A COMPARATIVE STUDY OF TESTAMENTARY DISPOSITIONS IN COMMON LAW AND ISLAMIC LAW

MAIZATUN MUSTAFA
G 9210998

HIS DISSERTATION IS SUBMITTED FOR MASTER OF COMPARATIVE LAWS (MCL)

KULLIYYAH OF LAWS
INTERNATIONAL ISLAMIC UNIVERSITY
PETALING JAYA
SELANGOR, MALAYSIA

1992/93

ACKNOWLEDGEMENT

Praise be to Allah , the cherisher and sustainer of the worlds. Most gracious and most merciful and by whose grace I am able to complete this dissertation as part of the requirement for my master of Comparative Laws Programme.

I would like to take this opportunity to express my heartfelt gratitude to individuals and institution without whose kind assistance, concern and encouragement this humble effort would not have been possible accomplished.

To my supervisor Professor Syed Khalid Rasheed, many thanks for his advice, suggestions and encouragement. May Allah reward him for what he has done in accomplishing this task.

To the International Islamic University for my admission in MCL program and for all the miscellaneous supports that have give to me, my grateful thanks.

Many thanks to Oyeen, who did most of the typing for me, for without her help, this dissertation may not be accomplished.

Last but not least, my love and thanks to may parents for their prayers and for my fiance for his constant advice and encouragement. And to all who in one way or another have contributed to the success of this dissertation. May Allah bless us all.

CONTENTS

CHAPTER TWO : NATURE OF WILLS AND ITS EXECUTION

COMMON LAW

ISLAMIC LAW

CHAPTER THREE : THE FORMALITIES OF WILLS

COMMON LAW

ISLAMIC LAW

CHAPTER FOUR : RESTRICTION IMPOSED ON TESTAMENTARY DISPOSITION

COMMON LAW

ISLAMIC LAW

CHAPTER FIVE : REVOCATION AND LAPSE OF WILLS

COMMON LAW

ISLAMIC LAW

CHAPTER SIX : INTERPRETATION OF WILLS

COMMON LAW

ISLAMIC LAW

PREFACE

Generally, testamentary disposition of property by a testator is recognised both in common law and in Islamic law.

This dissertation is an attempt to lay down the historical background, the nature, the formalities, the restrictions and the revocation of wills both under common law and under Islamic law.

A comparison will be made between the two and their similarities or differences will be highlighted, should there be any.

Nonetheless, there are certain matters of testamentary dispositions under both laws which cannot be compared or contrast as that particular matters may exist in one law but does not exist in another law. For example, the issue of real and personal property in testamentary disposition is not an issue under Islamic law.

There are also certain aspects in Common Law which is not discussed by Islamic law, such as that of privileged testator. Should this matter arises, it is therefore presumed that, if the law does not contradict with the Shariah, then the same rule may also be applicable in Islam, insya Allah.

CHAPTER ONE : HISTORY OF TESTAMENTARY DISPOSITIONS

COMMON LAW

HISTORY OF TESTAMENTARY DISPOSITIONS FROM NORMAN CONQUEST TO WILLS ACT, 1837

WHAT IS TESTAMENTARY UNDER COMMON LAW

The Century Dictionary puts as the first meaning of 'testamentary relating or appertaining to a will or wills.[1] A will (or testament), according to Saunders,[2] is the declaration in a prescribed manner of the intention of the person making it with regard to matters which he wishes to take effect upon or after his death.

In Fuller v Hooper,[3] Lord Hardwicke L.C., said that 'a will is to be considered in two lights, as to the testament and the instrument. The testament is the result and effect in point of law, of what is the will; and that consists of all the parts; and a codicil[4] is then a part of the will, all making but one testament; but it may be made at different times and different circumstances, and therefore there may be a

---

1 John B. Saunders, Words and Phrases Legally Defined, vol 5, P. 182 (1969)

2 Century Dictionary as cited in (d. at 3400

3 (1751) 2, ves sen 242

4 Rules pertaining to Codicil will be discussed in chapter 2.

different intention at making one and the other. The Instrument is that writing in which the will is contained.

Other terms relating to testamentary are the word 'devise' and 'bequeath'. In their ordinary sense they signify the declaration of a man's will concerning the succession to his own property after his death. Such a 'devise' or 'bequest' operates by virtue of the will, and of that alone.[5]

The word 'devise' according to saunders[6] is property applicable to a disposition of real estate, which is prima facie its meaning.

James[7] in his definition of 'devise' states that a devise or legacy, is where a man in his testament doth give anything to another; a devise is property applied to the gift of lands and legacy to the gift of goods or chattels.

Therefore a devise strictly is said to be where a man in his

---

5 John S. James, Strouds Judicial Dictionary of Words and Phrases, Vol 2, 768, 1972.

6 John B. Saunders, Supra note at Vol 2, p. 68

7 Supra note 5 at 769

testament doth give his lands to another after his decease; and a legacy is said to be where a man in his testament doth give any chattel to another to have after the death of the testator.

.2 HISTORICAL DEVELOPMENT

Before the Norman Conquest, England was ruled by the Anglo Saxon Law. By the middle of the 9th century there had existed documents which are known as Anglo-Saxon will or testaments.[8] Unfortunately much of the information about the Anglo Saxon laws and customs especially in this regards obscure as not much written records are preserved.[9]

The Anglo-Saxon will was written in Roman and it give a vague idea of what a man can, through written or spoken, determine about the goods he leaves behind after his death.

One of the most important ingredients under the Anglo-Saxon will is the 'post obit gift'.[10] It is where a man wishes to give land to a church, but at the same time he wishes to enjoy that land so long as he lives.A 'book' is drawn up in which he says ' I give the land after my death'.

