ELIZA WILLIAMS, Legatee under the Will of the Late E. E. FINCH, Appellant, v. **ELLEN A. FINCH**, Sole Executrix, Legatee and Remainderman of said Estate, Appellee.

APPEAL FROM THE MONTHLY AND PROBATE COURT OF MONTSERRADO COUNTY.

Argued October 12-13, 1949. Decided December 16, 1949.

1. Probate Court has inherent power to revoke the probate of an instrument already admitted to probate.

2. A beneficiary of a will who has accepted benefits under the will is estopped to contest the will.

3. The Probate Court is without power to revoke the probate of a will which had been probated in a prior term of court.

On appeal from a judgment of the Monthly and Probate Court denying the revocation of the probated will of E. E. Finch, *judgment affirmed.*

T. G. Collins for appellant. *R. A. Henries* for appellee.

MR. JUSTICE DAVIS delivered the opinion of the Court.

Eliza Williams, appellant in the above-entitled cause, feeling that she was being deprived of certain rights and that certain benefits which should have accrued to her from the estate of the late E. E. Finch and which should have been enjoyed by her, were flowing in another direction and were being enjoyed by another, did on January 31, 1947 institute proceedings in the Monthly and Probate Court of Montserrado County for the revocation of the probated last will and testament of E. E. Finch of the Commonwealth District of Monrovia, which last will and testament six months before had been duly proved, and, without objection, had been admitted to probate.

In her petition, which implored the court to revoke the said will of E. E. Finch, petitioner set forth as grounds for said request the following reasons, to wit :

"1. That Petitioner is the next-of-kin of the Testator E. E. Finch, being his niece, and that Testator during his lifetime made and executed a Will which he left unrevoked at

his death, devising certain properties to Petitioner and respondent in equal shares *in fee,* and by which Will Petitioner and Respondent were appointed Executrices.

"2. That in the month of July A.D. 1946 this Court admitted . . . into probate, a 'Written Instrument' purporting to be the Last Will and Testament of E. E. Finch, but that said 'Written Instrument' was not the genuine Will, but a forged and fraudulent one.

"3. That the proving and probating of said Will by the Probate Court was grossly irregular because :— (a) the petitioner was not cited to be present at said proving and probating; and (b) only one of the attesting witnesses to said Will testified during the proving of same, and the testimony of this particular attesting witness was insufficient to establish validity of the Will ; that the testimony of one Hagar Davies who had been called in to identify the signature of attesting witness Padmore was ir-relevant; and that attesting witness Counsellor N. H. Gibson, for some reasons not appearing in the minutes of court, did not testify in the proving of the said Last Will and Testament."

Petitioner, because of the above related circumstances, re-quested and prayed the Probate Court to enter a decree revoking the probate of the will and citing respondent to show cause why said revocation should not be decreed.

In an effort to controvert the allegations of fact and the points of law urged in said petition, with a view to defeating same, respondent Ellen A. Finch, sole executrix, legatee and vested remainderman of said estate, through her counsel, filed an answer, traversing in detail and attacking petitioner's petition. The salient points of this answer we hereunder quote, to wit:

"1. That the Will in question was read in open court when both Petitioner and Respondent were present, and were instructed to make an inventory of said estate; and that Petitioner being present both at the reading and proving of said Will was estopped from raising an issue on the validity of the Will when she had ample time to do so within the time prescribed by law.

"2. That Petitioner was further estopped from raising the issue of the validity of the Will because said Will she is a beneficiary and has been enjoying the legacies bequeathed and devised to her in said Will, and is still enjoying them although she has instituted these proceedings.

"3. That Petitioner cannot own real estate in this Republic because she is not a citizen of Liberia.

"4. That since the validity of the proved and probated Will was attacked by Petitioner, and an averment made that it is a forgery, the genuine Will referred to by Petitioner, or a certified copy thereof should have been proferted with Petitioner's petition under the law of Notice in order to afford Respondent an opportunity to disproving its genuineness.

"5. That this Court cannot now, or at any subsequent term revoke the probation of said Will, for same could only be done in the term of court in which the Will was proved and probated.

"6. That the Will is the genuine Last Will and Testament of E. E. Finch.

