

EQUITY

DOCTRINE OF ELECTION

Text:

Jegede—Chapter 13

INTRODUCTION

The doctrine of election is yet another curious and artificial doctrine developed and nurtured by the learned and unpredictable minds of the English Chancery judges.

As to the basis for its development, it was stated in the leading case of *Noys v Mordaunt* (1706) 23 ER 978, that the principle governing election was evolved to prevent a person claiming under a will from contravening it.

INTRODUCTION contd

In essence, no person can accept and reject the same instrument. Lord Eldon in *Ker v Wanchope* (1819) 4 ER 1.

Hence, it will contrary to the established principles of equity for a person to enjoy the benefits while he rejects the condition of the gift.

The doctrine was originally confined to gifts under a will, but it was later extended to gifts under deed. See *Freke v Barrington* 29 ER 533.

GUIDING PRINCIPLE

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The guiding principle is that if a donor, either by mistake or by design, gives property which is not his to give, and gives at the same time to the real owner of it other property, such real owner cannot claim the property given to him by the donor and at the same time retain his property of which the donor sought to dispose. See *Wollaston v King* (1869) 20 LT 1003; *Codrington v Codrington* (1875) LR 7 H.L. 854; *Taylor v Williams* (1935) 12 NLR 67.

GUIDING PRINCIPLE contd

The doctrine is based on the principle which the courts apply in the exercise of equitable jurisdiction enabling them to secure a just distribution in substantial accordance with the general scheme of the instrument. See Lord Haldane in *Brown v Gregson* (1920) AC 860.

The doctrine which can be explained on the basis of the maxim that 'he who seeks equity, must do equity', in practice means that equity will not allow a person to approve and reprobate and, if he approves, he shall do all within his power to confirm the instrument which he approves. See Chitty in *Re Lord Chesham* (1886) 31 Ch.D 466.

OPERATION OF THE DOCTRINE

The doctrine applies where for example, A by his will gives to B 'Agege Estate' which in fact belongs to C, and by another provision in the will, A gives his own property 'Ikeja Estate' to C. In this case, the gift of 'Ikeja Estate' to C has conferred a benefit on him, but at the same time, an obligation is imposed on him which is that he should allow his own 'Agege Estate' to pass to B as directed by the provisions of the will.

OPERATION contd

- It should be noted that both at law and equity, a person has no right to dispose of another person's property. Thus, *prima facie*, C can keep his 'Agege Estate' and at the same time, claim 'Ikeja Estate' under the will. The result will be that B takes nothing.

But the court of equity says that it is inequitable for C to take a benefit under an instrument and at the same time, refuse to discharge the obligation imposed by the instrument. If he accepts the benefit, he cannot reject the burden. 'He who wants equity must be prepared to do equity.'

OPERATION CONTD

C cannot be compelled to transfer his 'Agege Estate' to B as directed by A's will since A has no power to dispose of C's property. Nevertheless, C would be called to elect, in which case, C has one of two alternatives:

To elect in favour of the instrument;

To elect against the instrument.

If he elects in favour of the instruments, he takes the benefits, but he must relinquish his own estate which was wrongfully disposed of by the instrument, and make it available to the person-

OPERATION contd

to whom it was given by the instrument in conformity to the intention of the donor.

Since it clear that the instrument per se cannot pass a good title in the elector's own property to the person to whom the property is purportedly given under the instrument; the court of equity imposes an implied condition that if the elector-donee accepts the benefit which the donor had power to give, he shall convey his own property (over which the donor had no power), to the individual to whom it is actually but ineffectually given. See *Gretton v Howard* 36 ER 443; *Douglas v Douglas* (1871) L.R. 12.

OPERATION contd

If, in the alternative, he elects against the instrument, he keeps his own property and at the same time, claims the benefit conferred on him by the instrument. (see *Kerr v Wauchope* (1819) 1 Bl. 1).

But, he must compensate the disappointed beneficiary out of the benefit conferred on him by the instrument and to the extent of the value of the elector's own property which the elector has decided to retain. See *Pickersgill v Rodger* (1877) 5 Ch.D. 163.

OPERATION contd.

In essence, the elector takes against the instrument subject to an obligation to make good to the disappointed legatee, the sum he is disappointed of. See *Pickersgill* case.

This brings out the distinction between the equitable doctrine of election which is based on compensation and conditional gift which is based on forfeiture as the beneficiary cannot have both properties. See *Wilkinson v Dent* (1871) 6 Ch. App. 339.

JUDICIAL BASIS OF THE DOCTRINE

In a narrow sense, the doctrine may be said to be based on the implied intention of the donor. Ordinarily, a donor is presumed to have intended to dispose of the property, including the one not belonging to him contained in the instrument, or that the instrument shall take effect as a whole. See Lord Hatherly in *Cooper v Cooper* (1874) L.R. 7 H.L. 53 at 71.

Thus, the person against whom the case of election arises is bound to give effect to the whole instrument, and there is an implied condition arising out of the dispositions that the person who takes under the instrument should renounce any independent title that he has and could set up against the instrument. See Chitty J. in *Re Wheatley*.

