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*May 21.
*June 22.

ROBERT S. ROSBOROUGH AND KATHERINE AMELIA WALKER, COMMITTEE OF THE ESTATE OF JOHN DOUGLAS WALKER (PLAINTIFFS) ..... APPELLANTS;

AND

THE TRUSTEES OF ST. ANDREW'S CHURCH IN THE CITY OF SAINT JOHN AND ANOTHER (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK.

Will—Devise of Mortgage—Election—Maintenance.

W. by his will bequeathed real estate to a trustee the revenue therefrom, so far as necessary, to be applied to the support and maintenance of his son who was in poor health and afterwards became lunatic. He also devised the sum of $12,000 directly to the son and to St. Andrew's Church a mortgage he held on the church property which he had previously assigned to the said son. In an action by the Committee of the latter for a declaration of rights under the will:—

Held, affirming the judgment of the Appeal Division (44 N.B. Rep. 153) Fitzpatrick C.J. dissenting, that the Committee must elect between taking the benefits under the will, the provision for maintenance as well as the money devised, and retaining the rights of the son under the mortgage.

Per Fitzpatrick C.J. the case was not one for the application of the equitable doctrine of election. The devise of the mortgage must be treated as a legacy to the church of the amount due thereon.

APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick (1), affirming the judgment at the trial in favour of the defendants.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 44 N.B. Rep. 153.

The facts are not in dispute and are stated in the above head-note.

Powell K.C. and *F. R. Taylor K.C.* for the appellants. The devisee can only be compelled to elect if the property devised is free disposable property and the testator plainly intended the contrary. See 13 Halsbury Laws of England, page 123; *In re Wintle* (1); *In re Sanderson's Trust* (2) at page 503; *In re Bryant* (3).

The testator could not dispose of property that did not belong to him and must be considered as having had something in his mind besides the mortgage held by his son when he made the devise to the church. See *Dummer* v. *Pitcher* (4); *In re Harris* (5).

Pugsley K.C. and *Baxter K.C.* for the respondents. As to election see *Cope* v. *Wilmot* (6), referred to in *In re Sanderson's Trust* (2); *Pitman* v. *Crum Ewing* (7); *In re Sefton* (8).

THE CHIEF JUSTICE.—The will of the testator contained the following:—

> I give, devise and bequeath to the Trustees of St. Andrew's Presbyterian Church, in the City of St. John, the mortgage which I now hold on their property and all principal and interest due or owing thereon at the time of my death.

Prior to the date of his will the testator had assigned this mortgage, which was for $30,000, to his son absolutely.

Under the will the son is entitled to benefits which, I will assume, are of value exceeding $30,000. It is

(1) [1896] 2 Ch. 711.
(2) 3 K. & J. 497.
(3) [1894] 1 Ch. 324.
(4) 2 Mylne & K. 262 at p. 274.
(5) [1909] 2 Ch. 206.
(6) 1 Coll. 396n. (a)
(7) [1911] A.C. 217.
(8) [1898] 2 Ch. 378.

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claimed by the respondents that he must elect between taking the benefits under the will and discharging the mortgage, or retaining the mortgage and compensating the respondents for their disappointment. If he is put to his election at all it is perhaps not very material which he does; the amount for which he would be liable to the respondents is really the same in either case. The court below seems to have fallen into the error of supposing that if he elects against the will he must renounce all benefits under the will and that therefore it is more advantageous to him to take under the will. He is, however, only bound if he elects against the will to compensate the respondents to the extent of their disappointment under the will, and that, of course, is the sum of $30,000, which he would have to forego if he elected to take entirely under the will.

In my opinion, however, no question of election arises at all. The doctrine of election is purely an equitable one and in equity a mortgage is only a security for the debt. Now the testator mistakenly alleged that the respondents were indebted to him and he forgave the debt. There is no question here of a bequest of the son's property; it is a legacy to the respondents and it makes no difference that the mortgage is vested in the son for the respondents can redeem the mortgage and so the intention of the testator will not be disappointed.

