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[In Review.]

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Middleton, and Mr. Justice Wood Renton.

KADIJA UMMA *et al v.* MEERA LEBBE *et al.*

D. C. Colombo, 14,396.

Election, doctrine of—Approbation or reprobation—Knowledge of testator—Fact of election—English Law—Roman-Dutch Law.

A person who accepts a benefit under a deed or will is bound to confirm the whole instrument, conforming to all its provisions and renouncing every right inconsistent with them.

Noys v. Mordaunt [1] followed.

This rule applies whether the testator thought he had the right, or, knowing the extent of his authority, intended by an arbitrary exertion of power to exceed it.

Whistler v. Webster [2] followed.

HEARING in review at the instance of the plaintiffs of the judgments of the Supreme Court reported in (*1903*) *7 N. L. R. 23*, where the facts are fully stated.

Bawa, Acting S.-G. (with him *H. A. Jayewardene*), for the plaintiffs, appellants.

Sampayo, K.C., for the defendants, respondents.

Cur. adv. vult.

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The claim in this action is that the first plaintiff may be declared entitled to an undivided one-fourth of premises in Main street, Colombo, and for mesne profits, and for possession. The contest is now as to part only of the premises, viz., No. 90. The second plaintiff is joined as the first plaintiff's husband and the defendants are her brothers.

By deed of July 17, 1872, the grandfather of the first plaintiff and of the defendants conveyed the premises to their father Ibrahim Lebbe; and it has been held by this Court, and is not disputed, that this deed created a *fidei commissum*, after Ibrahim Lebbe's

[1] (*1706*) *2 Vern. 581.*

[2] (*1794*) *2 Ves. Jun. 367.*

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death, in favour of his four children, the first plaintiff and the defendants, and their issue; so that on his death the first plaintiff became entitled under it to one undivided fourth of the premises for her life.

Ibrahim Lebbe, by his will dated January 29, 1893, gave No. 90, Main street, specifically to the defendants, and, after another specific devise, directed that all the residue of his property should go to his wife and his said four children "according to our religion." He died on January 31, 1893. His will was proved on March 4, 1893. The inventory filed on June 22, 1893, enumerates a large number of properties belonging to the estate, including the other property specifically devised, but does not include No. 90, Main street.

By deed of November 10, 1893, made between the widow and the four children and the daughter's husband, after reciting that the testator was entitled to the properties mentioned in the schedule thereto, and reciting his will and death and the probate of the will, and reciting that according to the Muhammadan religion the widow was entitled to one-eighth share of the residue and the daughter to one-eighth, and each of the three sons to two-eighth shares, and that the parties had agreed to a division of all the immovables, certain divided portions thereof enumerated in the five parts of the schedule were allotted to and accepted by each of the five parties in full satisfaction of their said shares.

The defendants have been in possession of No. 90, Main street, ever since the testator's death; and the parties have been in possession of the shares allotted to them by the deed of 1893 ever since the execution of that deed.

The plaintiffs brought this action on December 15, 1900. The defendants in their answer first said that the provision in the deed of July 17, 1872, in favour of the children of Ibrahim Lebbe, was expressly subject to the qualification that he might give the premises to his heirs (a defence which is not now insisted upon), and they further said that the first plaintiff, after the death of the testator, elected to accept, and did accept, the benefits given to her by his said will, and that she was thereby precluded from claiming any share in the premises which were devised to the defendants by the will.

The plaintiffs insist on their right to retain the benefits given to the first plaintiff by the will, and also to retain the one-fourth share in the house No. 90, Main street, which the testator purported to devise to the defendants; whilst the defendants contend that she was bound to elect whether she would take under the will or against it, and that by the deed of November, 1893, she elected to take under it. That is the contest now, whether she was bound to elect, and if so, whether she did so elect. The Supreme Court, by its judgments dated June 5, 1903, and June 28, 1905, decided in favour

of the defendant's contention; and this is a hearing in review before appeal against those judgments to His Majesty in Council.

