Present: Garvin and Dalton JJ. 1927.

MOHAMED CASSIM *v.* MOHAMED HASSEN.

350—D C. Galle, 22,413.

Legacy—Property bequeathed partly disposed of—Tacit revocation.

Where a last will contained the following clause: "I do hereby direct that all the estate of my deceased brother . . . . be conveyed to his four children in accordance with his last will and testament which was duly proved in case No. 4,589. The half share of the immovables and all the movables given me by that will shall go to his two sons," and where it appeared that the testator had disposed of a portion of the movables devised to him under his brother's will.

Held, that the legacy must be regarded as tacitly revoked to the extent of the property disposed of.

THE plaintiffs are the two sons of one Ahamadu Lebbe. The defendant is the executor of Abdul Karim, who was a brother of Ahamadu Lebbe. Ahamadu Lebbe died in 1916 leaving a will dated February 6, 1896, by which he appointed his brother Abdul Karim sole executor, bequeathing him also one-half of his immovable property and the whole of his movable property. On January 24, 1922, Abdul Karim made a last will, and died on April 22 of the same year. By that will Abdul Karim made the following disposition:—

"I hereby direct that all the estate of my deceased brother Ahamadu Lebbe, which is now being administered in testamentary case No. 4,589 of the District Court of Galle, be conveyed to his four children in accordance with his last will . . . . The half share of the immovables given and all the movables given me by that will shall go to his two sons."

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The plaintiffs sought to recover from the defendant the legacy to which they were entitled under the last will of Abdul Karim, or in the alternative the value of the legacy. The learned District Judge gave judgment for the plaintiffs.

E. W. Jayewardene, K. C. (with *Garvin* and *Cassim Ismail*), for defendant, appellant.

Soertsz (with *R. L. Pereira* and *R. L. Bartholomeusz*), for plaintiffs, respondent.

April 12, 1927. DALTON J.—

The plaintiffs are two sons of one Ahamadu Lebbe; the first at the time of the institution of the action, being in Singapore and appearing by his attorney, Mohamed Salie; the second being a minor and appearing herein, by his next friend Mohamed Salie. Defendant is the executor of Abdul Karim, who was a brother of Ahamadu Lebbe and an uncle of the plaintiffs.

Ahamadu Lebbe died in 1916 leaving a will dated February 6, 1896; he left two sons, the plaintiffs, and three daughters. By that will he appointed his brother Abdul Karim sole executor, bequeathing also to him one-half of all his immovable property and the whole of his movable property. The remaining half of his immovable property he left to his children who survived after they attained the age of 21 years. Abdul Karim filed an inventory (exhibit P 2) in D. C. (Testy.) 4,589, and the estate was closed in 1917. The inventory shows the following items material to this case:—

		Rs. c.
18.	One carriage	250 00
19.	Two horses	300 00
20.	One hackery	25 00
21.	Half share of cash	1,811 28
22.	Half share of goods in the shop ...	1,100 00
23.	Amount in Mercantile Bank of India Ltd., Galle	7,931 82
24.	Half share of amount due for as per compensation	1,000 00

Then follow various sums due on numerous decrees and promissory notes and other debts due to the estate of Ahamadu Lebbe.

Subsequently, Abdul Karim himself died childless in 1922 leaving a will dated January 24, 1922. His nephew, the present defendant, and Mohamed Salie were appointed executors, but Mohamed Salie is said to have renounced probate. He was in fact an insolvent.

By that will Abdul Karim made the following disposition:—

1. "I do hereby direct that all the estate of my deceased brother Abdul Kader Hadji Ahamadu Lebbe Marikar, which is now being administered in testamentary case No. 4,589 of the District Court of Galle, be conveyed to his four children in

accordance with his last will and testament which was duly proved in the said case No. 4,589. The half share of the immovables and all the movables given me by that will shall go to his two sons."

There was a residuary bequest of all his property to his wife and to his nephews and nieces.

Basing their claim on this clause of the will of Abdul Karim, the plaintiffs ask that the defendant be ordered to deliver over to them the movable property inventorized in the estate of Ahamadu Lebbe, or in the alternative that the sum of Rs. 31,489.08, the value according to the inventory, be paid over to them.

They subsequently amended their claim and asked that defendant be ordered to render an account of all moneys formerly belonging to the estate of Ahamadu Lebbe which had come into his possession, that he assign to them all money decrees in favour of Ahamadu Lebbe and deliver to them or assign, as the case may be, all promissory notes, debts, and choses in action belonging or due to Ahamadu Lebbe, and that he deliver up all other movable property that formerly belonged to Ahamadu Lebbe and bequeathed to Abdul Karim. In default plaintiffs asked that he pay them the sum of Rs. 31,489.08.

The claim of the plaintiffs, therefore, was for delivery of the money and articles set out in the inventory (items 18-24) and for the delivery or assignment of the decrees, promissory notes, and debts set out therein.

After pleading that the action was misconceived and not maintainable defendant answered that some of the movable property had been disposed of by Abdul Karim, the cash and more had been spent by Abdul Karim on account of Ahamadu Lebbe's estate and family, and that the promissory notes and other documents were in the possession of the plaintiffs. He stated, however, he was prepared to assign any remaining decrees in favour of the plaintiffs.

After hearing evidence the learned Judge came to the conclusion that the clause in Abdul Karim's will set out above showed a very clear intention to bequeath to the plaintiffs all the estate of Ahamadu Lebbe left to him and as it existed at the time of Ahamadu Lebbe's death, and he therefore directed that defendant do pay to them the sum of Rs. 31,489.08 claimed. He answered all issues save one in favour of the plaintiffs; the one issue which seems to me to be the only really important issue in the case he held it was not necessary to decide. That issue was as to what of the movable property bequeathed by Ahamadu Lebbe to his brother Abdul Karim was actually in existence at the date of Abdul Karim's death. It is urged on behalf of plaintiffs that whether it existed or not Abdul Karim's executor had to hand it over or pay to them its value. and that trial Judge has upheld that contention.