Another characteristic of the Anglo Saxon will is the death bed distribution.[11]

---

8 Pollock & Maitland, The History of English Law, vol 2, 314, 1984

9 Id at vol 1, 25

10 Id. at 317

11 Ibid

Already in the 8th century, the dying man's last words are to be respected. But how much power this spoken words have is not known.

The 'post obit gift' and 'the last words' seem to be the only ingredients in the written will of the 9th, 10th and 11th century.[12] At this period, only great people can make wills.[13] They include kings, queens, king's son, bishops and other such persons. for the ordinary man, the king's consent must be obtained if the will is to be valid. another method used was to make an appeal to ecclesiastical sanctions where a bishop sets his cross to the will and cursed those who infringe it.

After England was conquered by William Duke of Normandy in 1066 the landholder could no longer give his land by will. This power was taken away under the 'feudalism' introduced by the Norman. Feudalism was established under William I,[14] Where it was assumed that all land is held ultimately of the king.

---

12 Id at 319

13 Id at 320

14 J.H. Baker, An Introduction to English Legal History, 257, 1990

A set of interdependent changes of wills took place during the 12th and 13th century and gradually established a definite law after the Norman conquest.[15]

1. The king's court condemns the post obit gift of land and every dealing with land that is of a testamentary character;
2. By evolving a rigorously primogenitary scheme for the inheritance of land, it destroys all such unity in the law of succession. The heir as such will have nothing to do with the chattels of the dead man.

3. The church asserts a right to protect and execute the last will of the dead man. The will which only deals with chattels gradually assumes a truly testamentary character and the executor of it gradually becomes the 'personal representative' of the dead man, but has nothing to do with freehold estates.

After the Norman Conquest had introduced the law against the devise of land, certain devices were practised by the English people. The most fruitful devices discovered in the 14th century was that which enabled a landowner to avoid the rule prohibited wills of land.[16]

---

15 Supra note 8 at 325

16 Supra note 8 at 284

A dying tenant could grant the land to a group of friends and neighbours on trust to regrant it after his death to such beneficiary as he should name. this enabled the land in effect to be devised and since title did not passed by descent,[17] the feudal incidents were avoided as well. This machinery was called a 'use' had later extended into a permanent institution.

Between 1391 to 1490 little was done to preserve the financial profits of feudalism against the encroachment of uses.[18] As a result of the use, feudal revenue from reliefs payment for taking up an inheritance and wardships [19] (payment for taking up an inheritance) in chivalry was by 1500 becoming virtually obsolete.

Later Henry VIII determined to revive some of the feudal revenues by raising fiscal feudalism'[20]. In 1526 the King's council adopted a policy of tightening up on alienation to ensure that the crown was compensated for any loss.

---

17 In legal understanding, it is taken when land, after the death of the accentor, is cast by the course of law upon the heir-stroud's

18 Supra note 8 at 289

19 Wardship is where if a deceased tenant heir was under age and so unable to perform his feudal obligations, he was subjected to wardship. The land come back to the lord during the infancy, so that he might be compensated out of the income for the loss of services.

20 Supra note 14 at 290

In 1529 the king agreed to introduce legislation whereby feudal incident would be restored to the extent of one-third of the amount due at common law. This proposal was rejected as uses were an established legal institution which the people keen to preserve since it conferred them the power to devise land.

Henry VIII applying the statue of 1484 through the common pleas judges who viewed that uses were governed by the common law. And that wills of uses would be void, because wills of land were void.

Here, uses might not be binding in conscience after all as it 'deprive the king and his subjects of their feudal incidents'. Thomas Andley a reader of the Inner Temple in 1526 who had propagated the new government policy, complained of landowners who had pursued uses, was placed by the king as a judge in conscience. In 1534 he discussed the case[21] of whether a will made by a tenant-in-chief which would have deprived the king of his wardship was valid.

The judges having coerced by Henry VIII declared that it was against the nature of land to be devisable by will, and that will of the use of land was just as invalid as a will of the

---

[2] Re Lord Dacre of the South (1535) B. & M. 105

land itself.[22]

The Statute of Uses which was introduced in 1536 carried the royal policies to the extreme of abolishing the power of devise for the future. This had been opposed by the people as the statute not only restored Feudal incidents, but it imposed compulsory primogeniture on a society which had accustomed itself to wills.

Protest was made to urge that landowners be allowed to leave part of their lands by will . Within four years the government accepted the demand and retreated to the one-third compromise proposed in 1529.

The Statute of Wills 1540 conferred for the first time the legal power to dispose freeholds by will.

---

[22] Supra note 14 at 291

1.3 TESTAMENTARY DISPOSITION RELATING TO REAL PROPERTY

Real property or realty according to Manchester[23] consist of things substantial and immovable, and of the rights and profits annexed to, or issuing out of these. Realty consisted of lands, of tenements or of hereditaments.[24]

As regards disposing of real property, the history states that the power of disposing of lands by will existed in the time of Saxons but after the establishment of the Feudal system after the Norman Invasion, the power was taken away. This is true for the land held by knight service[25] for being considered inconsistent with the principles of feudal law.

By 1535 Statute of Uses was introduced to abolish the individual power of testamentary disposition. This was abolished by the Statute of Wills, 1540.

---

23 A.H. Manchester, Modern Legal History, 302, 1980;

24 The distinction between real property and personal property under the feudal system is that the former was subject to tenure, inheritance or future estates; J.H. Baker, An Introduction to English Legal System, 255, 1990;

25 Halsbury's Statutes, vol 50, 148