APPELLATE CIVIL—FULL BENCH.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice*,
Mr. Justice Madhavan Nair and Mr. Justice Jackson.

1928, November 1.

RAMAKOTTAYYA (PLAINTIFF), APPELLANT,

v.

VIRARAGHAVAYYA (SECOND DEFENDANT), RESPONDENT.*

Hindu Law—Gift by widow with the consent of next reversioner—Personal estoppel.

If the next presumptive male reversioner consents, though for no consideration, to an alienation without necessity by a Hindu widow (e.g., a gift as in this case), the transaction will be binding on him when he actually succeeds to the estate; *Fateh Singh* v. *Thakur Rukmini Ramanji Maharaj*, (1923) I.L.R., 45 All., 339 (F.B.) and *Akkawa* v. *Sayadkhan*, (1927) I.L.R., 51 Bom., 475 (F.B.), followed; *Rangasami Gounden* v. *Nachiappa Gounden*, (1918) I.L.R., 42 Mad., 523 (P.C.), applied.

APPEAL under clause 15 of the Letters Patent against the Judgment of Mr. Justice RAMESAM in Second Appeal No. 814 of 1923, preferred against the decree of the District Court of Guntūr in Appeal Suit No. 92 of 1922 preferred against the decree of the Court of the District Munsif of Repalle at Tenali in Original Suit No. 147 of 1919.

The facts are given in the Judgment.

In the Second Appeal Mr. Justice RAMESAM gave a decree declaring that the gift impugned in this case would be binding on the plaintiff if he happened to succeed to the estate and not on the other reversioners.

* Letters Patent Appeal No. 93 of 1926.

Against that decree the plaintiff preferred this Appeal under clause 15 of the Letters Patent.

The Appeal coming on for hearing, the Court (the CHIEF JUSTICE and MADHAVAN NAIR, J.) referred the following question to a Full Bench :—

"Where an alienation without necessity (Exhibit I) by a Hindu widow of property forming part of her husband's estate is consented to by the next presumptive male reversioner, who, however, receives no consideration for giving such consent, is the transaction binding on the consenting reversioner, if he succeeds to the estate after the death of the widow and of the female reversioner succeeding her ?"

ON THIS REFERENCE—

V. Govindarajachari for appellant.—This alienation being a gift is not binding on the plaintiff (reversioner) especially when he did not get any consideration for it; *Rangasami Gounden* v. *Nachiappa Gounden*(1). There is no estoppel within the meaning of section 115, Evidence Act. As the succession has not yet opened, there is no scope for election by the reversioner "to hold the deed good" within the meaning of the above decision. Election is the choice between two *inconsistent* benefits conferred by *another*; See Story's Equity, section 1075; Encyclopaedia of the Laws of England under the heading "Election," White and Tudor, Vol. I, page 373, 9th Edition; whereas, ratification or confirmation is of one's own act. In this case there is no scope for the doctrine of ratification either. The Privy Council have held that whether a reversioner consents to an alienation by a widow by joining in the alienation, or whether he alienates his own reversionary right, he is not thereby prejudiced as he has in either case only a *spes successionis*. What cannot be done directly cannot be done indirectly either. Hence his consent later on, before the succession actually opens to him is equally immaterial. The decisions of the Allahabad and Bombay High Courts in *Fateh Singh* v. *Thakur Rukmini Ramanji Maharaj*(2) and in *Akkawa* v. *Sayadkhan Mithekhan*(3), are against the view of the Privy Council in the above *Gounden's case* and are wrong.

(1) (1918) I.L.R., 42 Mad., 523, 538 (P.C.).
(2) (1923) I.L.R., 45 All., 339. (3) (1927) I.L.R., 51 Bom., 475.

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Ch. Raghava Rao for respondent.—Election to hold the deed good is different from the doctrine of general election. If the reversioner has done some act, even before the succession opens, showing his intention to hold the deed good, he is estopped even if he received no consideration, *Clough* v. *London North-Western Railway*(1). This has been definitely laid down in *Pangasami Gounden* v. *Nachiappa Gounden*(2), and in the above Allahabad and Bombay cases; see also 20 Halsbury, pages 737, 740 and 748.

OPINION.

COUTTS TROTTER, C.J.

