KADIJA UMMA *v.* MEERA LEBBE.

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D. C., Colombo, 14,396.

Deed inter vivos—*Grant of property subject to* fidei commissum—Power to *fiduciary to transfer his interest by way of gift or dowry to his heir or heirs under certain restrictions—Transfer by fiduciary by last will to his sons, excluding his daughter—Bequest to daughter of a share in the residuary estate—Her right to approbate or reprobate the will—Consequences of her acceptance of the share—Loss of her claim to the* fidei commissum *land.*

A L by deed *inter vivos* in 1872 gifted to I L certain lands subject to a *fidei commissum*, viz,, that I L should possess it during his lifetime, and that after his death the same shall devolve on his children in equal shares, with liberty however to I L to transfer his right by way of gift or dowry to his heirs or heirs, "but under the same conditions as aforesaid."

I L possessed the lands, and by his last will dated 29th July, 1893, bequeathed one of them to three of his sons, and the residue of the movable and immovable property to his widow, three sons and a daughter.

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After I L's death the legatees, by deed of partition dated 17th November, 1893, divided among themselves the residuary estate. Several years afterwards the daughter, jointly with her husband, sued her three brothers for an undivided one-fourth of the land which she alleged was bequeathed to them by the last will of I L in violation of the powers given him by A L's deed of 1872.

Held, that as the plaintiff had recognized in the deed of partition the provisions of I L's last will, and acknowledged to have received in full satisfaction of her claim under the will, and as she had acquiesced for several years in the exclusive possession and enjoyment of the defendants of the land she now claimed, she could not now reprobate what she had approbated, even if I L's last will contravened the limitations contained in A L's deed of gift to him.

Her duty is to elect whether she will approbate I L's will as a whole, taking the residue and relinquishing her interest in the *fidei commissum* land, or will approbate it as a whole, retaining this land and foregoing the benefit of the devise to her.

Rei vindicatio in respect of an undivided one-fourth share of certain lands and for rents and profits.

The first plaintiff Kadija Umma and the three defendants were the children of one Ibrahim Lebbe, who died in January, 1893, leaving a last will. After his death the three defendants entered into possession of the lands and buildings mentioned in the plaint to the exclusion of the first plaintiff, who now came into Court praying for a declaration of title as to her one-fourth share. Her claim to that share was founded on one of the provisions of a deed dated 17th July, 1872, by which Ibrahim Lebbe held the property from his father, Ahamado Lebbe.

The words of that provision were that Ibrahim Lebbe " shall not sell, alienate, mortgage, or encumber the same or any part thereof, or the issues, rents, and profits thereof, but shall possess and enjoy the same during his natural life, and after his death the same shall devolve on his children share and share alike, or if there be but one child on such child, and thereafter on the lawful issues of such children or child, and so from generation to generation under the *fidei commissum* law of inheritance.....*provided, however, that the said Ibrahim Lebbe*, his child or children, or the person or persons so lawfully claiming as aforesaid, *may transfer his* or their *interest in the said premises by way of gift or dowry to his* or their lawful *heir or heirs, but under the same conditions as aforesaid.*"

It was contended on behalf of the defendants that this proviso gave Ibrahim Lebbe the power by last will to divert the devolution of the *fidei commissum* property in the direction of some of his children to the exclusion of the others; and that as Ibrahim Lebbe declared in his last will that his shop No. 90 should " go "

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to his sons, the three defendants, they had the right to exclude their sister, the first plaintiff, from the benefits of her grandfather's original deed of 1872.

The Additional District Judge, Mr. Felix Dias, gave judgment for plaintiff as prayed.

The defendants appealed. The case was argued on 5th May, 1903.

Dornhorst, K.C., Sampayo, K.C., and *W. Pereira*, for defendants, appellants.

Bawa, for plaintiffs, respondents.

Cur. adv. vult.

5th June, 1903. LAYARD, C.J.—

In this case it appears to me the District Judge was right in his construction of the will of Ibrahim Lebbe.

I agree with him that where the will speaks of "his interest" in conferring on Ibrahim Lebbe a power to transfer it by way of gift or dowry, it means his life interest, because that is expressly all that the will gives him—a right to possess and enjoy the same during his natural life, and after his death to devolve on his children "share and share alike."

Accordingly, he could not dispose of any interest of any child of his which would vest upon his (Ibrahim's) death. The construction contended for by the appellants takes no notice of the important words, "but under the same conditions and restrictions as aforesaid." This must mean, if anything, that neither Ibrahim nor his heirs can alter the disposition of the property to Ibrahim for life, and on his death to his "children share and share alike."

If Ibrahim could by gift or dowry give an absolute interest to any one child, it would be a contravention of the provision of those clauses prescribing that such gift or dowry must conform to the "conditions and restrictions as aforesaid."

