

character as a grove for ever. There seems to be nothing even in the strict Muhammadan law against the dedication of such permanent rights which amount to a permanent occupation of the land and full proprietary right over the trees that stand on the land and also the right to maintain the grove as such on the land. The position in our opinion has been made still clearer by the definition of the word "wakf" in the Mussalman Wakf Validating Act, which has a very wide and comprehensive scope and must include the rights of a groveholder.

We are, therefore, of the opinion that the plaintiffs are entitled to maintain the suit as trustees under the wakf of 1916. We accordingly uphold the decision of the lower appellate court and dismiss the appeal with costs.

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TESTAMENTARY JURISDICTION

Before Mr. Justice Harries

ADMINISTRATOR-GENERAL (PETITIONER) v.
 A. M. BOWER (OPPOSITE PARTY)*

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 September,
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Construction of document—Will—Bequest whether of absolute interest or of life interest—Bequest of house with a condition that if legatee sells during her life time she will have life interest in the money, with reversion to her daughters—Condition in restraint of alienation and repugnant to bequest—
—Succession Act (XXXIX of 1925), section 133.

By his will the testator bequeathed his movable property to his wife during her life time, and after her death to his daughters in a specified manner; by another clause of the will he bequeathed his house, and any other immovable property which there might be, to his wife, but added a condition that "should my wife at any time wish to sell or dispose of the house she is hereby authorised to do so at a reasonable price and without detriment or loss to the estate and to invest the whole of the sale proceeds in Government promissory notes, and the interest thereof shall be enjoyed by my wife during her life time", and after her death the interest and the

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principal was to go to his daughters in the same manner as was already specified in the case of the movable property. The widow remained in possession of the house till her death. The question arose whether this will gave her an absolute estate in the house or only a life estate.

Held, that having regard to the circumstances that the will dealt separately with the movable and the immovable property; that in the case of the former the testator in express terms gave his wife only a life interest whereas in the case of the latter the language used was different and it was not said that he gave her only a life interest; that the testator did not in terms say that the widow could not sell the house except upon certain definite conditions but only that if she should sell it then she would have only a life interest in the proceeds of sale; that he did not in any way limit her interest in the event of the house not being sold; that the only restriction imposed on the widow's right to deal with the house was in respect of her power of sale in her life time and not her power to dispose of it by will; it followed that the testator bequeathed to her an absolute interest in the house, though intending at the same time to annex a restriction on her rights as an absolute owner in the matter of disposing of the property during her life time, and intending that the gifts in remainder and gifts over were to arise only in the event of sale. Consequently the absolute interest in the house vested in the widow and she was the full owner of it.

The provisions in the will depriving the widow of her absolute interest in the house in the event of her selling it were repugnant to the devise or bequest itself and were void. The ulterior gifts which were to take effect upon the happening of the sale were therefore void, but that could not affect the validity of the prior bequest, according to section 133 of the Succession Act.

Messrs. *O. M. Chiene* and *D. N. Sanyal*, for the petitioner.

Dr. K. N. Katju and *Mr. Balmakund*, for the opposite party.

HARRIES, J.: This is a suit brought by the Administrator-General of the United Provinces for a grant of Letters of Administration *de bonis non* to the estate of James William Twalling deceased, with a copy of the will annexed. The opposite party denies the right

of the petitioner to obtain such a grant, alleging that the estate of James William Twalling deceased has been completely administered.

The material facts of the case and all the relevant documents have been admitted on the pleadings or by counsel for both parties before me during the hearing, and, that being so, it was unnecessary to call any evidence on behalf of either of the parties. The issue involved in this case is a purely legal one, viz., the true construction to be given to a devise or bequest of certain real or immovable property contained in the will of James William Twalling deceased.

James William Twalling, a Government pensioner residing in the cantonments at Meerut, died on the 4th of September, 1893, leaving a will dated the 17th of October, 1887. He left surviving him his widow Mrs. Eliza Rebecca Twalling and three daughters, viz., Miss Grace Edith Twalling, Mrs. Walker and Mrs. Fink. The latter appears to have greatly displeased the testator during his life time and she is expressly deprived in the will of any share in the property left by the testator.

By the terms of this will the testator revoked all previous wills and appointed his widow sole executrix thereof. After a direction to the executrix to pay all just debts, funeral and testamentary expenses the testator proceeds to dispose of his property, dealing separately with his personal and real property.