Judicial Basis Contd

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But the basis of the doctrine involves more than merely resting it on the presumed intention of the donor. For it is clear that such a basis, if pushed to its logical conclusion, can result in difficulties' see Keeton, *Introduction to Equity*, (6th ed) at 189.

For example, it is not a requirement for the operation of the doctrine that the person making the disposition should have intended that the elector-beneficiary take upon condition, for this would be inconsistent with the doctrine of election where the elector can keep both properties and then compensate the disappointed person.

Judicial Basis contd

Secondly, it is immaterial, for the purposes of doctrine, whether or not the donor gives away, by mistake or design the property which does not belong to him. See *Cooper v Cooper*.

Hence, the correct position is that the doctrine enables the court to secure a just distribution in substantial accordance with the general scheme of the instrument. See *Re Mengells Will Trusts* (1962) Ch. 791.

It is a means of doing justice as between the elector-beneficiary and the disappointed person. See Lord Haldane in *Brown v Gregson* (1920) A.C. 860 at 868.

ESSENTIALS OF THE DOCTRINE

The donor must have given his own property to the elector.

It is out of this property that the elector would compensate the disappointed person where the elector has elected against the instrument. See *Bristow v Warde* (1794) 30 ER 660; *Whisler v Webster* (1794) 30 ER 676.

Note that under customary law, family property is indivisible and a member has no alienable interest in the family property. (see *Ogunmefun v Ogunmefun* (1931) 10 NLR 82). Hence, such a devise will be invalid. See *Taylor v Williams* case.

ESSENTIALS contd

The donor must have given the elector's property to another person.

The principle is that the donor must have taken away some of the elector's property for which the elector has been compensated by the donor's gift to him. See *Wollaston* case; *Re Fletcher* case; *Re Nash* (1910) 1 Ch 1; *Wooldridge v Wooldridge* (1859) 70 ER 340.

Thus, there must be some disposition of property which the donor had no right to dispose of to make it a case of election. See *Wooldridge* case.

ESSENTIALS contd

The two gifts must have been made in the same instrument.

The doctrine can only apply when it arises within the document which raises the case of election. For example, where a will contains a gift of property not within the testator's disposing power and a gift of the testator's own property to the owner of the property which the testator purports to dispose of to another person. See *Gibson v Gibson* 61 E.R. 367; *Re Edwards* (1958) Ch. 168.

ESSENTIALS contd

i. The donor's property which is given to the elector must be freely alienable so that it could be available for compensation if the elector elects against the instrument.

It is settled that the doctrine does not involve forfeiture, but involves compensation out of the property which is given to the elector by the instrument, so that in event of the an election against the instrument, the elector could freely alienate that property for the purpose of making compensation to the disappointed person. See *Re Wheatley* (1884) 27 Ch.D. 606.

ESSENTIALS contd

It follows that if property is not freely alienable, there is no case for election. See *Wheatley* case.

The principle is that the property must be freely alienable for the purposes of making compensation as at the time, the donee is called upon to elect. See *Haynes v Foster* (1901) 1 Ch. 361.

ESSENTIALS contd

The elector's property which the donor purports to dispose of must be freely alienable.

The principle on which the doctrine is based is that a man shall not be allowed to approbate and reprobate, and that if, he approves he shall do all in his power to confirm the instruments which he approves. See *Re Lord Chesham* case.

Therefore where he takes in favour of the instrument, he must transfer his own property which the donor purports to dispose of, in accordance with the wishes of the donor.

ESSENTIALS contd

Election in this respect presupposes that the person who is being called upon to elect has a freely disposable interest in his own property which he can alienate in compliance with the donor's wishes, otherwise, there is no case for election. See *Re Wheatley* case.

Thus, there is no case for election where the property sought to be disposed of, is a family member's interest in a family property. See *Ogunmefun v Ogunmefun* (1931) 10 NLR 82.

ESSENTIALS CONTD

Elections means free choice. It follows that the doctrine cannot be introduced where it is impossible for the person against whom it is pleaded effectively to exercise the election demanded. See *Re Lord Chesham* case; *Brown v Gregson* (1920) A.C. 860; *Re Dicey* (1957) 1 Ch. 145.

ESSENTIALS contd

The donor must manifest a clear intention on the face of the instrument to dispose of the elector's property.

Where the instrument manifests an intention to dispose of the elector's property, the doctrine operates and it is immaterial that the disposition was by mistake or design. See *Welby v Welby* (1813) 35 ER 296.

The principle is that the donor intends that his instrument shall take full effect. See *Cooper v Cooper* (1874) L.R. 7 H.L. 53.

ESSENTIALS contd

The general scheme of disposition as contained in the instrument must be capable of raising a general intention on the part of the donor that effect shall be given to every part of the instrument.

Thus, the doctrine rests not on the particular provisions of the instrument which raises the election, but on the presumption of a general intention in the maker of the an instrument that effect shall be given to every part of it. See *Re Vardon's Trust* (1885) 31 Ch.D. 275.

