APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Beaman.

1906.
December 19.

BANUBI KOM UMARSAHEB AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* NARSINGRAO RANOJIRAO MANE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Suit in ejectment—Persons in actual possession necessary parties—Wakf—Statement in a will that the testator had at a former time given away or set apart property to charity—Not a testamentary devise—Absence of actual delivery—Reasonably clear intention.

In a suit in ejectment the persons in actual possession need to be joined as parties.

A mental act although afterwards sufficiently expressed in conduct will not, unless clothed in appropriate words, create a *wakf*.

PER CURIAM:—We do not think that a mere statement in a will of some gift in the past can be referred back to the date, still undetermined, when that gift is afterwards alleged to have been made, or that such a narrative statement can in any view be an adequate substitute for the oral declaration of dedication to God, which the Mahomedan Law appears to us imperatively to require, synchronously with the act of dedication itself.

There is a plain distinction between giving in charity and declaring that one has given in charity. And for the purpose of fixing the origin of the *wakf*, if there was a *wakf* at all, the mere statement in a will that at some past date the testator had set apart such and such funds for charitable objects is of comparatively slight value.

Where there has been no actual delivery, a reasonably clear declaration is necessary to create a *wakf*.

FIRST appeal from the decision of G. A. Thomas, Assistant Judge of Belgaum.

The plaintiffs sued to recover possession of two-thirds of the property in suit left by their deceased father, alleging that as sole surviving daughters of the deceased they were entitled under Mahomedan Law to two-thirds of their father's property and that the will made by their father on the 19th June 1902 directing the distribution of his property mainly for charitable

* First Appeal No. 102 of 1905.

purposes was contrary to law. Defendants 1-5 were sued as trustees under the will, defendant 6 was the manager of certain shops in which the deceased had a share, defendant 7 was the widow, defendant 8 was the widowed daughter-in-law and defendant 9 was the grandson of the deceased. Defendant 9 was a minor represented by his mother, defendant 8.

The main contention of the defendants was that the plaintiff had no title to the property set apart by the deceased for charitable purposes, namely, the maintenance of the Karim Dad mosque of Belgaum and the *madrassa* (school) referred to in the will. They further contended that the plaintiffs had no title to the other property mentioned in the will because it was reserved for the maintenance of defendants 7, 8 and 9.

The following are the material portions of the will referred to in the plaint and the written statement:—

Details of the property given to charity.

I have given away before this the house and the land mentioned in paragraphs 1 and 2 of the description of the property for the residence or for feeding the *musáfars* (travellers) coming to the masjid of Karim Dad situate in the lane called Bagwan Lane in the town of Belgaum. The trustees are to continue the same as before. If per chance the present *panch* of the masjid should not use the property given by me according to my wishes, the trustees should appoint a proper *panch* for the purpose of managing the said property and get the same managed as mentioned above or they should themselves manage the same and take steps to do as mentioned above.

I have established a *madrassa* in my name at Belgaum. The name of the same is Madrassa-a-Mohid Islam. For the purpose of carrying the work thereof I have given Rs. 7,000 (seven thousand) from out of my estate and I have made a separate arrangement in respect of the same in my trade business. The trustees should carry on the trade accordingly from out of the said money, and after deducting the expenses, etc., thereof, from the balance that may remain as net profits the trustees should pay the house rent of the *madrassa* and the pay of the teacher and other expenses. The trustees have no authority to spend more than the income.

I have given Rs. 7,000 to this institution, but I wish that the amount should be increased up to Rs. 10,000. To accomplish this (wish of mine), the trustees should from the income of my other property, other than the amount of the aforesaid sum of Rs. 7,000, make up the deficiency. If it be not possible to make up the deficiency from the income, then the same should be made from my estate.

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Excepting the estate given by me for charitable purposes as mentioned above from the income of the remaining estate belonging to me the expenses of repairs and of breakages and dilapidations of the house, the Municipal rates, the assessment of the fields and other expenses of management should be paid, and the net income, whatever may remain, should be applied by the trustees towards the maintenance expenses of my wife, my daughter-in-law and my grandson.

The Assistant Judge found that the disposition of the property by the deceased was a *wakf*, that the *wakf* was valid, and that the plaintiffs were entitled to two-thirds share in the property left by the deceased except the properties devoted to charity.

The plaintiffs appealed.

C. A. Rele for the appellants (plaintiffs) :—The *wakf* of the house and the land in favour of the masjid and of Rs. 7,000 and Rs. 3,000 to the *madrassa* is not valid according to Mahomedan Law. Delivery of possession is necessary to constitute a valid *wakf*: *Muhammad Aziz-ud-din Ahmad Khan* v. *The Legal Remembrancer to Government*(1). There is no satisfactory evidence that the house and the land were given by the *wakif* in the possession of trustees. The Judge has not gone into the question as he held that delivery of possession was not necessary.