In *Findlater* v. *Lowe* (1), it was held that:

> If a testator has had at a time antecedent to the will a certain kind of stock or property, and he has parted with it before the date of the will, and by his will purports to dispose of it in a way which if he had retained it would have been a specific legacy, it will be treated by the court as a general legacy of equivalent amount payable out of the general personal estate.

(1) [1904] 1 Ir. 519.

Mrs. Baker, the residuary legatee, is not a party to these proceedings but I observe that at the trial Mr. Teed K.C. who with Mr. Ewing K.C. appeared for the executor, stated that he was instructed more particularly on her behalf.

The residuary legatee has, however, no equity to oblige the plaintiff to make an election. I refer to the case of *Lady Cavan* v. *Pulteney* (1), at page 561, (2), at page 385, and also to the elaborate judgment in *McGinnis* v. *McGinnis* (3).

There should be a declaration that the plaintiff is not put to his election in respect of any of the benefits left to him by the will, to the whole of which he is entitled according to their nature and the tenor of the will, and that the respondents, the Trustees of St. Andrew's Church, are entitled to a general legacy of the amount equivalent to the mortgage debt formerly held by the testator and interest due at the time of his death, payable out of the estate of the testator.

The executor has pleaded that the estate is not liable to the respondents, the Trustees of St. Andrew's Church, but as they have not advanced any claim against the estate I think they are not entitled to any costs although the result is to give them a right to be paid out of the estate. All parties bear their own costs.

DAVIES J.—This appeal is from the judgment of the appeal division of the Supreme Court of New Brunswick confirming a judgment of the trial judge in equity declaring that the plaintiffs, the Committee of the Estate of John D. Walker, a person of unsound

(1) 2 Ves. 544. (2) 3 Ves. 384.
(3) 1 Ga. 496.

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mind and so found, who applied for a declaration as to their rights under the will of the late James Walker, were bound to elect in favour or against the will bequeathing a certain interest in property of his for the maintenance and support of said John D. Walker, and certain other property which did not belong to the testator but did belong to said John D. Walker, to the Trustees of St. Andrew's Church and directing that the committee should elect under and not against the will and making the necessary provisions to have their decree of election carried out.

The facts to enable the controversy as to John D. Walker's being compelled to elect under or against the will to be understood are not in dispute.

Shortly they are that some years before his death, James Walker became the assignee and owner of a mortgage on certain real property given by the Trustees of St. Andrew's Church to secure the payment of $30,000 and interest and had assigned the same to his son, John D. Walker.

Subsequently, and after the latter had become *non compos mentis*, James Walker made a will by which he bequeathed that mortgage and the moneys secured by it (although they were not then his) to the Trustees of St. Andrew's Church, the mortgagors. In and by the same will he bequeathed certain property to trustees for the support and maintenance in comfort of his insane son, John D. Walker, and by a codicil to the will bequeathed his son $12,600 additional.

On his death, the question at once arose whether John D. Walker was entitled to claim his support and maintenance under the will and the $12,600 specifically bequeathed to him and at the same time claim as his own property the mortgage and moneys secured thereby. In other words, could he approbate the will to

the full extent of all the benefits it conferred upon him and at the same time reprobate it by refusing to recognize and complete the bequest of the mortgage to the trustees of the church, or was he bound to elect either for or against the will and so in the former case accept all the benefits it conferred upon him adopting the bequest of the mortgage to the trustees, or, in the latter case, of electing against the will, retain his own property, the $30,000 mortgage, and renounce the maintenance and support provided for him in the will as well as the $12,600 specifically bequeathed to him, or could John D. Walker hold that the doctrine of election did not apply at all and that he could claim the mortgage as its *owner*, and his maintenance and support and the $12,600 under the will?

The latter claim was the one advanced on the part of the Committee of John D. Walker, which the courts below had decreed against, and which claim on this appeal it was desired this court should affirm.

As to the further bequest by codicil of $12,600 to John D. Walker, the argument was advanced by the appellants, though very weakly, that even with respect to this sum, reading will and codicil together, the doctrine of election was not applicable.