The bequests of his personal or movable property read as follows: "I give, devise and bequeath all my personal property which I have acquired or may acquire by purchase or otherwise at any time before my decease such as jewellery, silver plate, household furniture, fittings up, carriages and horses and all and every sum or sums of money which may be in my house or due to me at the time of my decease, as also all stock, funds, Government promissory notes commonly called company's paper, and other securities unto my

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beloved wife Eliza Rebecca Twalling who shall enjoy the income, dividends, interests and profits thereof during her life time only and after her decease shall pay and apply the same income, dividends, interests and profits towards the maintenance and support of such of my daughters as shall from time to time be sole and unmarried, and after the marriage or decease of my last unmarried daughter shall divide my said personal property in equal shares among such of my daughters as shall then be living, except my daughter Alice Eliza Fink whom I exclude altogether from this will as her conduct has been most disgraceful."

With regard to his real or immovable property he makes the following provisions: "I also give, devise and bequeath to my said beloved wife Eliza Rebecca Twalling all that messuage, tenement or dwelling house with outoffices, wells, rights of way and appurtenances, purchased by me from the estate of the late George Beau of Saharanpur and being situate in Hill or Barrack Street No. 123 in the cantonment of Meerut and butted and bounded as described in the deed of sale dated the 16th of December, 1878, as also every other real property whether in reversion, remainder or expectancy. Should my said beloved wife Eliza Rebecca Twalling at any time wish to sell or dispose of the said house she is hereby authorised to do so at a reasonable price and without detriment or loss to the estate and to invest the whole of the sale proceeds of the said house in Government promissory notes, commonly called company's paper, and the interest thereof shall be enjoyed by my said beloved wife Eliza Rebecca Twalling during her life time only and after her decease the same interest shall be paid and applied towards the maintenance and support of such of my daughters as shall from time to time be sole and unmarried and after the marriage or decease of my last unmarried daughter the amount of the said Government promissory notes commonly called company's paper shall be divided in equal shares among

such of my daughters as shall then be living, except my daughter Alice Eliza Fink who is mentioned in the second clause of this will."

Probate of this will was granted to the widow Mrs. Twalling on the 14th of October, 1893, and thereafter she continued to reside in the Meerut cantonments in the house mentioned in the will (now referred to as "Park View") until her death on the 14th of July, 1900. Mrs. Twalling left no will, and Letters of Administration to her estate and to any unadministered portion of the estate of her husband the late James William Twalling were granted to the unmarried daughter Miss Grace Edith Twalling on the 29th of November, 1900. The Letters of Administration to any unadministered portion of the estate of her late father were granted to Miss Twalling upon the assumption that her mother Mrs. Twalling deceased had only a life interest in the house in question and that after her decease Miss Twalling had a limited interest only in this house liable to be defeated in certain events. For the purposes of granting Letters of Administration to Miss Twalling it was not necessary to construe the will of James William Twalling deceased and it is not contended that any decision has been given on this will by the court granting Letters of Administration which can in any way operate as *res judicata* between the present parties.

Miss Grace Twalling continued to reside in the old family residence "Park View" and it is now alleged that she spent large sums of money upon it to maintain it in a habitable condition. This fact, however, is not admitted by the petitioner and no evidence was called to establish it. No decision upon this issue, however, is necessary as it cannot affect my ultimate decision in this case.

Mrs. Walker died on the 6th of March, 1920, and Mrs. Fink also died some time subsequent to the death of Mrs. Twalling and before the death of Miss Grace Edith Twalling, which occurred on the 20th of Novem-

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ber, 1933. At the date of her death Miss Twalling resided at "Park View" and by her will dated the 24th of May, 1932, bequeathed the whole of her property to the opposite party Mrs. Bower, who obtained probate of the said will on the 24th of March, 1934. Mrs. Bower, it is to be observed, is the eldest daughter of the late Mrs. Fink who had been expressly excluded from any share in her father's property.

It is the case for the petitioner that Mrs. Twalling and after her death Miss Grace Edith Twalling were only life tenants of the house now known as "Park View" and that on the death of the latter no interest in it could pass under the will to the opposite party. As I have pointed out previously, Miss Twalling was the last surviving daughter of James William Twalling deceased and in the events that have happened it is contended that the bequest or legacy lapsed and that the house now forms part of the estate of James William Twalling deceased which has not been disposed of by his will. For that reason the present claim to a grant *de bonis non* with the will annexed is made.

On the other hand the opposite party contends that the will of James William Twalling deceased gave the widow Mrs. Twalling an absolute interest in the house which passed to Miss Twalling as her administratrix. As the latter at the date of her death had been in sole possession of the premises for 33 years it is contended that any rights vested in Mrs. Twalling's other children and their representatives are long since barred by limitation and that consequently at the date of her death Miss Twalling was the sole owner of the property and entitled to dispose of it by will.