I agree with the judgment of June 28, 1905, that the first plaintiff was bound to elect. She cannot, however, be said to have elected to take the benefit given to her by her father's will and to give up any inconsistent claim which she had to any of the property with which the will purported to deal, unless she knew that she had some such claim. No issue was settled, and no evidence was given on the question whether she had such knowledge; so that, if the judgments under review are to stand, it must be because the admitted facts and documents prove that she had such knowledge. The plaintiffs do not say when it was that she became aware of her rights, or whether the fact was that at the date of the deed of 1893 she did not know of the existence of the settlement of 1872, or whether it was that she knew of its existence but mistook its effect. The inventory, which excludes the Main street property, shows that the executor at any rate knew that the property was not part of the testator's estate, although there is no evidence as to whether the daughter saw the inventory. In my opinion these circumstances, coupled with the fact that for seven years after the deed of 1893 the parties had possession of all the properties mentioned in the will, including that which is now in dispute, in accordance with the terms of the will, required some explanation from the plaintiffs.

There is the further fact that her share, to which she was entitled absolutely under the will was according to the inventory about Rs. 27,000 (*i.e.*, one-eighth of Rs. 222,219), and that she actually took under the deed of 1893 immovables of the value (as the District Judge finds) of Rs. 21,500; whereas her one-fourth share of No. 90, to which she was entitled only for life, was probably of very much less value. There is no positive evidence of the value of No. 90; but the four houses on each side of it, Nos. 88, 89, 91, and 92, give an annual nett rental of Rs. 700 each, or a total annual rental of Rs. 2,800; and the plaintiffs themselves in their plaint put the rental of all the five houses at Rs. 5,280 (*i.e.*, Rs. 440 a month), so that according to the plaintiffs' own estimate the value of No. 90 would only be Rs. 2,480, and the plaintiffs' one-fourth share of it would be Rs. 620. And Rs. 27,000 absolutely is certainly worth a great deal more than Rs. 620 a year for life.

I think that upon the facts set out in the pleadings and upon the allegation in the answer that the daughter had made her election to take under the will, it was incumbent on her to at least assert that she did not know of her rights at the time of the alleged election, and that it is a reasonable inference that she did know of them. I would therefore affirm the judgments under review with costs.

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The facts of this case so far as they are material to the question before us are set out in the judgment of my brother Wendt under review, and I do not propose to recapitulate them. On the trial of the original action no agreed case appears to have been stated, and no issues were settled and agreed to, and the Court apparently decided the questions before it on the pleadings and arguments of counsel.

The first point raised before us, as I understand Mr. Bawa, is that the plaintiff ought not to be put to an election here, inasmuch as the testator erroneously believed the devised tenement belonged to him, and therefore by the Roman-Dutch Law the bequest was void. This appears to have been the Roman Law as laid down in *Justinian's Institutes 11, 24, 1*, in that respect different to English Law, which upholds the validity of the bequest and enforces the doctrine of election, whether the testator knew that the property devised belonged to another or whether he erroneously supposed it to belong to himself (*Snell 208*).

In the present case the property devised is, in my opinion, clearly the tenement No. 90, and not the contents of a shop and its business as a going concern. This was admitted by counsel for the appellant on the hearing, and upon the trial of the issue, which was remitted by this Court to be tried by the District Court, the District Judge found that the will only referred to that part of the *fidei commissum* land coloured pink and white and bearing assessment No. 90 in Mr. Leembruggen's plan X. There is no reason to hold that his finding is incorrect.

We have, therefore, here a bequest of property in which a life interest belongs to certain *fidei commissarii*, amongst whom was the plaintiff, one of the heirs of the testator, which could not be acquired till after the testator's death, coupled with a disposal of residue, to a part of which the plaintiff would have been entitled as heiress in the absence of the will, and Burge says, whether it was the testator's belief that the property belonged to himself or not, it would not exempt one of the heirs if he accepts the inheritance from delivering it to the legatees (*4 Burge 713*).

