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**FACULTY OF JURIDICAL SCIENCES**

**E- CONTENT**

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**SUBJECT: EQUITY AND TRUST**

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**NAME OF FACULTY: DR. ANKUR SRIVASTAVA**

# Lecture-17





## **LECTURE-17**

### **ELECTION:**

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) Vern 581 at 583; 23 E.R. 978, that the general principle governing election was evolved to prevent a person claiming under a will from contravening it.

Of the doctrine of election Lord Eldon observes in **Ker v. Wanchope** (1819) 1 Bli. 1; 4 E.R. 1 at 22, that no person can accept and reject the same instrument. 'If a testator gives his estate to A and gives A's estate to B, Courts of Equity hold it

to be against conscience that A should take the estate bequeathed to him, and at the same time refuse to effectuate the implied condition contained in the will of the testator. The court will not permit him to take that which cannot be his but by virtue of the disposition of the will; and at the same time to keep what by the same will is given or intended to be given to another person. It is contrary to the established principles of equity that he should enjoy the benefit while he rejects the condition of the gift.'

The doctrine was originally confined to gifts arising under a will, but it was later extended to gifts under deed. This could be seen in the dictum of Sir Richard Arden M.R., in *Freke v. Barrington* (1791) 3 Bro. C.C. 274 at 285; 29 E.R. 533; while commenting on the doctrine, he observed that he did not mean, in that case, to 'intrench on the rule that no man can take an interest under a deed or will, without confirming the deed or will'. See further *Anderson v. Abbot* (1857) 23 Beav. 457; 53 E.R. 180.

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 own property of which the donor sought to dispose. See James V.C. in *Wollaston v. King* (1869) 20 L.T. 1003, 1005.

This was further elaborated upon by Lord Cairns in ***Codrington v. Codrington*** (1875) L.R. 7 H.L. 854 at 861, when he said that 'It is a well settled doctrine of the courts that 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.'

### **Judicial Basis of the Doctrine:**

The juridical or the theoretical basis of the doctrine is not free from confusion. 'The principle is, that there is an implied condition 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.' 99 Per Lord Chelmsford in *Codrington v. Codrington* (1875) L.R. 7H.L. 854 at 866. 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 all 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 Hatherley 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. Per Chitty J. in *Re Wheatley* (1884) 27 Ch.D. 606 at 612. But the basis of the doctrine involves more than merely resting it on the presumed intention of the donor. 'It is clear that such a basis, if pushed to its logical conclusion, can result in difficulties.' See Keeton; *An Introduction to Equity* (6th Ed.) p.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 should 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. Secondly, it is immaterial, for the purposes of the doctrine, whether or not the donor gives away, by mistake or by design the property which does not belong to him. See *Cooper v. Cooper* (supra) at 67.

However, in *Cooper v. Cooper* (supra), Lord Cairn

appreciated the difficulty in explaining the doctrine on the basis of the presumed intention of the donor. In his opinion the rule of election does not proceed either upon an expressed intention, or upon a conjecture of a presumed intention, but it proceeds on a rule of equity founded upon the highest principles of equity, and as to which the court does not occupy itself in finding out whether the rule was present or was not present to the mind of the party making the instrument.

As was stated by Buckley J. in *Re Mengells Will Trusts* (1962) Ch. 791 at 797. 'For myself I should prefer to say that it is a doctrine by which equity fastens on the conscience of the person who is put to his election and refuses to allow him to take the benefit of a disposition contained in the will, the validity of which is not in question, except upon certain conditions.' The doctrine enables the court to secure a just distribution in substantial accordance with the general scheme of the instrument; 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.

### MCQs

1. 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.
  - i. True
  - ii. False
  - iii. Cannot say
  - iv. None of these
2. In *Cooper v. Cooper*, (Lord Cairn appreciated the difficulty in explaining the doctrine on the basis of the presumed intention of the donor.
  - i. True
  - ii. False
  - iii. Cannot say
  - iv. None of these
3. The doctrine enables the court to secure a just distribution in substantial accordance with the general scheme of the instrument; it is a means of doing justice

**as between the elector-beneficiary and the disappointed person.**

- i. True**
- ii. False**
- iii. Cannot say**
- iv. None of these**

**4. It is immaterial, for the purposes of the doctrine, whether or not the donor gives away, by mistake or by design the property which does not belong to him.**

- i. True**
- ii. False**
- iii. Cannot say**
- iv. None of these**

**5. 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.**

- i. True**
- ii. False**
- iii. Cannot say**
- iv. None of these**

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