1948 *Present :* **Basnayake and Gratiaen JJ.**

KIRTHISINGHE, Appellant, *and* THE ARCHBISHOP OF COLOMBO, Respondent

S. C. 148—D. C. Negombo, 14,045

Last Will—Property bequeathed belonging to testator and another—Rights of legatee—Election—Principles applicable.

Where property bequeathed belonged to the testator jointly with another he is, in case of doubt, presumed to give only his own share.

The doctrine of election does not operate unless the person alleged to have made the election knew his alternative rights and knew that he was under a legal obligation to make a choice.

APPEAL from a judgment of the District Judge, Negombo.

D. W. Fernando, for plaintiff appellant.

C. V. Ranawake, for defendant respondent.

June 29, 1948. BASNAYAKE J.—

This is an action by one Earnestine May Kirthisinghe *nee* Fernando against the Archbishop of Colombo. The plaintiff claims all but one-fourth share of an allotment of land in extent 2 and 93/100 perches according to the plan dated January 24, 1890, made by W. C. Fernando, Surveyor, together with the tiled building bearing assessment No. 283 now bearing assessment No. 272 standing thereon. The defendant claims one-half of the land. The dispute is in respect of one-fourth

share (hereinafter referred to as the disputed share). The learned trial Judge has dismissed the plaintiff's action with costs, and the present appeal is from that decision.

Learned counsel for the appellant at the very outset indicated that he could not support the claim of the plaintiff to the whole of the disputed share and restricted his claim to one-eight of one-fourth of premises No. 272 ; in other words, to one thirty-second share of it. His reason for so restricting the plaintiff's claim is that she is one of eight children who would become entitled to the disputed share by right of inheritance.

It appears from the evidence that one Virisida Fernando (hereinafter referred to as Virisida) was married to one John Peiris in 1878. At the time of her marriage she owned an undivided half share of premises No. 272 by right of inheritance, and her brother Stephen Manuel Fernando owned the other undivided half. By deed No. 3,980 dated December 30, 1876 (P 1), Stephen Manuel Fernando agreed to give his share to his sister on her marriage to John Peiris, which he conveyed jointly to Virisida and John Peiris by deed No. 29,649 dated March 4, 1892 (P 3). John Peiris died in 1918 leaving a will dated November 11, 1918 (P 4), the material terms of which are as follows :

> " I give and devise the whole of my residing property situated at Grand Street, Negombo, bearing assessment No. 79 called and known as Suriyagahawatta to my nephew Kurukulasuriya Alfred Benjamin Christopher Piries of Grand Street, Negombo, son of my cousin Kurukulasuriya John Pieris whom I have been adopting subject to a life interest in favour of my wife Kurukulasuriya Virisida Fernando of Grand Street, Negombo, and subject also to the condition and restriction that my said nephew shall not have the right or power to sell, gift, mortgage or lease for a period not exceeding two years at a time or otherwise alienate or encumber the said property or dispose of the same by Will to among or in favour of any person save and except his own children or in case he has no children then to among or in favour of those who would be my legal heirs at his death.
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> " I also give and devise an undivided half share of Boutique bearing Assessment No. 283 situate at Main Street, Negombo, to the Roman Catholic Church called St. Mary's Church at Negombo, subject to the life interest of my wife the said Kurukulasuriya Virisida Fernando and out of the income derived from the said half share to say Masses for the Repose Souls of me the said Kurukulasuriya John Pieris and my wife the said Kurukulasuriya Virisida Fernando.
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> " I give and bequeath to my wife Kurukulasuriya Virisida Fernando all my movable property without any exception whatsoever.
>
> " I do hereby appoint Kurukulasuriya Virisida Fernando to be the Executrix of this Last Will and Testament."

The will was admitted to probate in D. C. Negombo Case No. 1,762/ T. It appears from the paragraph of the will sidelined that the testator purports to devise an undivided half-share of premises No. 272 when in fact he was only entitled to an undivided one-fourth share by virtue of the deed P 3.