The heir is bound to approbate or reprobate the will. Section 26 of book XXX.—XXXII., *Voet* (*Buchanan's translation*), also is authority for the obligation of the heir to deliver his bequeathed property to the legatee, whether the testator knew or did not know it was his own property he was bequeathing, and making a distinction between the property of another than the heirs dealt with by a testator, says " that the heir is always bound to deliver up his own property, even though the testator has treated it as his in the bequest," subject no doubt to the right to elect whether he should reprobate or approbate the will altogether.

If the property bequeathed was that of another than the heir of the testator, the heir could treat it as invalid, unless the legatee proved that the testator knew it was the property of another (*ibid*).

See also *Nathan, vol. IX.*, 1884-1885, quoting *Lucas v. Hoole*,[1] which would appear to discountenance the doctrine of compensation known to English Equity Courts.

Even if the plaintiff here is looked upon as a third person and not as an heir of the testator, there is no necessity, I think, for the legatee defendants to prove that the testator knew it was not his own property he was disposing of, inasmuch as, if he knew the contents of the deed P 1, he must have been well aware that the life interest of the plaintiff after his death was not his own property. This point must therefore, I think, be decided against the plaintiff, in whose favour the English cases quoted can be of no avail, and I must hold that the bequest of No. 90 was not invalid, and that the plaintiff was bound, under the Roman-Dutch Law, to elect whether to approbate or reprobate the will.

The next point is, Has the plaintiff elected in favour of the will? In my opinion she has, and I think the reasons given by my brother Wendt and Layard C.J., are amply sufficient to show this.

That she must have known also of her legal position as regards her life interest in No. 90 and her rights as an heiress to a share in the residue of her father's estate is, I think, indicated by the fact that the deed No. 2,067 was entered into with the assistance of her husband and, no doubt, with the advice of a competent legal adviser.

It is true that in the deed of gift P 1 the property is described as one house and ground, but it is impossible to believe that the plaintiff and her husband were not well aware what that particular property was, a share of which was settled on her in *fidei commissum*, or that she did not know that it had been divided by Municipal numbers and that No. 90 was a part of it. There is nothing to show that the plaintiff has beeen deceived, and she must have been in a position to understand what her rights were.

That this election also took place is, I think, further confirmed by her long acquiescence in the position adopted by the parties under the deed. I agree also that the property in No. 90 disposed of by the testator was only the life interest of the plaintiff.

In the present case the election is in favour of the will, and the English doctrines of compensation alluded to by my brother Wendt need not, I think, concern us at present.

I would affirm the judgment under review and dismiss the appeal with costs.

[1] *Buchanan (1879) 143.*

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I agree with the rest of the Court on the question as to the obligation to elect. But I do not think that on the evidence before us Kadija can be said to have as yet elected to take under Ibrahim Lebbe's will.

I will state my reasons as briefly as possible, noticing only the fresh points brought before us in review. The first question to be decided is, whether the fact, if it be a fact, that the testator was unaware that he had no disposing power over premises No. 90 makes the doctrine of election inapplicable? The Solicitor-General, in pressing us to answer this question affirmatively, relied mainly on two passages in *Burge's Commentaries*:—

"To raise an implied condition on acceptance, the intention to impose it must be clear beyond all doubt." (*Vol. IV. 716*).