"7. That the proving and admitting to probate of the Will was regular and legal, because although there is no law which requires the citing of the next-of-kin to be present at the proving of a Will, Petitioner was present, and the testimony of the witnesses was regular and legal, and also that attesting witness Gibson appeared in court, but refused to testify because he was angry over not being retained to proffer the Will.

"8. That there is no law which requires a witness to be present at the making of a Will, nor to know where it was made, what was done, and by whom it was made, and that the Will of a blind person need not be read over to him at the time of its execution in the presence of subscribing witnesses to make it valid.

"9. That the testimony of witness Hagar Davies to identify the signature of one of the attesting witnesses was competent, because that witness was her 'boy-friend', and she had corresponded with him, and he could not be brought to court to testify because he was serving sentence for an infamous crime."

It is significant to note, from the records certified to us, that petitioner failed to join issue with respondent on the several points of law and fact contained in respondent's answer, and neglected to file a reply.

The pleadings having thus rested, His Honor S. Raymond Horace, then Commissioner of Probate for Montserrado County, proceeded to hear and determine the issues raised by both parties. In passing upon the law issues, he ruled that the

petition should be dismissed, since in his opinion he felt that the points of law relied upon and urged by respondent were sufficient to defeat petitioner's action without passing upon the issues of fact. It is from this decision of the Commissioner of Probate that petitioner, under the name of appellant, had fled hither for review and possible relief.

Pressed with questions from the Bench during the arguments at this bar, appellant's counsel yielded the following points set up and stressed in his adversary's brief, to wit: (1) That his client, the appellant, did take part in making and submitting to the Probate Court the inventory of the estate in question; (2) That she was present in court when the will was read, but that she does not understand the English language well; and (3) That she has been, and still is, receiving her legacies under the said will, even though this suit is pending.

In support of his prayer to this Court for a reversal of the judgment of the court below, the appellant's counsel in his argument waxed eloquent in stressing the point that the failure of the trial court to obtain the testimony of witnesses N. H. Gibson and Rachforte Padmore, who, according to appellant's counsel, were all available, rendered the identification and proof of the will insufficient and therefore a fit subject for revocation. This argument of appellant's counsel seemed plausible at first blush; but additional facts negated the argument. The appellant contended in her petition that E. E. Finch during his lifetime made and executed a will which he never revoked, which was different from the one proved and admitted to probate; that the said will provided that she, the appellant, should enjoy equal shares of E. E. Finch's estate in common with appellee, and in *fee simple;* and that she was also co-executrix of said will. This being true, where is the said will containing such a devise in favor of appellant, or even a copy thereof? Should appellant not have made profert of same in order that if the present will, which she claims is not Finch's genuine will, is revoked and set aside, the said will relied upon and referred to by her as the genuine will could be substituted? The next question is, would the revocation of this will bestow upon appellant the benefits which she claims were provided for her under the will referred to in her petition?

A further review of the contentions of the parties in this controversy and a study of the facts and circumstances contained in the records certified to this Court disclose and present the following questions for consideration, the solution of which is, in our opinion, essential to an impartial determination of the case :

1. Whether the Probate Court has the inherent power to revoke the probate of an

instrument already admitted to probate, especially a will.

2. Whether a beneficiary under a Will, enjoying benefits therefrom, can question the validity of said will.

3. Whether the court at that time could revoke the probate of the will of E. E. Finch, said will being then under review in these proceedings.

As regards point one, whether or not a Probate Court has inherent power to revoke the probate of an instrument duly admitted to probate, the law writers of the common law all agree that a probate court has such inherent power, but specifically lay down certain conditions or limitations which under any circumstances must be adhered to in seeking to have said court revoke the probate. For example, the said revocation of probate must be done only at the instance of a person interested in the estate, or the personal representatives, heirs, devisees or legatees of such person, and then only when such person is not estopped by the acceptance of a legacy or otherwise. Moreover our own statutes regulating the Probate Court in Liberia give unto said Court the power "to do all other matters and things of a court of probate." Art. II, § of the Judiciary Act, Old Blue Book, 113, 117. Consequently it requires no further argument to show that a Probate Court has inherent power to revoke the probate of an instrument already admitted to probate.