As regards the gift of Rs. 7,000 to the school, there was neither previous declaration, nor appropriation, nor delivery of possession. A previous declaration is necessary and until such a declaration has been made the *wakf* cannot be established. A mere recital in a will that the testator had established a school and that he had made provision for its expenses by the investment of Rs. 7,000 in trade is not sufficient. No specific sum was set apart for the school and the school was not maintained out of that sum. There is no mention in the accounts of the shop of the appropriation of Rs. 7,000 to the school. As there was no previous declaration or appropriation, the gift of Rs. 7,000 to the school fails. The declaration was made for the first time in the will. Therefore the gift of Rs. 7,000 can only be treated as a gift under the will and can take effect only to the extent of a third share of the testator's property.

(1) (1893) 15 All. 321.

Wakf of moveable property was not valid: *Fatima Bibee* v. *Ariff Ismailjee Bham*[1]. As regards the additional gift of Rs. 3,000 to the school, it is based on the principal gift of Rs. 7,000, and as that gift fails, the gift of Rs. 3,000 must also fail.

G. S. Mulgaumkar for the respondents (defendants):—Delivery of possession was not necessary: *Doe dem Jaun Beebee* v. *Abdollah Barber*[2]. There is evidence to show that possession of the house and the land was given by the *wakif* to the trustees.

A mere declaration coupled with intention and overt acts is sufficient. It is not necessary that the *wakif* should make a declaration to any one but himself: Amir Alli's Mahomedan Law, pages 148, 149, 150, 153, and 160. The donor did spend money for the maintenance of the school. He took money from the shop's accounts from time to time and spent it for the school. He had struck balance before his death.

Assuming that there was no previous appropriation of Rs. 7,000, still there was appropriation on the date of the will. Thus, it would be a gift of Rs. 7,000 under the will and would be valid to the extent of one-third of the donor's property.

Wakf of moveables is valid. It is not suggested that the fund dedicated to the school is perishable: *Abu Sayid Khan* v. *Bakar Ali*[3].

Rele in reply:—A mere intention to create a *wakf* will not suffice. Even according to the view of Abu Usuf and Mahomed, the two disciples of Hanifa, a previous declaration is necessary. They hold the same view on this point although they differ on the point of delivery of possession and other points. The Judge has found that there was no previous declaration.

BEAMAN, J.:—One difficulty occasioned by the form of the suit which was not apparently before the mind of the learned trying Judge is this: touching the house which the deceased is alleged to have given to the masjid the suit is in ejectment, and therefore the persons, if any, in actual possession need to be joined as parties. This was not done. Without expressing any opinion

(1) (1881) 9 Cal. L. R. 66. (2) (1838) 1 Fulton's Reports, 345.
(3) (1901) 24 All. 190.

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as to whether this was a true and valid *wakf*, it is clear that in respect of this relief the claim fails. Neglecting some other difficulties which might be similarly occasioned and confining ourselves to what is substantially in controversy, there remain two principal points.

First, of the *wakf* of Rs. 7,000. The plaintiffs' case is that this was not a valid *wakf*. But if it was, it was created by will or on the death-bed, and in such case it could not extend to more than ⅓rd of the *wakif's* estate. We are very sensible of the care and ability with which the entire question has been examined by the learned Judge below. His judgment, though we find it unnecessary to deal fully with all its contents, is a very able and instructive contribution to the case-law on the subjects of which it treats. But for the purpose of disposing of this appeal it will be sufficient to confine our observations within a small compass. It is virtually admitted that apart from expressions to be found in the will itself there was no declaration of the *wakf* of Rs. 7,000 out of the testator's profits or shares in the partnership concern. Nor of course was there any actual delivery. Thus, the questions are :—(1) Whether a *wakf* can be validly created by a purely mental act ? (2) Whether, if not, actual delivery is necessary ? Whether the statement in the will is a good declaration, and, if so, whether it can be referred back to a prior mental resolve so as to bring the *wakf* into being from the date of the latter ? Whether property of the kind which the will describes as constituting this *wakf* can properly and legally be so dedicated ? And, last, there is the most important practical question of all—whether in fact the evidence proves that, apart from the statement in the will, there had been any dedication of the Rs. 7,000 to the charity ?