On June 10, 1922, Virisida gifted the half-share of premises No. 272 she had inherited from her parents to the plaintiff, who is her niece, by deed No. 1,117 (P 6). In that deed she declared that she was married in community of property to the late John Peiris and also referred to her late husband's will whereby a half-share of the said premises was devised by him to the Roman Catholic Church called St. Mary's Church, reserving the life-interest to her. Virisida died on July 27, 1936, leaving among others the plaintiff as her heir. She left no will. About a month after her death the defendant claimed a half-share of the income of premises No. 272 and took the income thereof and was receiving it at the date of this action, which was instituted on July 26, 1946.

It is claimed on behalf of the defendant that, Virisida having accepted under the will, her right to the one-fourth share which she derived from the deed P 3 must be deemed to have passed to the defendant by virtue of her late husband's will P 4. In support of this proposition learned counsel submits that it is a rule of equity that when a person accepts under a will by which the testator bequeaths the legatee's property he is deemed to be bound by the bequest. Learned counsel also relies on the following declaration in deed P 6, wherein Virisida says that she was married in community of property and refers to this very bequest in these terms :

> " And whereas the said John Peiris died in the year 1918 leaving a last will and testament bearing No. 1,162 dated November 11, 1918, and attested by P. D. F. de Croos, Notary Public, whereby a half-share of the said premises was gifted by him to the Roman Catholic Church called St. Mary's Church at Negombo, reserving the life interest of the said half-share to me."

Learned counsel contends that Virisida having accepted the position that the will bequeathed not only the share of her late husband but also her share, her representative in interest is estopped from now denying that the will affects her share of the property. I am unable to uphold either contention of learned counsel. Virisida's declarations in P 6 do not indicate that she was aware that her late husband had devised any part of her property. She appears to have been under a mistaken belief that she was married in community of property when in fact she was not. She even appears to have assumed that her late husband was entitled to an undivided half-share of premises No. 272.

It is clear that under our law when a thing which is common to the testator and another is left as a legacy to a third party, in case of doubt, only that part which belongs to the testator, and not the other, must be paid to the legatee, whether the testator knew or did not know that the thing he so left was common to himself and that other [1]. This rule extends to property common to the testator and his spouse. In the title I have quoted Voet indicates the difference between a legacy of property which belongs entirely to another and a legacy of property which is common to the testator and another. He says :

[1] *Voet, Bk. XXX–XXXII, Sec. 28, Buchanan's Translation.*

"But when a thing common to the testator and another is left by legacy, the intention of the testator can be carried into effect, even if only that part of the common thing which belongs to the testator is paid to the legatee, and so there is no necessity that the part which belongs to another should be made good to the legatee for the purpose of giving effect to the testament of the deceased testator."

The defendant is therefore not entitled to claim more than the share which belonged to the testator John Peiris.

The case of *Estate Brink v. Estate Brink* [1] is in point, and supports the view I have taken. Gardiner J. elaborates therein the principle I have stated above, and I quote below his observations *in extenso* as the report of the case is not available in the majority of our law libraries.

"It must also be borne in mind that there is a presumption in our law against an intention to create the burden of *fidei commissum*, and it seems to me that there is an even stronger presumption against an intention to deprive another of his property in return for a mere usufruct. If the testator knew and realised at the time he made his will that he owned only one-half of the common estate—and he may well have known this seeing that, as appears from the will, the estate of his predeceased spouse was being separately administered—then we must take it that he used the word "my" in its legal sense; see the judgment of the majority of the Court in *Caffin v. Heurtley's Executors* [2]. If he did not know, or, what would be equivalent to an absence of knowledge, did not realise that he had only a half-share in the community, we cannot take it that he intended to deprive his wife, whom clearly he wishes to benefit, of her ownership in her share, and to hamper her in her enjoyment, of what would otherwise have been her own property, by the restrictions to which a person, who has only a usufruct, is subject."

It is admitted that Virisida's declaration in P 6 that she and her husband John Peiris were married in community of property is not correct. In the inventory filed in her husband's testamentary case (D 2), Virisida included an undivided half-share of premises No. 272. It appears from all this that she was ignorant of her rights in the property in question. In these circumstances it cannot be said that Virisida renounced her right to the disputed share. There is no evidence of an express renunciation nor even is there material from which a renunciation can be implied. As was observed by Villiers C.J. in the case of *Watson v. Burchell* [3]:

"no doctrine is better settled in our law than that a person cannot be held to have renounced his legal rights by acquiescence unless it is clear that he had full knowledge of his rights and intended to part with them."