COUTTS TROTTER, C.J.—The facts necessary for the determination of this reference are briefly these :—

Vemulapalli Subbayya died in 1909, leaving a widow Seethamma, the first defendant and his mother Bapamma, the third defendant surviving him. On the 2nd of October 1918, Seethamma executed a deed of gift in respect of some of the properties that came to her from her husband in favour of her own brother Veeraraghavayya who is impleaded as the second defendant in this case. The gift was effected by means of a document which is filed as Exhibit I in the case, and on the 19th of October, the plaintiff executed a document filed as Exhibit II, which in effect is a complete relinquishment of all his rights as prospective reversioner and also purports to give full consent to the transaction evidenced by Exhibit I, to which document indeed he was an attesting witness. The question is whether by reason of his action in these matters he is to be held to be precluded from challenging the transaction. The exact wording of the question is as follows :—

"Where an alienation without necessity (Exhibit I) by a Hindu widow of property forming part of her deceased husband's estate is consented to by the next presumptive male reversioner, who, however, receives no

(1) (1871) L.R., 7 Ex. Cas., 26, 34. (2) (1918) I.L.R., 42 Mad., 523.

consideration for giving such consent, is the transaction binding on the consenting reversioner, if he succeeds to the estate after the death of the widow and of the female reversioner succeeding her ?"

There is a Full Bench decision of the Allahabad Court, *Fateh Singh* v. *Thakur Rukmini Ramanji Maharaj*(1), which is directly in favour of the respondent here, and that in its turn was followed by a Full Bench of the Bombay Court, *Akkawa* v. *Sayadkhan Mithekhan* (2). In substance, the argument before us is that these cases are inconsistent with the Privy Council decision in *Rangasami Gounden* v. *Nachiappa Gounden*(3).

The learned Judge who decided the Second Appeal, RAMESAM, J., speaks in his judgment, of the plaintiff, the prospective reversioner, being estopped. In our opinion no question of estoppel arises in this case at all, for the essence of the doctrine of estoppel is that a person who acts on a representation of fact made to him by another person and is thereby damnified, is entitled to say that the person who made that representation cannot be heard to contest the truth of the facts which he himself asserted. The essence of the doctrine is that the person who acted on the faith of the assertion was damnified by so acting, and that feature is altogether absent in this case.

The next ground on which it is suggested that the plaintiff may be put out of Court is on the doctrine of election. That well-known equitable doctrine is stated in the leading case of *Streatfield* v. *Streatfield* decided in 1735 and most conveniently reported in 1 White and Tudor, 9th Edition, 373, and I cannot summarize it better than in the words of the learned editors in their notes

(1) (1923) I.L.R., 45 All., 339. (2) (1927) I.L.R., 51 Bom., 475.
(3) (1918) I.L.R., 42 Mad., 523.

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to that case which begin at the bottom of page 444. They say this :—

"Election is the obligation imposed upon a party by Courts of Equity to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both. Every case of election, therefore, presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both that one should be a substitute for the other. The party who is to take has a choice, but he cannot enjoy the benefit of both."

The same principle is often put in another form that a person cannot approbate and reprobate the same transaction. In this case that doctrine can have no application for the simple reason that no benefit was taken by this plaintiff of any kind, and that his approbation was a mere expression of intention which had no further consequences. But there is a third doctrine of Equity, an obviously indispensable one which has received various legal labels, sometimes being spoken of as election and sometimes as ratification. Its most authoritative exposition for an Indian Court is to be found in the judgment of the Board in *Rangasami Gounden* v. *Nachiappa Gounden*(1), delivered by Lord DUNEDIN and I think it best to set out the material passage in full :

"No doubt there is another view which is not estoppel, but is expressed by one learned Judge as ratification. It is scarcely that, though it might be hypercriticism to object to the use of the word. What it is based on is this. An alienation by a widow is not a void contract, it is only voidable—*Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*(2). Now in all cases of voidable contracts there is a general equitable doctrine common to all systems that he who has the right to complain must do so when the right of action is properly open to him and he knows the facts. If, therefore, a reversioner, after he became *in titulo* to reduce the estate to possession and knew of the alienation, did something which showed that he treated the alienation as

(1) (1918) I.L.R., 42 Mad., 523. (2) (1907) I.L.R., 34 Calc., 329 (P.C.).

good he would lose his right of complaint. This may be spoken of, though scarcely accurately, as ratification. In some cases it has been expressed as an election to hold the deed good—*Modhu Sudan Singh* v. *Rooke*(1).