Even if this construction makes this clause mere surplusage, as the District Judge appears to think, that is no reason for rejecting it, as surplusage is not uncommon in ill-drawn documents.

But even if such a disposition could be made by gift or dowry so as to defeat a child's claim to his or her equal share, there is nothing to authorize the exercise by will of a similar power; an express power of appointment by deed is not either by English or Roman-Dutch Law exercisable by will.

With regard to the question of election, the Civil Law, which the Roman-Dutch Law follows, differs in principle from the

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English Law in not recognizing the principle of compensation which is the fundamental part of the English doctrine.

The rule is expressed in 4 Burge's *Colonial Laws, pp. 712 to 716*, and it only admits of approbation and reprobation; and, following the maxim *quod approbo non reprobo*, it appears to me that Kadija in this case, by her joining in the partition deed No. 2,067 approved the dispositions made by Ibrahim's will, though they contravened the limitations contained in Ahammado's donation, and she cannot now reprobate them.

It is clear that the question of the relative value does not affect election under the Roman-Dutch Law.

Even if the benefit taken under the instrument be less than that to which the party put to his election is entitled outside the terms of the instrument, it appears that he will be bound by his election once made to take the benefits the instrument gives him. (*Dig. lib. 30 to 32, No. 26.*)

Accordingly here, Kadija having with her husband's advice elected to " approbate " Ibrahim's will, and by deed No. 2,067 to take certain property as her share thereunder, cannot go back upon that decision, and I would accordingly allow the appeal on the ground that Kadija is bound by the election contained in deed No. 2,067 to approbate Ibrahim's will.

As pointed out by my brother in his judgment, the parties do not appear to be agreed as to whether the whole of the *fidei commissum* land was devised to the defendants. I agree, therefore, to the order proposed by him. I concur in the opinion he expresses, that the election of Kadija cannot prejudice the succession of the persons entitled to take after her death under the *fidei commissum*.

WENDT, J.—

This is an action to vindicate an undivided one-fourth share of certain land and the buildings standing thereon, situated in the Pettah, Colombo, and bearing the assessment Nos. 88, 89, 90, 91, and 92, Main street. This property was admittedly subject to a *fidei commissum*, and the first plaintiff, who is the wife of the second plaintiff, claims in the character of a *fidei commissary* heir. The *fidei commissum* is created by a notarial deed *inter vivos*, No. 263, dated 17th July, 1872, whereby the then owner of the property, Ibrahim Lebbe Ahamadu Lebbe Marikar, in consideration of his love and affection for his son, Ahamadu Lebbe Marikar Ibrahim Lebbe (hereinafter referred to as Ibrahim Lebbe), conveyed the property to him, his heirs, executors, administrators, and assigns by way of gift absolute and irrevocable, " subject,

however, to the following conditions and restrictions, to wit, that the said Ibrahim Lebbe shall not sell, alienate, mortgage, or incumber the same or any part thereof, or the issues, rents, and profits thereof or of any part thereof, but shall possess and enjoy the same during his natural life, and after his death the same shall devolve on his children, share and share alike, or if there be but one child on such child, and thereafter on the lawful issues of such children or child and so from generation to generation under the *fidei commissum* law of inheritance; and further, that the said premises or the issues, rents, and profits thereof or of any part thereof shall not be liable for any debt or default of the said Ahamadu Lebbe Marikar Ibrahim Lebbe, or of any person or persons lawfully claiming by, from, or under him, and that in the event of his dying without leaving any children or their lawful issues surviving him, the same shall devolve on his heirs under the same conditions and restrictions according to the Mohammedan Law of Inheritance.

"Provided, however, that the said Ibrahim Lebbe, his child or children, or the person or persons so lawfully claiming as aforesaid, may transfer his or their interest in the said premises by way of gift or dowry to his or their lawful heir or heirs, but under the same conditions and restrictions as aforesaid."

Ibrahim Lebbe duly accepted the gift and possessed the property thereunder until his death, which occurred on 31st July, 1893. Two days before his death he executed a last will, the material parts of which were as follows:—

"(2) The whole of the shop No. 90, situate at Main street, in which I am now carrying on business, with the goods therein, to go to my sons Ibrahim Lebbe Marikar Mohamadu Meera Lebbe Marikar, Ibrahim Lebbe Marikar Meera Lebbe Marikar, and Ibrahim Lebbe Marikar Avoe Lebbe Marikar, to these three persons thus declared.

"(3) Also declared to give over the house No. 47, situate in New Moor street, to Agammadu Lebbe Marikar Sesma Lebbe Hadjiar.

"(4) This testator states.....the residue of the movable and immovable properties and cash and all to be received by my wife Pattu Muttu, sons Mohamadu Meera Lebbe Marikar, Meera Lebbe Marikar, Avoe Lebbe Marikar, and daughter Kadija Umma according to our religion."