The courts below were unanimous, however, in holding that so far as the $12,600 bequest was concerned the Committee of John D. Walker's estate would be obliged to elect and I, concurring with them, do not think the question arguable.

Chief Justice Sir E. Macleod, however, differed from his colleagues in the Appeal Division as to the application of the doctrine of election to the maintenance and support provisions of the will, holding that it was not applicable because, as I understand his argument, these provisions did not vest in John

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D. Walker any estate or interest which was capable of being disposed of by him or could be used for any other purpose than his maintenance and support; in other words, it was not "free disposable property" vested in or given to the legatee which he held was essential in order to put him to his election, and that the terms of these maintenance and support provisions clearly indicated an intention on the part of the testator not to put him to such an election.

The learned Chief Justice accepted what he considered to be the law with respect to this subject as laid down in 13 Halsbury, page 123, but I am not able to agree with him in his conclusion that the provisions of the will for the maintenance and support of his son John D. indicated a particular intention inconsistent with the general and presumed intention of the will, or that these provisions did not vest in the son such an interest in and benefit out of the properties devised for him as would entitle the court to lay hold on such interest and benefit and sequestrate them for the purpose of obtaining compensation to the Trustees of St. Andrew's Church in case of an election against the will.

The paragraph reads as follows:—

> 139. From the principle that election proceeds on the footing of compensation it follows that no case for election will be raised against a person whose property a testator has purported to dispose of, unless he takes under the will a benefit out of property which the testator can actually dispose of. It is only such benefit which gives the necessary fund for compensation. The doctrine of election cannot be applied, except where, if an election is made contrary to the will, the interest that would pass by the will can be laid hold of to compensate the beneficiary who is disappointed by the election. Therefore, in all cases there must be some free disposable property given by the will to the person whom it is sought to put to his election.

It is not doubted or questioned, in fact it is conceded, that the testator had a free disposable interest

in the property he devised to the Committee of his son John D. Walker and I am quite unable to draw or conclude from the provisions of the will for the maintenance and support of the son and procuring for him "the necessaries and comforts of life so long as he shall live" any indication of an intention not to put him to an election under the will as between these provisions and the bequest or gift of the mortgage to the trustees of the church. I cannot doubt that if the son John D. Walker was of sound mind he would be compelled to make such an election. His interest would be disposable by him and available towards making compensation to the disappointed beneficiary in the event of his electing against the will. Its value in such case would be ascertainable, though perhaps with some difficulty, but the mere fact of its being difficult would not alter the duty of the court to have its value ascertained. Of course, if he elected under the will, no compensation would have to be provided because in that case as in the one now before us where the court elected for him he would be directed to cancel and discharge the mortgage.

The fact that the son had become and was at the date of the will a lunatic or person of unsound mind does not change the conclusion which I think should be drawn from these maintenance and support provisions.

The only difference between the conditions is that in the one case suggested the beneficiary being *compos mentis* would make his own election, while in the other, the present case, the court makes it for him.

If it became necessary in case of an election against the will to put a value upon the interest of the son under these maintenance and support provisions, I would hold that the beneficiary was entitled to the whole

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of the net proceeds of the properties devised for his benefit. No words of limitation are used to indicate that he was only to get a part of these net proceeds. No person is given the power to determine or to exercise any discretion with respect to the amount he was entitled to. If he was *compos mentis*, I think he could insist upon all the net "rents and income" being paid to him and I cannot see that the fact of his not being of sound mind could prejudice his rights in that regard.

This is not like the case of *In re Sanderson's Trusts* (1), where the gift was to trustees to pay and apply the *whole or any part* of the rents, issues and property for and towards the maintenance, attendance and comfort of J. Sanderson who was an "imbecile and not competent to manage his own affairs." In that case there was drawn a

> distinction between a gift, like the above, of "*the whole or any part*" and a gift of an entire fund, or the entire interest of a fund, for a particular purpose assigned; in the latter, although the purpose fails, the court holds the donee entitled to the entire fund or interest (as the case may be), treating the purpose merely as the motive of the gift.