Passing upon the second question with respect to whether a beneficiary under a will, who is enjoying such benefits as are provided for him under said will, may contest or question the validity of the same, we have the following rule laid down in *American Jurisprudence:*

"The general rule is that one who has accepted benefits under a will is estopped to contest the will, especially where other persons interested in the disposition of the testator's property have, on the faith of such acceptance, so acted that their position cannot be restored. . . ." 57 *Id., Wills, § 804 (1948).*

The foregoing view is supported by *Ruling Case Law:*

"Election under a will consists in the exercise of a choice offered the devisee of accepting the devise and surrendering some right of his which the will undertakes to dispose of, or of retaining such right and rejecting the devise. . . . Therefore, one who elects to take under the will is bound to give effect to all of its provisions, and perform the burdens attached to his benefit. Having taken a benefit under the will he

is estopped from asserting the invalidity of that instrument, and he will not be permitted to set up any right or claim of his own, however legal and well founded it may otherwise have been, which would defeat or in any way prevent the full operation of the will. In other words, there is an implied condition that he who accepts a benefit under it shall adopt the whole by conforming to all its provisions. Ignorance of the rule of law that a party taking a benefit of a provision in his favor under a will is estopped to assert the invalidity of that instrument, although coupled with ignorance of any evidence on which a contest could be based, will not prevent the application of such rule, in the absence of fraud, imposition, or misrepresentation, where the original situation cannot be restored, and there has been extreme negligence in attempting to discover the facts. . . .

"Those who are beneficiaries in a will and who have received property thereunder cannot maintain a bill as heirs at law of the testator, to have it declared invalid. . . 28 *Id. 328 (1921).*

It is evident from the foregoing citations of law that a beneficiary under a will who has received the benefits from the said will is estopped from challenging or contesting the validity of the same will. This Court is of the opinion that to give sanction to such a procedure would be opening an avenue of endless litigation, even to the prejudice of innocent parties. Appellant's counsel having confessed in his arguments at this bar that appellant has received the legacy provided for her under the said will before, as well as since, the institution of this suit, we are of the opinion that she is estopped from instituting an action to invalidate the said will. Under the law of wills, a party cannot be permitted to enjoy one portion of a will which is in his favor and contest the other as invalid.

We come now to the next question, whether the Probate Court at that time, six months after the proving of and admission to probate of the will of E. E. Finch, could revoke its probate. We are of the opinion that the Commissioner of Probate did not err in his ruling on this particular point when he held that he felt himself without jurisdiction to review the act of his predecessor unless commanded to do so by a superior court, to which an appeal had been prosecuted by the adverse party on such point, and that the term of the Probate Court in and during which the said will had been proved and admitted to probate had long expired.

Judge Bouvier supports the position taken by the Commissioner of Probate :

"All the judgments, decrees, or other orders of courts, however conclusive in their

character, are under the control of the court which pronounced them during the term at which they are rendered or entered of record, and may then be set aside, vacated, or modified by the court . . . but after the term has ended, unless proceedings to correct the errors alleged have been taken before its close, they can only be corrected by writ of error or appeal, as may be allowed in a court which by law can reverse the decision. . . .

"The general rule is that after the expiration of the term all final judgments, etc., pass beyond the control of the court unless steps be taken during the term to set aside, modify or correct them. . . ." 2 Bouvier, Law Dictionary 1725 (Rawle's 3d rev. 1914).

In addition to this we have the following citation respecting the revocation of the probate of a will in *Cyclopedia of Law and Procedure:*

"Probate may be revoked only at the instance of a person interested in the estate, or the personal representatives, heirs, devisees, or legatees of such person, and then only when such person is not estopped by acceptance of a legacy or otherwise." 40 *Id.* at 1236 (1912).

It follows therefore that even where appellant's action had been instituted within the term of Court at which the will was proved and admitted to probate, the fact of her accepting and receiving the legacy bequeathed unto her under the said will would have operated as an estoppel to her contesting the validity of said will.

In view of the foregoing citations of law and premises stated, we are of the opinion that the judgment of the court below should be, and the same is hereby affirmed to all intents and purposes, with costs against the appellant. And it is hereby so ordered. *Affirmed.*