"The foundation of the equitable doctrine of election is the intention, express or presumed, of the author of the instrument to which it is applied. And such is the import of the expressions by which it is described as proceeding, sometimes on a tacit, implied, or constructive condition, sometimes on equity. From this principle the whole doctrine, with its distinctions and exceptions, is deduced." (*Vol. IV. 717.*)

In view of the fact that, admittedly under Roman and Roman-Dutch Law, a bequest to a third person of the property of an heir is valid whether the testator was or was not under the belief that the subject belonged to himself, it might seem almost unnecessary to deal with this question. As residuary devisee, Kadija must, I think, be regarded as being in the position of an heir. But even if the fact were otherwise, I should hold that the doctrine of election would apply. I do not think that either of the passages above cited supports the inference which Mr. Bawa sought to draw from them. The former must, in any event, be read together with the latter, which is taken bodily from Mr. Swanston's note to *Dillon v. Parker.*[1] In that note (*ubi inf.* at page 407) the view that an heir cannot be put to an election by a devise under an erroneous supposition of title is expressly declared to be contrary to authority, and the English decisions cited both by Burge and by Swanston in dealing with election show that this is so. I put aside at once the class of cases of which *Judd v. Pratt* [2] may be taken as an example. They relate only to the ascertainment of the *corpus* of a bequest. The question involved in them is, What did the testator intend to dispose of?—not—Did the testator know that the property he was disposing of was not his own? See further as illustrations of the same point: *Dummer v. Pitcher,*[3] *Allen v. Anderson,*[4] and the local case

[1] (*1818*) *1 Swans 403.*
[2] (*1806*) *13 Ves. 168.*
[3] (*1833*) *2 My. & K. 276.*
[4] (*1846*) *5 Hare 169.*

of *Teyvana v. Sinnecooty*.[1] The principle was established in English Law by *Noys v. Mordaunt* [2] that he who accepts a benefit under a deed or will is bound to confirm the whole instrument, conforming to all its provisions and renouncing every right inconsistent with them. See also *Streatfield v. Streatfield*,[3] and *Clarke v. Guise*.[4] An attempt was made, however, to engraft on this principle the rule of the Civil Law that a bequest on the erroneous supposition that the subject belonged to the testator was void (*Inst. 2, tit. 20, 4, Dig. 31, tit. 67, 8*), unless the legatee stood in a certain degree of relationship to him, see *Forrester v. Cotton*;[5] *Cull v. Showell*.[6] But it proved unsuccessful. In the leading case of *Whistler v. Webster*,[7] Arden M.R. laid down the rule of law thus: "Whether (the testator) thought he had the right, or, knowing the extent of his authority, intended by an arbitrary exertion of power to exceed it, no person taking under the will shall disappoint it." [*Cf. also Anon*,[8] *Wright v. Rutter*,[9] *Rutter v. Maclean* [10]]. I take it, therefore, that the Solicitor-General's first point is bad from the standpoint of English Law. I think it is equally little entitled to succeed under Roman-Dutch Law. In a passage borrowed, like the citation from Burge given above, from Mr. Swanton's note to *Dillon v. Parker*,[11] Nathan (*Com. Law of S. A. 3, S. 1863*) adopts, as the general rule of law, the view that he who accepts a benefit under a will is bound to confirm the whole instrument, and the following passage from *Voet* (*Bk. 30, S. 26*) embodies a sufficiently numerous and comprehensive class of exceptions to the doctrine *heres rem alienam præstare cogitur, nisi testator eam sciverit alienam esse*, to enable the general rule, as stated by Nathan, to be applied in most cases, and certainly in such a case as the present:—

"*Aliena vero non aliter redimenda vel æstimatio ejus per heredem solvenda, et hoc ipsum per legatarium, tanquam actorem et affirmantem, probetur, nisi testator rem alienam legaverit conjunctæ personæ, vel jusserit ut heres præcepto certo fundo, qui alienus erat, hereditatem reliquam restituat vel res suas inter heredes suos divendo, uni rem non suam assignaverit, vel pie aut alterius favorabilis causæ ratio legati validitatem ex æquitate sustineat.*"

It was not contended before us that the special doctrines of English Equity Jurisprudence (*a*) that, upon a devisee electing against a will, equity will sequester the property devised to him for the purpose of making satisfaction out of it to the person whom his election has disappointed, or (*b*) that a refractory devisee may retain both benefits upon condition of making good to the disappointed devisee