The testator was survived by his widow Pattu Muttu and four children, viz, three sons, Mohammado Meera Lebbe Marikar, Meera Lebbe Marikar, Avoe Lebbe Marikar, and one daughter, the first plaintiff, Kadija Umma.

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The first plaintiff, as one of four children of the fiduciary Ibrahim Lebbe, would, in the ordinary course, have taken on his death one-fourth of the property, but it is contended by her brothers, the defendants, that the devise to them contained in the last will of Ibrahim was an exercise by him of the power to transfer by gift or dowry, and that this power included the right to select some of his children to receive the property to the exclusion of others. The plaintiffs reply that the power could only have been exercised by act *inter vivos*, and if exercised at all must have been exercised in favour of all the donees' "heirs." In the view I take it is unnecessary to decide the latter point or the question as to the meaning of the transferor's "interest."

I am of opinion that the devise of the property by Ibrahim Lebbe's last will was not a transfer by way of gift or dowry. It is true that a prohibition against alienation being a burden on the *dominium* is strictly construed, but the words here leave no doubt that every form of disposition was forbidden. The donee is not to sell, alienate, mortgage, or encumber the land or any part thereof, or the issues, rents, and profits thereof or any part thereof, but he is to possess and enjoy during his natural life, and after his death the property is to devolve on his children share and share alike. The provision for the devolution of the property after the fiduciary's death leaves no room for any testamentary disposition by him. The passage in *2* Burge, *p. 114*, which says that a prohibition to sell or burthen the property does not prevent the heir from disposing of it by will refers (as the text of Voet, upon which it is founded, viz., *Lib. 36, 1, 27* shows) to cases where there is not a fully defined *fidei commissum*, with express indication of the persons who are to take after the heir, but merely a simple prohibition against alienation. In such a case, says Voet, "a prohibition against alienation by act *inter vivos* must not be extended to testamentary dispositions," but he recognizes the principle that "under the general prohibition of alienation, even alienation by last will is forbidden."

The words which we have to construe, however, do not occur in the prohibitory clause, but by way of exception thereto; and the question is, whether the testator, having in that clause distinctly taken away the power to devise by last will, has restored it in the words of the exception. I think certainly not. The words are appropriate to transactions *inter vivos*. (It must be borne in mind that the instrument under consideration was drawn up in the English language, and therefore eliminates the fruitfut cause of uncertainty which is produced by translations from the native tongues.) "Transfer" is defined in Wharton's *Lexicon* as meaning

" to convey, to make over from one to another," and the term is commonly used in legal phraseology to describe transactions *inter vivos*. A " gift " is in almost every case a present passing of property from one living person to another, although there is a certain small and rare class of transactions which are classed as gifts under the name of *donationes mortis causa*, but which partake more largely of the nature of testamentary dispositions. A "dowry," again, is essentially a matter *inter vivos*, the consideration being a marriage very shortly to take place. There is reason to infer from the instrument that the power given to transfer to the heir or heirs contemplated the necessity arising for advancing a son in life or for giving a marriage portion to a daughter, a necessity which would, in the ordinary course of things, have to be met by an immediate disposition of property *inter vivos*, and could not well be postponed till after the disponor's death.

For these reasons, I think that the devolution of the property to plaintiff, in equal shares with the defendants under the *fidei commissum*, was in no way interfered with by the last will of the fiduciary, Ibrahim Lebbe.

The next question is, whether first plaintiff, to whom Ibrahim Lebbe has devised a share in his residuary estate, can be put to her election between that interest and her right to the *fidei commissum* property. And here it is to be regretted that the District Judge did not frame proper issues at the trial, as required by section 146 of the Civil Procedure Code. Parties merely put in the instruments relied upon on either side, and counsel were then heard. No facts outside the documents were agreed upon. It appears, however, that what was devised to the defendants by the will was "the whole of the shop No. 90, situate in Main street, in which I am now carrying on business." The plaintiffs contended that this description covered only part of the *fidei commissum* land. What the defendants' contention was is not recorded. If first plaintiff is to be forced to elect, the Court must first determine the extent of the devise to the defendants.

It is manifest that the testator did not intend his daughter, the first plaintiff, to have both the share of residue and the *fidei commissum* property, for he expressly devised the latter to other persons. The first plaintiff must therefore elect whether she will approbate the will as a whole, taking the residue and relinquishing her interest in the *fidei commissum* land, or will reprobate it as a whole, retaining this land and foregoing the benefit of the devise to her.

