his own moneys paid the said Elizabeth Hessey the sum of £550.

7. The terms of the said purchase are set out in a Deed dated the 28th December 1912 which was executed in conformity with an Act of the said Cour du Samedi dated the 16th November 1912. pp. 36 & 37.
pp. 34-35.

RECORD.

The above-mentioned Will of the said George Edward Ching deceased, and the Acts of the Ecclesiastical and Royal Courts referred to in Paragraph 3 hereof, were left in full force; and the said period of a year and a day from the said Act of the Royal Court of the 9th October 1909 having elapsed no further application can be made to set the said Will or the said Acts aside in whole or in part by reason of the provisions of Article 15 of the above-mentioned Law of 1851 by which:—

“ Les actions en nullité de Testaments contenant des legs d'immeubles devront être intentées dans l'an et jour de l'Acte de la Cour Royale qui en ordonnera l'enregistrement.”

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p. 15. 8. The previous action between the Appellant and the Respondent (hereinafter referred to as “ Action No. 2 ”) was one commenced by the Appellant in the said Heritage Division on the 9th May 1929 in which he claimed that the Respondent ought

p. 16 (4-8). “ lui délivrer la juste part dudit Monsr. George James Gilbert de tous les héritages qui furent audit feu Monsr. George Edward Ching et pour cet effet voir appointer Arbitre pour partager lesdits héritages selon droit et usage.”

pp. 16 & 17.
p. 22. 9. After certain preliminary genealogical enquiries had taken place before the Greffier, the said Heritage Division by its Act dated the 9th 20 October 1930 sent the case to proof, whereupon the Respondent submitted by way of preliminary objections that he was not obliged to plead to Action No. 2 on three grounds, namely,

p. 23 (25-41). (i) that the Appellant was wrong in commencing Action No. 2 as principal heir of his father Edward Gilbert;

p. 23 (44-49). (ii) that the Appellant was wrong in alleging that he represented his grandmother Mrs. Elizabeth Ching; and

p. 25 (10). (iii) “ qu'il n'y a jamais eu et il n'y a au moment actuel aucune succession successorale à partager.”

p. 28 On the 30th January 1932 the Inferior Number decided in favour of the 30 Respondent on all three grounds stating with regard to the third

p. 29 (21-26). “ Que par conséquent il est impossible de dire que ledit Mr. George Edward Ching est mort “ ab intestat ” laissant une succession collatérale à partager; la Cour, jugeant qu'il n'y a pas à l'heure qu'il est succession successorale à partager a renvoyé le défendeur de l'action et est l'Acteur condamné aux frais.”

10. The Appellant appealed to the Superior Number of the Heritage Division of the said Royal Court, whereupon, on the 19th May 1932,

p. 30 (41-43). “ La Cour a jugé que le défendeur n'est pas tenu de plaider à l'action dans sa forme actuelle et l'a renvoyé de l'action chaque partie devant porter ses frais.”

In giving its reasons for so deciding the Superior Number stated that it RECORD.

- (i) Unanimously agreed with the decision of the Inferior Number on the first ground; p. 30 (29-40).
- (ii) Unanimously agreed with the decision of the Inferior Number on the second ground; and p. 30 (31-38).
- (iii) By a majority disagreed with the Inferior Number on the third ground. p. 30 (39 & 40).

The Respondent having thus succeeded in Action No. 2 and judgment having been entered in his favour it is submitted on his behalf that the statement of the Superior Number that they did not agree with one of the three reasons given by the Inferior Number was *obiter*, of no legal effect, and in no way binding upon or prejudicial to the rights of the Respondent in the present action. The Respondent could not have appealed from the said judgment to His Majesty in Council because

(A) The judgment was in his favour; and

(B) even if (contrary to the Respondent's contention) the passage therein relied on by the Appellant has any effect in law it was not a "Sentence Definitive" within the meaning of the Order in Council of Queen Elizabeth of the 13th May 1572 which is incorporated in a Code of Laws for the Island of Jersey as approved and confirmed by an Order in Council of the 28th March 1771. p. 8 (31-44).

11. The Appellant having thus failed in Action No. 2 then commenced the present action in which he made the wider and different claim against the Respondent referred to in Paragraph 2 hereof. The Respondent took the objection that the real property referred to in the said claim having been the subject of a bequest by Will any action such as the present should have been instituted before the Cour du Samedi by reason of the express provisions of the above-mentioned Article 28 of the Law of 1851. The Appellant thereupon replied that the Respondent was precluded from making this objection and relied on what had taken place in Action No. 2, alleging that the above-mentioned "decision" therein of the 19th May 1932 of the Heritage Division (Superior Number) on the third ground (see Paragraphs 9 and 10 hereof) p. 9 (6-8).

"n'ayant pas été frappé d'appel, a maintenant force de chose jugée et est décisive et final." p. 11 (38).

and further

"Que l'Acteur ayant par devant le Corps de Cour obtenu gain de cause sur le troisième point, il ne lui restait plus qu'à intenter une autre action où les omissions et fautes signalées par le Nombre Inférieur et confirmées par le Nombre Supérieur, seraient comblées et rectifiées, pour que, de plein droit, il pût réclamer d'être envoyé par devant le Greffier Arbitre, les jugements rendus dans la p. 12 (11).

RECORD.

première instance formant un obstacle insurmontable à tous arguments au contraire que met en avant ledit défendeur, ès qualités.”

The Respondent having advanced his arguments in reply the Inferior Number gave judgment as follows:—

p. 13 (22-23).

“La Cour accueillant la prétention du défendeur, ès qualités, s'est déclarée incompétente dans l'espèce.”

The Appellant appealed to the Superior Number, and on the 31st May 1933 the Superior Number having before it (*inter alia*) the hereinbefore mentioned Will, the Acts of the Ecclesiastical and Royal Courts referred to in Paragraph 3 hereof, the Deed of the 28th December 1912 and the Act of the Cour du Samedi dated the 16th November 1912, by a majority affirmed the judgment appealed from.

12. The Respondent humbly submits that the judgment of the 31st May 1933 of the Heritage Division (Superior Number) ought to be affirmed and this Appeal dismissed with costs for the following amongst other

REASONS.

- (1) Because having regard to the provisions of Article 28 of the Law of 1851 relating to “Testaments d'Immeubles” the Heritage Division of the Royal Court of Jersey has and had no jurisdiction to entertain an action relating to the real property which was the subject matter of the above-mentioned Will of the said George Edward Ching and was right in refusing further to entertain the present action.
- (2) Because the Respondent was not precluded by the above-mentioned judgment of the 19th May 1932 of the said Heritage Division in Action No. 2 or by anything therein contained from relying in the present action upon the provisions of the said Article 28.
- (3) Because the Respondent does not and never did hold the said real property either as “principal heritier” of the said George Edward Ching or in any such other capacity as would under the laws of the Island of Jersey render him liable to make partition thereof with or to account for the same to any other person whomsoever.
- (4) Because the said judgment of the 31st May 1933 is right.

H. B. VAISEY,
A. M. COUTANCHE,
ERIC SACHS.

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BETWEEN

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Attorney of George James Gilbert (*Plaintiff*)
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AND

FRANCIS HENRY CHING, Attorney
of John James Ching, principal
heir of George Edward Ching,
his Cousin - - - (*Defendant*)
RESPONDENT

CASE FOR THE RESPONDENT.

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