If Mrs. Twalling was given an absolute interest in the property by the will under consideration the property cannot now form part of any unadministered portion of the estate of her husband. On the other hand if a limited interest only was given to Mrs. Twalling and after her death to Miss Grace Edith Twalling

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it may well be that in the events that have happened there has been a lapse and that the house now remains undisposed of by the will of James William Twalling and is therefore a part of the latter's estate still unadministered. If the house is not disposed of by the will the petitioner is entitled to the grant prayed. It may be pointed out at this stage that the claim is limited to the house known as "Park View," as it is now admittedly impossible for the petitioner to trace and identify any of the personal property possibly undisposed of by the testator by his will.

The issues which were agreed between the parties are:

(1) On a correct construction of the will of the testator, the late Mr. J. W. Twalling, did any portion of the estate of the late James William Twalling remain unadministered at the death of Miss Grace Edith Twalling?

(2) Is the Administrator-General, U. P., entitled to Letters of Administration *de bonis non*?

The answers to the questions raised in these issues depend upon the true construction of the bequest of the immovable property contained in the will of the late James William Twalling, the terms of which I have set out in an earlier portion of this judgment.

As stated previously the will deals separately with the movable and immovable property. The widow is in terms given only a life interest in the personal or movable property and on her death detailed provisions are made for the devolution of the property. On the other hand the bequest of the real or immovable property differs very materially from that of the personal or movable property. The house is devised and bequeathed to the widow "as also every other real property, whether in reversion, remainder or expectancy". If the terms of the devise or bequest stopped there, the will would clearly confer upon the widow an absolute interest in the realty or immovable property, as it is

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provided by section 95 of the Indian Succession Act of 1925 that where property is bequeathed to any person such person is entitled to the whole interest of the testator therein unless it appears from the will that only a restricted interest was intended for him.

The matter is, however, complicated by the provisions which follow this bequest. By these provisions the testator imposes limitations on the widow's right to sell or dispose of the property and the wording of these provisions is somewhat strange. The testator does not in terms say that the widow cannot sell except upon certain definite conditions but what he does say is, that, should she at any time wish to sell or dispose of the said house she is authorised to do so at a reasonable price and without detriment or loss to the estate and in such case the proceeds of sale are to be invested and disposed of in precisely the same way as the personalty or movable property is disposed of in the earlier portion of the will. It is to be observed that these provisions dealing with a possible sale by the widow apply only to the house and not to any other real or immovable property, whether in reversion, remainder or expectancy, which might pass under this devise or bequest. The actual bequest to the widow covers the whole of the property, whereas the limitation sought to be imposed upon her power of sale is confined only to the house.

It has been strongly urged by counsel for the petitioner that the will only gave the widow a life interest in this house. It is argued that the provisions as to the devolution of the proceeds of sale of the house show a clear intention on the part of the testator to give the widow not an absolute interest but a limited interest, that is an interest for her life only. It is expressly provided by section 82 of the Indian Succession Act, 1925, that the meaning of any clause in a will is to be collected from the entire instrument, and all its parts must be construed with reference to each other. That being so, it is argued that it is clear that what the testator intended

was that the real or immovable property should pass in the same way as the personalty, that is, to the widow for her life, then to such daughter or daughters as were unmarried, and upon the marriage or decease of the last unmarried daughter to the surviving daughters equally, always excluding Mrs. Fink. It is urged that in construing the bequest of the house regard must be had to the terms of the previous bequests. In short, it is contended that when the will is regarded as a whole it is clear that the testator never intended his widow to have anything more than a life interest in the immovable property, or in any event in the house in question. If that was the intention of the testator it is extremely strange that he did not expressly say so. He had in an earlier portion of this will disposed of his personalty and had expressly created limited interests. He was careful to say that his widow was to have the income, dividends, interest and profits of his personal property during her life time only but he makes no such provision when dealing with his realty or immovable property. It is true that he gives her a life interest only in the proceeds of sale if and when the house is sold, but he does not in terms limit her interest in the event of the house not being sold. If he intended his immovable property to pass in the same way as his movable property why did he not use the same language as he had actually used earlier in the will to create limited interests in the personalty or movable property? The fact that he uses different language to dispose of two kinds of property strongly suggests that his intentions with regard to the movable and immovable property were not the same. However, he does make provisions for the devolution of the real property similar to those for the devolution of the personal property once the realty is converted into money or movable property and that suggests that he only intended the limited interests to take effect if the house was actually sold.