ESSENTIALS contd

The mere fact that the circumstances which give rise to election could not have been in the contemplation of the maker of the instrument is not sufficient to repel the general and presumed intention. See *Cooper* case.

However, the general and presumed intention is conclusively repelled by an expressed declaration, contained in the instrument, that in no case should the doctrine of election be applied to the provisions of the instrument. See *Re Vardon's Trust*.

Essential contd.

Similarly, the doctrine is excluded where the instrument itself merely denotes of a particular intention which is inconsistent with the general and presumed intention which is the foundation of the doctrine. See *Re Vardon's*.

For example, if the instrument contains a provision such that, if the donee were put on his election, and by electing, he would be doing precisely what the instrument prohibits him from doing, such a provision denotes a particular.....

Essentials contd

- ..denotes a particular intention inconsistent with the general and presumed intention which gives rise to election, and therefore excludes the doctrine. See *Re Vardon's*.
- The general and presumed intention of the donor to dispose of property over which he had no control, must appear on the face of the instrument which is alleged to have made such disposition.

• OTHER RELEVANT POINTS

DERIVATIVE INTERESTS

- Where a testator sought to dispose of property which does not belong to him and that property was derivatively acquired through someone who could not be put to election, there will be no case for election. See *Grissell v Swinhoe* (1869) L.R. 291.
- Where a person who had the obligation to elect had elected, such election would be binding on him and whosoever takes under him.
- Other relevant points contd
- But there may be difficulties if he dies without having elected. If the elector's property devolve in one direction, his successor would be standing in his shoes and would be called upon to elect. See *Cooper's* case.
- But where the elector's property devolve in different directions, there is no case for election.
- Other relevant points
- However, the obligation to compensate the disappointed person falls on the person who succeeds to the benefits out of which compensation would have been made to the disappointed person if he had elected against the instrument in his life time. See *Pickergill v Rodgers* (1876) 5 Ch.D. 163.
- It follows that the estate of the elector who died without having elected, is not exonerated from the payment of compensation for the elector would have been liable had he elected in his life time.
- Other relevant points
- Note that where the elector elects against the instrument and hence, liable to compensate the disappointed legatee, the amount of compensation payable is the value of the elector's property of which the testator

ought to dispose of. The value is to be ascertained as at the date of the testator's death and not when the election is made. See *Re Hancock* (1905) 1 Ch. 16.

Other relevant points

RIGHTS OF ELECTOR

Whenever a person is put to his election, the court has jurisdiction in equity to compel a final election 'so as to quiet the title of those interested in the objects of which one is to be chosen.' see *Douglas v Douglas* (1871) 1 R. 617.

However, as a condition precedent to the exercise of this jurisdiction, they will secure to..

Other relevant points

...elector, the right of all information necessary to guide him in his choice. See *Douglas* case.

He must be given a genuine opportunity of ascertaining the relative values of the properties before electing in favour or against the instrument.

He is even entitled to bring an action with a view to knowing the nature and extent of his rights and to ascertain the relative values of the properties between which he is called upon to elect. See *Kidney v Coussmaker* (1806) 33 E.R. 53.

Other relevant points

TIME TO ELECT

Note that there is no time limit within which election is to be made, but a time limit may be specified or imposed by the instrument or by the court.

Where there is such time limit, a person who is bound to elect but fails to elect within the time stipulated is deemed to have elected against the instrument, and will be under a duty to compensate the disappointed party. See *Streatfield v Streatfield* (1735) 36 ER 459.

Other relevant point.

Where there is no time limit, failure to elect for a considerable length of time per se will not imply an election.

But if by such continuous act of his, so long a time has elapsed that it can reasonably be inferred that he has acquiesced in the other's enjoyment of the property to him by the instrument and that it would be inequitable to disturb such other's enjoyment, he may be said to have elected to take, not his own property and making compensation, but what the will gives to him i.e. Permitting the specific enjoyment of his own property under the will. See *Tibbit v Tibbits* (1816) 34 E.R. 659.

Other relevant points

WHO MAY ELECT

Any person who is *sui juris* and mentally sound.

Where an infant is bound to elect, the court usually elects for him after an enquiry as to what is best for the infant in the circumstance. See *Seton v Smith* (1840) 59 E.R. 796.

A similar course of action is followed in the case of a person of unsound mind. See *Wilder v Piggot* (1883) 22 Ch.D 263.

Other relevant points

SATISFACTION AND ELECTION

A beneficiary under a will is put to his election on the principle that the testator has conferred some benefits on him, and at the same time, attempted to dispose of the beneficiary's property.

Where the benefit of legacy given to the beneficiary is in satisfaction of a debt, there can be no case for election, for no benefit has in fact, been conferred on him.

Other relevant points

But if the legacy was in satisfaction of a statute-barred debt, such legacy is generally regarded as a bounty, for the testator has no legal obligation to pay the debt, therefore, the beneficiary is bound to elect. See *Re Fletcher's Settlement Trusts* (1936) 2 All E.R. 236.