Present: Garvin and Lyall Grant JJ.

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MUHEETH *v.* ABDUL WAREEK *et al.*

211—D. C. (Inty.) Colombo, 1,338.

Last will—Property specifically devised—Subsequent gift—Revocation.

Where property, which formed the subject of a specific devise under a will, was subsequently disposed of by the testator during his life time by deed of gift,—

Held, that such disposition operated as a revocation *pro tanto* of the devise.

APPEAL from an order of the District Judge of Colombo.

Hayley, K.C. (with *H. H. Bartholomeusz* and *H. V. Perera*), for appellant.

Koch (with *Keuneman*), for respondents.

February 14, 1928. GARVIN J.—

By his last will dated November 27, 1912, M. M. H. Cassim Lebbe Marikar made several specific devises of immovable property to his eldest son, the appellant, and others; he set apart certain premises to be sold and the proceeds applied in payment of his debts, and provided that the rents and profits arising out of the immovable property specially devised should be recovered by his executor and applied in the payment of taxes and the maintenance of the premises, and the surplus in the discharge of mortgages created over the immovable property.

M. M. H. Cassim Lebbe Marikar did not die for about eleven years after he made this last will. In the interval he acquired other property and divested himself of title to some of the property of which he was the owner at the time when he made this will. He made various gifts by deed to the executor and others, and in so doing followed for the most part the dispositions made in this will. But there are instances in which he departed from the distribution in his will and transferred property specifically devised to one person to another.

Some years have elapsed since this will was admitted to probate, and there are indications on this record that the heirs are dissatisfied with the executors' administration of this estate. Mortgages have not been discharged with the result that they have

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been put in suit and decrees obtained. Certain of the premises specifically devised are in immediate peril of being taken in execution.

The District Judge ordered the executor to give a full account and then directed that this account should be judicially settled.

This account proceeds upon the assumption that the estate of the deceased included all the immovable property which formed the subject of the various deeds of gift earlier referred to. It was sought to impeach these gifts, but the learned District Judge has held that they were valid and operative. This decision has not been challenged.

It was then submitted that by reason of the doctrine of election those persons who, being devised under the will, have received under a deed of gift property which by the will, had been specifically devised to some other person, must surrender the property so gifted, if they desire to take benefit under the will. This contention was rejected by the Judge. The point was somewhat faintly urged in appeal, and the reason for this is manifestly that the executor, who has obtained property of the value of Rs. 60,000 by gift, will gain nothing by any re-adjustment on this basis.

This is merely a case in which a person during his life time makes a will and later disposes of property which formed the subject of a devise.

There is every indication that the testator later in his life time and possibly in view of acquisition of property made since his last will decided to make an immediate distribution of some of his property. When he departed from the scheme of distribution in his will he presumably did so deliberately. Under the circumstances I agree with the District Judge that where by a deed of gift property which formed part of a specific devise has been disposed of by the testator during his life time the disposition operates as a revocation *pro tanto* of the devise.

The property, which formed the subject of the several deeds of gift, clearly formed no part of the estate of the deceased at his death, and the accounts of the executor must be rendered on this basis.

Thus far I am in agreement with the learned District Judge, and it only remains to consider the submission that the Judge's order that the immovable property which forms part of the residue devised to the executor should be sold for the payment of debts cannot be sustained. No authority was cited for the proposition that the Court had power by such an order to compel the executor to sell a particular parcel of immovable property and not another. I doubt whether such a power exists. But there is a further objection to this order. This is a proceeding for the judicial settlement

of the executor's accounts, and I am unable to see that an order such as this can appropriately be made in such a proceeding and particularly at this stage of the proceeding.

Should the immovable property specifically devised, upon which these mortgages were charged, be taken in execution, by reason of the failure of the executor to discharge them, those devisees will no doubt take such legal remedies, if any, which may in the circumstances of the case be available.

The direction to the executor to sell the immovable property which forms part of the residue is set aside, but in other respects the order of the District Judge will stand affirmed.

There will be no order as to the costs of appeal.

LYALL GRANT J.—I agree.

Decree varied.