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Further, it is to be observed that the only restriction imposed on the widow's right to deal with the immovable property bequeathed to her is a restriction on her power of sale or disposition in her life time. Nothing is said as to what is to happen if the property remains unsold and there is nothing which expressly restricts her power to dispose of the property by will if not sold in her life time. In fact the will does not contain even an express prohibition against alienation. All it says is that if the widow desires to sell or dispose of the said house she may do so without loss to the estate, in which event she is expressly given a life interest and provision is made for the devolution of the proceeds of sale after her death. From this it may, I think, be legitimately inferred that the testator intended to take away the widow's unrestricted right of alienation *inter vivos*, but it is difficult to infer anything more from these provisions.

From the language used by the testator his intention is, in my judgment, tolerably clear. He intended his wife to take the house and other realty (if any) whilst at the same time imposing a restriction upon her power of selling or disposing of the house during her life time. In short, he intended to give her an absolute interest in the house and at the same time to take away from her one of the rights of an absolute owner, that is, the unrestricted right to dispose of the property at any time during such owner's life time.

To construe the provisions of the will dealing with the house as granting the widow a life estate only in it, will, in effect, be creating a new will for the testator. As the will stands the gifts in remainder and gifts over only arise in the event of sale, whereas I am asked by the petitioner to read this part of the will as granting the widow in every event a life interest only and after her death as creating interests similar to those granted in the case of the personal or movable property. To construe the will in this way is to do violence to the

words used in the will. The intention of the testator must be inferred from what he actually wrote and not from what a court thinks the testator intended to write. This is clear from the speech of Lord WENSLEYDALE in *Roddy v. Fitzgerald* (1): "These rules are perfectly plain and clear. The first duty of the court expounding the will is to ascertain what is the meaning of the words used by the testator. It is very often said that the intention of the testator is to be the guide, but that expression is capable of being misunderstood, and may lead to a speculation as to what the testator may be supposed to have intended to write, whereas the only and proper enquiry is, what is the meaning of that which he has actually written. That which he has written is to be construed by every part being taken into consideration according to its grammatical construction and the ordinary acceptance of the words used, with the assistance of such parol evidence of the surrounding circumstances as is admissible, to place the court in the position of the testator." This dictum has been approved of by their Lordships of the Privy Council in the case of *Venkatadri Appa Rao v. Parthasara'hi Appa Rao* (2).

In my judgment the only construction which does no violence to all the terms of this will is the construction contended for by the opposite party, which is that the devise or bequest of the house to the widow is a devise of an absolute interest but with a limited restriction on alienation *inter vivos* annexed to it. In the event of alienation *inter vivos* only is the widow's absolute interest cut down, and as she retained the property throughout her life she was at the date of her death the absolute owner of it.

In my judgment the will of James William Twalling deceased conferred upon his widow an absolute interest in the house which in the events that happened was never taken away from her, and that being so she was

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(1) (1857) 6 H.L.C., 823(876).

(2) (1925) I.L.R., 48 Mad., 312.

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the absolute owner of the premises at the date of her death. Consequently the absolute interest vested in Miss Grace Edith Twalling as administratrix of her mother's estate and the house could never form part of an unadministered portion of the estate of James William Twalling deceased. As the present claim of the petitioner is expressly confined to the house it must fail as there is no unadministered portion of the estate in existence to which Letters of Administration can be granted. Had there been any traceable movable property which belonged to James William Twalling deceased different considerations would of course have arisen.

Further, the provisions depriving the widow of her absolute interest in the house in the event of her selling the property are, in my opinion, repugnant to the devise or bequest itself and must be disregarded. In the words of WILLES, J., in *Tagore v. Tagore* (1), "If, again, the gift were in terms of an estate inheritable according to law, with superadded words restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognize."

The absolute bequest and the condition divesting her of her absolute interest in the event of a sale are wholly incompatible and cannot stand together. Where there is a gift with a condition inconsistent with or repugnant to such gift the condition is wholly void and must be disregarded. That being so, the condition divesting Mrs. Twalling of her absolute interest in the property bequeathed to her, in the event of sale, is void. Other bequests were made upon the happening of this condition and the fact that these ulterior gifts are not valid

(1) (1872) 9 Beng.L.R., 377(395).

does not and cannot affect the validity of the prior bequest or gift; see section 133 of the Indian Succession Act.

In my view the petitioner has wholly failed to show that this house is now a part of the estate of James William Twalling deceased left undisposed of by his will, and for the reasons which I have given above I dismiss this suit with costs.

Two further points have been argued on behalf of the opposite party, but it is unnecessary for me to express any opinion upon them as the points do not arise, having regard to the construction which I have given to the bequest or devise in question.

* * * * *

The record together with the will was sent for at the request of the petitioner. By the rules of this Court the record together with the will must be returned by the clerk who was entrusted with their production and the petitioner must of course bear all the costs connected with the production and return of the record and the will.

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