This doctrine of election is an equitable one and its foundation and characteristic effect is stated in different language in the text books but there is really no difference between the statements. In Snell's Principles of Equity they are stated thus at page 179:

> Election in equity arises, where there is a duality of gifts or of purported gifts in the same instrument,—one of the gifts being to C. of the donor's own property, and the other being to B. of the property of C.; in the case of such a duality of gifts, there is an intention implied, that the gift to C. shall take effect, only if C. elects to permit the gift to B. also to take effect. This presumed intention is the foundation or principle of the doctrine of election; and the characteristic of that doctrine is, that, by an equitable arrangement, effect is given to the purported gift to B. "The principle is that there is an implied condi-

(1) 3 K. & J. 497.

tion that he who accepts a benefit under an instrument must adopt the whole of it, conforming to all its provisions, and renouncing every right inconsistent with it."

See also Smith's Equity Jurisprudence in the chapter on Election at page 137 and following pages, and Williams on Executors, 10th ed., page 1030.

In the late case of *In re Vardon's Trusts* (1), relied on at bar, Fry L.J. in delivering the judgment of the Appellate Court consisting of Lord Esher M.R., Bowen L.J. and himself, says at page 279:—

> That doctrine rests, not on the particular provisions of the instrument which raises the election, but on the presumption of a general intention in the authors of an instrument that effect shall be given to every part of it, "the ordinary intent," to use the words of Lord Hatherley (*Cooper* v. *Cooper* (2)), "implied in every man who effects by a legal instrument to dispose of property, that he intends all that he has expressed." This general and presumed intention is not repelled by shewing that the circumstances which in the event gave rise to the election were not in the contemplation of the author of the instrument (*Cooper* v. *Cooper* (2)), but in principle it is evident that it may be repelled by the declaration in the instrument itself of a particular intention inconsistent with the presumed and general intention.
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> For example, if the settlement in question had contained an express declaration that in no case should the doctrine of election be applied to its provisions, there seems to be no reason why such a declaration should not have full effect given to it. The late Mr. Swanston appears to us to have correctly enunciated the law on this point, when he said: "The rule of not claiming by one part of an instrument in contradiction to another, has exceptions; and the ground of exception seems to be, a particular intention, adopted by the instrument different from the general intention the presumption of which is the foundation of the doctrine of election."

The court in that case held that the restraint upon alienation in the settlement there in question contained

> a declaration of a particular intention inconsistent with the doctrine of election

and therefore excluded it. But I find nothing of the kind here, nothing equivalent to a restraint upon alienation, nothing inconsistent with the doctrine of elec-

(1) 31 Ch. D. 275. (2) L.R. 7 H.L. 53 at p. 71.

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tion and no express declaration which the testator might, if he desired, have put in his will that in no case should the doctrine of election be applied to its provisions.

In Lord Chesham's case, *Cavendish* v. *Dacre* (1), Chitty J. in reviewing the authorities and the law on this doctrine of election, and the principle on which the doctrine is based, says at page 474:—

> In *Wollaston* v. *King* (2), at page 174, Lord Justice James, then Vice-Chancellor, after stating that he had endeavoured to extract from the cases a principle, adopted the rule laid down by the Master of the Rolls in *Whistler* v. *Webster* (3), in the following general terms, viz.: "That no man shall claim any benefit under a will without conforming, as far as he is able, and giving effect to everything contained in it whereby any disposition is made shewing an intention that such a thing shall take place."
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> In *Cooper* v. *Cooper* (4), Lord Hatherley says (page 69): "The main principle was never disputed, that there is an obligation on him who takes a benefit under a will or other instrument to give full effect to that instrument under which he takes a benefit; and if it be found that that instrument purports to deal with something which it was beyond the power of the donor or settlor to dispose of, but to which effect can be given by the concurrence of him who receives a benefit under the same instrument, the law will impose on him who takes the benefit the obligation of carrying the instrument into full and complete force and effect."
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> In *Codrington* v. *Codrington* (5), Lord Cairns states the law thus (page 861): "By the well settled doctrine which is termed in the Scotch law the doctrine of 'approbate' and 'reprobate,' and in our courts more commonly the doctrine of 'election,' where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them."