[1] (1864) *Ram. 1863-68, 103.*
[2] (1706) *2 Vern. 581.*
[3] (1735) *White & Tudor L. C., 7th ed., 416.*
[4] (1755) *2 Ves. Sen. 617.*
[5] (1760) *Ambl. 388.*
[6] (1773) *Ambl. 727.*
[7] (1794) *2 Ves. Jun. 367; 10 Rul. Cas. 315.*
[8] (7 Anne) *Gilb. Eq. Rep. 15.*
[9] (1795) *2 Ves. Jun. 673.*
[10] (1799) *4 Ves. 531.*
[11] *1 Swans. 403.*

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the value of the property intended by the testator for him, are in force in Ceylon. I have nothing to add to what Wendt J. has said in regard to these points in the judgment under review. It clearly results, in my opinion, from clauses 2 and 4 of his will, that the testator did not intend Kadija to have both her share of the residue and any interest that might belong to her in the *fidei commissum* property. Clause 2 of the will, in view of the express distinction drawn in it between " the shop No. 90 " and " the goods therein " cannot be construed as restricted to the goodwill of the testator's business. The *corpus* of the bequest is clearly ascertained.

The only question that remains, therefore, is whether Kadija must be taken to have in fact made her election under the will? On this point I come, with hesitation and diffidence, to a conclusion different from that of Layard C.J. and Wendt J. There is no controversy as to the law applicable to the decision of cases of election by conduct. The election must be by a person who knows what his rights are, and with that knowledge really means to elect (*Wilson v. Thornbury* [1]). The same principle was laid down in an expanded form by Romilly M.R. in *Worthington v. Wiginton.*[2]

" With reference to the argument that this lady was not cognizant of her rights and had no knowledge of the law, I will now state that every one is assumed to know that, if he takes under a will, he must give full effect to it, and that he cannot be allowed to adopt that part of it which is for his advantage and reject that which is not; but whether the person taking under the will knew he had an interest adverse to it is a question of fact resting on evidence."

I entirely agree that, in the present case, the evidence shows that Kadija accepted the interest given to her under the deed of partition with full knowledge of the provisions of the will and in lieu of her claims thereunder. But what evidence is there that she or her husband was ever aware that she had " an interest adverse " to the will? The existence of that interest depended on the construction of the *fidei commissum* of 1872, which was certainly not *ex facie* obvious, and which was only judicially determined in the present action. I do not think that Kadjia can be fixed by implication with knowledge of restrictions on the testator's disposing power, which have had to be established by litigation (see *Pusey v. Desbouvrie* [3]), or that, under the circumstances of the present case, the burden rested on her of raising this point in the Court below. If it had been clear on the face of the *fidei commissum* that Ibrahim Lebbe could not deal with the property comprised in it by way of testamentary disposition, or deal even by disposition *inter vivos* with any interest created by that *fidei commissum* other than his own life interest, I agree that a strong presumption of an election having been made would arise from the terms of the deed of partition

[1] *(1875) L. R. 10 Ch. 239.* [2] *(1885) 20 Beav. 67, at page 73.*
[3] *(1734) 3 P. Wms. 315, 322; 10 Rul. Cas. 351.*

entered into by Kadija and her husband, and from the fact of that deed having been acted upon by all parties for many years without question. But it is otherwise, I think, where the existence of the limitations on the testator's disposing power is not apparent, but, on the contrary, is open to elaborate argument in a Court of Law. I would hold that Kadija has not elected as yet either under or against Ibrahim Lebbe's will, and that, while she is now bound to elect, she ought to have, if she desires it before doing so, the advantage of further inquiry in the District Court as to the respective value of the inconsistent and alternative rights created by the *fidei commissum* and the will.

As, however, the view of the majority of the Court on this point is different from mine, the judgment under review will be affirmed with costs.

Judgment in appeal affirmed.