By the Roman Law a testator could devise to a third person the property of his heir, and the heir, if he accepted the inheritance,

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was bound to deliver the subject devised to the devisee. It made no difference if the testator was under the belief that the subject belonged to himself (*Institutes, lib. 2, 20, 4; Dig. lib 31, 2, 77, 8*), and Voet shows that this principle was fully accepted by the Roman-Dutch Law. The heir had to deliver his property so devised, in specie, and could not offer its value as compensation (*Ad Pand. lib 30-32, num. 26; 4* Burge, *713*). So far as concerns the matter in hand, the first plaintiff, being a residuary devisee, must be regarded as in the position of an heir.

In England, however, Courts of Equity, assuming thereby to carry out the wishes of the testator, have engrafted two new principles upon the Civil Law, viz., first, that where the election is against the will they will not suffer the benefit intended for the refractory devisee to lapse into the residue by reason of his refusal, but will sequester it in order thereout to compensate those whom his election disappoints; and, further, they permit the refractory devisee to retain both benefits upon condition of his making good to the disappointed devisee the value of the property intended by the testator for him (*Story's Equity Jurisprudence, sections 1,083-85*). The question is whether these developments in English equitable doctrines have ever been recognized or applied in Ceylon. They have no place at the Cape, where also the Roman-Dutch Law prevails; and a legatee electing against a will there forfeits all benefit under it (see *Luces v. Hoole, Buc. (1879) 132;* Juta's *Leading Cases* (*Wills*), *2nd Edition, p. 153*).

In Ceylon I have found the following cases only which touch the subject (I cite them in order of date):—*Baba v. Sinibera, 3* Lor. *302* (*1859*); District Court Trincomalee, No. *19,559*, *Ram. (1864) 103*, *Vanderstr, 34*, note (wrongly cited in 2 Thompson, *241*, as decided in 1861); *Strachan v. Brown. Leg. Misc. (1866), p. 59;* District Court, Colombo, 51,428, *Vand. 9* (*1869*); District Court, Colombo, 3,233, *Vand. 34* (*1869*); District Court, Kalutara, 23,882; *Vand. 96* (*1870*); *Ponniah v. Coomaraswamy, 5 S.C.C. 81* (*1882*). All these cases but the last were cases of a widow's rights as against her husband's will, and of election in favour of the instrument. In none of them was the Court called upon to settle the rights of parties upon a devisee electing against the will, though in the earliest case the judgment of this Court states that upon the devisee electing against the will "equity will sequester the property devised to him for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights;" and for this statement *1* Powell *on Devises, p. 433*, is cited. Thompson, whose *Institutes* were published in 1866, merely quotes the English equity rules from

Smith's Manual of Equity, and cites the first two of the local cases I have mentioned. In the absence of anything more direct and precise holding that these rules obtain in Ceylon, and applying them to actual cases that have arisen, I do not think we can regard the principles of English equity as in force in this Island. We ought only to apply the Roman-Dutch Law, under which a legatee must either stand by the will as a whole, or repudiate it as a whole. In the last of the cases above-mentioned a child of the testator's first bed elected against his will and recovered judgment for a moiety of the common estate. Subsequently she sued to recover the land specially devised to her under the will, but her action was dismissed on the ground that she had elected to repudiate the will, and could, therefore, take nothing under it.

The defendants argued that the first plaintiff has, in fact, already elected in favour of the will, and cannot now go back. They relied strongly on a deed, No. 2,067, dated the 17th November, 1893, and executed by Ibrahim Lebbe's widow, the three defendants, and the first plaintiff, assisted by her husband the second plaintiff. By this deed the parties divided amongst themselves the lands forming the testator's residuary estate in the proportion of one-eighth to the widow, one-eighth to the first plaintiff, and two-eighths to each of the defendants, those being their respective shares under the Mohammedan Law as to intestate succession. This deed recognized the provisions of the will, for it recited that the testator had made certain specific bequests, and described the residue as comprising the scheduled houses and lands, which it proceeded to apportion among the parties, giving to each of them one or more lands and houses in severalty. And each of the parties acknowledged to have received his portion in full satisfaction of his claim under the will. There might have been some opening for the argument that the execution of this deed by the plaintiffs was consistent with an intention on their part to claim the *fidei commissum* property also, as wrongly included in the will, were it not for the fact that plaintiffs had for seven years after its execution acquiesced in defendants' exclusive possession and enjoyment of that property before they brought the present action. This fact completes the proof of their election to take under the will, and the action must fail so far as concerns that extent of the *fidei commissum* land which the will devises to the defendants. To ascertain what this extent is the case must go back to the District Court. If the Court finds that part only was devised, the first plaintiff will be entitled to have possession of the remainder, with mesne profits for such period as the Prescription

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Ordinance may allow of her recovering. If the whole of the land was devised, the action will fail altogether.

It may be useful to add that, in my opinion, the election of first plaintiff will not prejudice the succession of the persons entitled to take after her death under the *fidei commissum*.

The appellants will have their costs of the appeal. The costs in the District Court will abide the final result.