The case in Vanderstraaten's Reports page 96 (D.C. Kalutara, 23,882), which the learned District Judge has followed has no application to the facts of this case.

[1] *(1917) C. P. D. 612 at 615.* [2] *1 M 178.*

[3] *9 Juta P. 2 at p. 5.*

The appeal is allowed with costs, and judgment is entered for the plaintiff declaring her entitled to one-eighth of the disputed share. The plaintiff is also declared entitled to one-eighth of the sum claimed by her as damages and further damages at the rate of one-eighth of the monthly rental of the disputed share until possession is restored to her. The plaintiff is entitled to the costs of the trial.

GRATIAEN J.—

I agree to the order proposed by my brother Basnayake. My view is that the testator John Peiris, being under the erroneous impression that he was legally entitled to an undivided half-share of the premises, intended to dispose entirely of this half-share by his will P 4. I am not satisfied, however, that "the doctrine of election" comes into operation in this case. The plaintiff can therefore defeat the testator's intention to dispose of a larger share than he actually owned.

The principle of law that where the property bequeathed belonged to the testator jointly with another, he is presumed to give only his own share does not seem to arise except "*in case of doubt*" (*Voet Bk. 30–32, Section 28*), and this presumption would certainly have applied if the language of the will had left any room for doubt as to the testator's intentions. But in the present case John Peiris purported specifically to dispose of "*an undivided half-share*", and I think that it would be unduly straining the language of the document to interpret it as a bequest of only the undivided one-fourth share which he legally owned. It was not the case for the appellant that such an interpretation of the will was justified As Wood Renton J. said in *Kadija Umma v. Meera Lebbe* [1]. "The question involved 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?*" A similar case arose in South Africa (*Phillips v. Standard Bank of S.A., Ltd.*[2]), where the testator, who owned certain property in community with his wife, purported by his will to dispose of the entire property under the mistaken impression that he was the sole owner. Gardiner J.P. held that the testator intended to pass the whole of the property, but that, unless the "doctrine of election" came into operation, his wife would not be obliged in law to part with her share of the property which he had purported to dispose of under the will. Similarly, I think that the only question which arises in the present action is whether the testator's wife Virisida can be held on the evidence to have elected to approbate the will by accepting, as she undoubtedly seems to have done, the benefits which passed to her under it. These benefits included the bequest of a life interest in the one-fourth share in respect of which the testator had full disposing power. If Virisida had so elected, she and those who have now succeeded to her interests in the property would be precluded from challenging the bequest of the one-fourth share to which the testator had no legal title. If, on the other hand, no such election had taken place, then only the testator's quarter share passed to the defendant under the will.

[1] *(1908) 11 N. L. R. 75 at p. 80.*

[2] *(1929) C. P. D. 128.*

The "doctrine of election" does not operate unless the election is made "by a person who knows what his rights are, and with that knowledge really means to elect"—*Wilson v. Thornbury* [1]. The Court must be satisfied that the person electing knew his alternative rights (namely, the right either to approbate or reprobate the will in its entirety), and knew that he was under a legal obligation to make a choice (*Spread v. Morgan* [2]). The same principle applies under the Roman-Dutch Law and has been consistently adopted in our courts. (*Kadija Umma v. Meera Lebbe* [3] and *Fernando v. Fernando* [4]). In the case now under consideration it is clear that Virisida at all relevant times shared her husband's erroneous impression that he had full disposing power over a half-share of the property, and evidence of her conduct, which was influenced by ignorance of the true legal position, falls far short of the evidence which would justify a court in holding that she had elected to approbate the will with knowledge of her rights. In these circumstances I cannot accept the submission made on behalf of the defendants that either Virisida or the plaintiff who claims certain interests as her intestate heir must honour the testator's bequest of any share in the property which belonged to Virisida and not to him. The plaintiff is therefore entitled to an undivided one-eighth of the disputed share of the property, and the defendant's claim must fail to this extent. The rights of Virisida's other heirs, who are not parties to these proceedings, do not arise for adjudication in the present action.

Appeal allowed.