I would dismiss the appeal; but under the circumstances think that costs of both parties to the appeal should be paid out of the testator James Walker's estate.

(1) 31 Ch. D. 466.
(2) L. R. 8 Eq. 165.
(3) 2 Ves. 367.
(4) L. R. 7 H.L. 53.
(5) L.R. 7 H.L. 854.

IDINGTON J.—I am of the opinion that the judgment appealed from should stand. But on the question of costs of appeal here I am in doubt. I imagine there can be no doubt that a case of some difficulty was presented requiring the construction of the will and hence the appellant trustees entitled to their costs out of the estate, yet Mr. Rosborough seems distinguished against by the formal judgment of the court below.

The respondents are entitled to their costs and I presume costs of all parties should come out of the estate. But for the not unreasonable division of opinion of the Court of Appeal I think litigation should have ended there.

The substantial division of opinion seems to me to entitle all parties to their costs out of the estate.

DUFF J.—I concur in the result.

ANGLIN J.—In the report of this case in the Appeal Division of the Supreme Court of New Brunswick (1) the facts are fully presented and the leading cases bearing upon them are discussed. But for the circumstances that the testamentary beneficiary, a portion of whose property the testator has devised to another, is a lunatic and that part of the benefit to which he is entitled under the will in question consists of a provision for his maintenance, there would seem to be no room to question the applicability of the doctrine of election. That the beneficiary is bound to elect between taking a pecuniary legacy of $12,600 given to him by a codicil, and retaining his $30,000 mortgage which his father bequeathed to the respondents, was the unanimous opinion of the learned

(1) 44 N.B.R. 153.

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trial judge and of the three learned judges who composed the appellate court. The contrary view was very faintly urged in this court, and is scarcely arguable.

But there was a difference of opinion in the provincial appellate court upon the question whether the provision for payment, out of the revenues of certain properties, of so much thereof as should be required to provide the lunatic with all necessaries and comforts and to give him a decent Christian burial, clearly denotes a particular intention that the right to this benefit should be inalienable, so that it would not be available for application in compensation should election be made against the will.

If the beneficiary were *compos mentis* his interest in this provision for maintenance would undoubtedly be alienable and therefore available towards making compensation in the event of an election against the will. Its value is ascertainable. The fact that the beneficiary is a lunatic does not exempt him from the operation of the doctrine of election in a case which is otherwise a subject for its enforcement. The court protects him by supervising the election.

With Mr. Justice White and Mr. Justice McKeown I am of the opinion that in making provision for the maintenance of his lunatic son, the testator has not evinced a particular intention either that that provision should be inalienable or that his son should be entitled to the full benefit of it even though he should refuse to relinquish his own property devised by his father to the church. It would be quite within the power of the court in the interest of the lunatic so to deal with the $30,000 mortgage, should he retain it, that whatever purpose the testator may have had in making the provision for payment of income to his custodians of insuring the permanence and continuance

of his maintenance would not be frustrated. With Mr. Justice McKeown I am satisfied that the testator had no actual intention on the subject of election. On the other hand, it is clear that he intended that St. Andrew's Church should be relieved from the $30,000 mortgage which he formerly held and had assigned to his son. He probably forgot that he had parted with this mortgage. The authorities, however, establish that it is immaterial whether the testator knew the property so dealt with not to be his own, or mistakenly conceived it to be his own. *Welby* v. *Welby* (1), at page 199.

For these reasons, more fully stated by Mr. Justice White and Mr. Justice McKeown, I would affirm the judgment in appeal. On the ground assigned in *Singer* v. *Singer* (2), at page 464, I think the appellants should pay the respondents their costs in this court.

Appeal dismissed. Costs payable out of estate.

Solicitor for the appellants: *Fred. R. Taylor.*
Solicitor for the respondents: *C. H. Ferguson.*

(1) 2 V. & B. 187.

(2) 52 Can. S.C.R. 447.