"But it is well settled though he who may be termed a presumptive reversionary heir has a title to challenge an alienation at its inception, he need not do so, but is entitled to wait till the death of the widow has affirmed his character, a character which up to that date might be defeated by birth or by adoption. The present plaintiff raised these proceedings immediately after his title was confirmed.

"Of course something might be done even before that time which amounted to an actual election to hold the deed good."

His Lordship points out that an alienation of this nature by a widow is not a void but only a voidable contract, and that it can be affirmed expressly or impliedly by conduct of those whose interest it is to have it avoided. It has been argued that their Lordships meant to confine the class of persons who could validate the voidable contract to a reversioner who had not merely a *spes successionis* but had become *in titulo* to reduce the estate into possession. Giving the best consideration we can to this leading authority, we think that that passage is by way of illustration and should not be treated as exhaustive of the possibilities of a reversioner validating a *prima facie* voidable contract. There are two cases in which a reversioner may lose his rights. The first is when he does something definite and positive to indicate his election to abide by it; the other is where he is merely guilty of laches and sleeps on his rights. It is clear that what their Lordships call a presumptive reversioner like the present plaintiff cannot be deemed to have affirmed the widow's alienation by mere inactivity. He is entitled to bring a declaratory

(1) (1897) I.L.R., 25 Calc., 1 (P.C.).

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suit but he is not bound to do so; he may wait until the succession opens by the death of the widow and the termination of any other intervening interest. The question is, whether the same holds good in the case not merely of passivity but of a positively manifested intention to abide by the act of the widow. That seems to be left open by the concluding words of the passage that I have quoted, in which it is said that something may be done even before that time (that is, when the succession opens) which amounted to an actual election to hold the deed good. Their Lordships do not specify what class of cases they had in contemplation. One would obviously be where the presumptive reversioner had brought himself either within the doctrine of estoppel, or had taken a benefit and thereby fallen within the doctrine of election strictly so called, as defined in *Streatfield* v. *Streatfield*(1). The Allahabad and Bombay High Courts hold that a third case exists, namely, where although no one has been damnified so as to call into operation the doctrine of estoppel and the reversioner has taken no pecuniary benefit to bring himself within the meaning of the strict doctrine of election, he has nevertheless positively and definitively chosen to announce his intention and in fact agreed to abide by the act of the widow. The Full Benches of Allahabad and Bombay have decided that he can do so even while he only occupies the character of a presumptive reversioner. We agree with the Allahabad and Bombay Courts in thinking that if he takes such a step he is personally debarred from resiling from it afterwards. Indeed it is so obviously desirable that the Courts of India should speak with one voice on a matter of such constant recurrence as this that we should not

(1) (1735) 1 White and Tudor (9th Edition), 373.

dissent from those decisions unless we were convinced that they were contrary to the decision of the Privy Council in *Rangasami Gounden* v. *Nachiappa Gounden*(1). For the reasons stated we do not think that they are.

MADHAVAN NAIR, J.—I agree.

JACKSON, J.—I agree.

N.R.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kumaraswami Sastri, Mr. Justice Ramesam and Mr. Justice Reilly.

IMMIDISETTI DHANARAJU AND ANOTHER (PETITIONERS), APPELLANTS,

v.

SAIT BALAKISSENDAS MOTILAL AND ANOTHER (COUNTER-PETITIONERS), RESPONDENTS.*

1929, February 19.

Civil Procedure Code (Act V of 1908), sec. 98—Letters Patent, 1862, as amended in 1865—Appeal preferred to the High Court under Civil Procedure Code—Equal division of opinion between the Judges who heard the Appeal—Procedure to be adopted, whether under clause 36 of the Letters Patent or section 98 of the Civil Procedure Code—Amendment of section 98 of the Code—Amending Act XVIII of 1928, effect of—Practice.

In the case of an equal division of opinion between the judges of the High Court, in an appeal preferred to it under the Civil Procedure Code, the procedure to be adopted by the High Court is governed by clause 36 of the Letters Patent, and not by section 98 of the Code of Civil Procedure.

APPEAL against the order of the Subordinate Judge of Cocanada in Civil Miscellaneous Petition No. 381 of 1926 in Original Suit No. 67 of 1922.

This reference to a Full Bench arose out of a difference of opinion between PHILLIPS and TIRUVENKATACHARIYAR, JJ., in certain miscellaneous appeals arising out of

(1) (1918) I.L.R., 42 Mad., 523.

* Appeal against Order No. 155 of 1926.