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In the course of his argument on the appeal Mr. Pereira for the plaintiffs (respondents) agreed that he could not uphold the judgment to the extent to which the trial Judge had gone, but he urged that at any rate he was entitled to the four items—

		Rs. c.
21. Half share of cash ...	...	1,811 28
22. Half share of goods in shop	...	1,100 00
23. Cash in Bank, Galle	...	7,931 82
24. Half share of compensation	...	1,000 00

amounting to Rs. 11,843.10.

When the evidence is examined, it will be found that there is not the least attempt on behalf of the plaintiffs to show how much of Ahamadu Lebbe's property bequeathed to Abdul Karim came into the hands of Abdul Lebbe's executor, or that any part of it existed at the time of Abdul Karim's death. They rely purely and solely upon the inventory P 2. The only witnesses called in support of the claim are the first plaintiff and Salie, the next friend of the second plaintiff. The first admits he has failed in business, has warrants out against him, and but for this case he would be in hiding, whilst the second is an insolvent whose certificate was suspended for two years, and admits that the story he told in this case was not what he told the court in his insolvency proceedings.

On the other hand, the defendant has given evidence purporting to show how Abdul Karim disposed of or dealt with the movables and cash mentioned in the inventory P 2, none of which he says came into his hands. Both the first plaintiff and Salie were in Abdul Karim's shop for at least twelve months, and then Abdul Karim apparently had to put the defendant in charge. There is evidence to show that the first plaintiff himself actually disposed of the buggy inventorized in P 2, whilst it would also appear that he and Salie took possession of the promissory notes they now claim. It is very difficult to accept first plaintiff's uncorroborated statement that, on his father's death the widow was left with cash to the value of Rs. 20,000. The evidence given by defendant as to the maintenance of the widow by Abdul Karim and the education of the children is much more likely. The defendant further has not been discredited as has the first plaintiff.

The plaintiffs have entirely failed to show then that these four items 21-24 came into the defendant's hands, or had any existence at the time of Abdul Karim's death. It is true that it has been urged that, in view of the language of Abdul Karim's will, there was no such onus upon them, but I am quite unable to agree.

There is to my mind no difficulty in coming to the conclusion that the trial Judge was wrong in his conclusion; the only difficulty to my mind being whether the common law or English law is applicable.

I am not satisfied that the common law is not applicable, but on the facts here in either case the result must in my opinion be the same.

The bequest by Ahamadu Lebbe to Abdul Karim is an absolute bequest without condition of part of his estate (*bonorum*). To ascertain the extent of that part it is conceded that it is necessary to look at the amount of Ahamadu Lebbe's property at the time of his death. It is for that purpose that the inventory P 2 is required. His estate was closed in 1917. The bequest by Abdul Karim to the plaintiffs is a legacy of all the estate (*bonorum*) of Ahamadu Lebbe left by the latter to Abdul Karim. When Abdul Karim bequeaths in 1922 to the plaintiffs that portion of the estate (*bonorum*) inherited by him from Ahamadu Lebbe, it is equally necessary to ascertain the extent of that property as at the death of the testator, *i.e.*, Abdul Karim, in the absence of any clearly expressed intention of the testator to the contrary. (*Voet Bk. XXX., 9.*) What was left to Abdul Karim is easily ascertainable from P. 2. If that property was in existence or could be satisfactorily traced on the principles laid down by Voet, and still remained the property of Abdul Karim at his death, then it is left to the plaintiffs. A legacy may, however, be expressly or tacitly revoked. If the property bequeathed perishes, or be disposed of by the testator before his death, or be destroyed or altered in such a manner that it can no longer be regarded as the same thing, then the legacy is tacitly revoked. (*Maasdorp's Institutes Vol. I. p. 188; Voet Bk. XXX., 55; Grotius Bk. 2, c. XXIV., 28.*) It is true that it is a principle of the common law that a testator may bequeath as a lagacy not only his own property but also property belonging to others (*cf. Voet Bk. XXX., 26*, and *Receiver of Revenue, Pretoria v. Hancke* [1]), but this is not a case of such a bequest, because there is nothing to show that Abdul Karim had any intention whatsoever to bequeath anything but what was his own.

The difference between English and the common law on this subject of legacies appears to be due to the precise classification of legacies in English law. Owing to the absence of that classification in the common law there would appear to be greater scope for really ascertaining and following the intention of the testator, since it is rather a question of the testator's wish than a matter of law (*Voet Bk. XXX., 55*, and *Morice English and Roman-Dutch Law, p. 302*). The trial Judge has read into the will an intention on the part of the testator Abdul Karim which cannot in my opinion on any reasoning be found there. I am unable to agree further that there is any legal evidence to justify a conclusion that the words of the clause either recognize the alleged generosity of Ahamadu Lebbe "by returning to the sons all that he had received from the father," or that they justify a conclusion that it was "a case of complete restoration."

[1] (*1915*) *A. D. at p. 77.*

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No question has been raised as to whether rights of action could or could not pass under either bequest, having regard to the language used in the wills, but in any case defendant raises no difficulty on that point.

For the reasons given the plaintiffs' case fails, and their action should have been dismissed with costs. The appeal is therefore allowed with costs, the judgment of the trial Judge is set aside, and judgment is entered for the defendant with costs.

GARVIN J.—I agree.

Appeal allowed.