It has been strenuously contended on behalf of the respondents that a mere intention to set apart property for charitable purposes, followed by actual appropriation (as in the case of a definite sum of money, by applying the interest to the intended purpose), is quite sufficient to create a *wakf*. No authority as far as we know goes that length. The passages most strongly relied on by the respondents are taken out of Amir Ali's Text-Book ; but even

supposing this is good authority, we do not find the learned writer anywhere saying that a mere mental act, unaccompanied by any form of explanatory words, will do; all that he says is that it is not necessary, while stating the object of the dedication, to say explicitly that it is "*wakf*". Some statement apparently there must be and this is quite consistent with the objectivity of archaic systems and the prominence given in them to ceremonial *formulæ* and illustrative acts or words. It may be difficult to discover any good reason why saying in the market-place or in the presence of one or more hearers: "I set apart 7,000 Rs. for the endowment of my new school and will henceforth apply the income to that purpose," even although the *wakif* should never in fact set apart the *corpus* or apply a penny of the income, does, while actually setting apart the *corpus* and applying the income to the contemplated charity, because unaccompanied by a verbal statement, does not, create a valid *wakf*. But in trying to administer branches of law which have come down to us from remote times and primitive societies it does not do to insist too much on a modern reason for every rule. We must, we feel, keep as close as we can to such authorities as are available for our guidance; and not one of these supports the proposition that a mental act, although afterwards sufficiently expressed in conduct, will, unless clothed in appropriate words, create a *wakf*.

The respondents' next contention is that although at the time that the founder conceived the idea of the *wakf*, he did not verbally announce it, he did do so formally and sufficiently in his will. He there declares that he has given this sum to be the endowment of his school; and that is proof enough, when taken with the fact that the school had been built and masters employed, of the practical reality of the mental dedication two years previously. There is a plain distinction between giving in charity and declaring that one has given in charity. And for the purpose of fixing the origin of the *wakf*, if there was a *wakf* at all, the mere statement in a will that at some past date the testator had set apart such and such funds for charitable objects, is of comparatively slight value. It might be otherwise, were such a declaration accompanied by accounts showing exactly when sums began to be so expended. So supplemented were it not for the legal objection that a *wakf*

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must be created by declaration, it might very well be argued that the facts proved by the accounts coupled with the declaration in the will proved well enough not only that the *wakf* had, but also when it had come into being. And this point is important in connection with the rule that a *wakf* may if created during the lifetime of the *wakif*, and otherwise than by will or on the death-bed, exceed a third of the whole estate; whereas *wakfs* created on the death-bed or in a will are subject to the ordinary rule which limits a testator's powers of free disposition to ⅓rd of his whole estate. The main argument is that the declaration in the will can be ante-dated two years by reference to the testator's conduct and actual facts, *i. e.*, the building and starting of the school, or the hiring of school premises and employment of masters; so as to supply the deficiency arising out of the *wakif* having, in the first instance, kept his charitable intention to himself, and bring the *wakf* within the category of *wakfs* created during the life-time of the *wakif*. For, if that were so, then, the whole sum would go to the purpose of the *wakf*, whether or not it exceeded a third of the testator's whole estate. Implied in this, however, there is a second and subsidiary argument that whether the will will do to validate the *wakf* from the time the *wakif* conceived the intention, it certainly does in itself create the *wakf*. The objection to that from the respondents' point of view is that, if the *wakf* of Rs. 7,000 is held to be created by the will, it is subject to the ordinary rule, and along with any other charitable bequest similarly made in the will is liable to be cut down within the required limit, ⅓rd of the estate. We find it impossible to accede to the first argument. We do not think that a mere statement in a will of some gift in the past can be referred back to the date, still undetermined, when that gift is afterwards alleged to have been made, or that such a narrative statement can in any view be an adequate substitute for the oral declaration of dedication to God, which the Mahomedan Law appears to us imperatively to require, synchronously with the act of dedication itself.

Such a view would open the door to obvious and possibly dishonest evasions of the restriction imposed on the powers of testamentary disposition by Mahomedan Law.

We are unable to hold that a bare statement in a will that the testator has at a former time given away or set apart a portion of his property to or for a charity amounts to a testamentary devise. Reason is clearly against it, and we think it would be extremely dangerous to countenance any such view.

In our opinion, where there has been no actual delivery, a reasonably clear declaration is necessary to create a valid *wakf*.

There is a difference of opinion between the two leading Mahomedan schools, led by Mahomed and Abu Yusuf, as to whether actual delivery in addition to declaration is also necessary. The Courts of India appear to have inclined now to one, and now to the other opinion. In the present case there is no allegation that the Rs. 7,000, with which we are now concerned, was ever actually delivered. Nor indeed could it have been, since it appears to be the estimated yield of unascertained shares and profits in a partnership business. We do not therefore feel called upon to decide this vexed question. It might well be that even in the absence of any proof of an express declaration, if the fund or property intended to be dedicated were actually delivered, such delivery might raise an irresistible presumption of the requisite declaration having been contemporaneously made. But where we find that there was no declaration, this question could only have any importance where notwithstanding that initial defect, there was proof, or at any rate an allegation of actual delivery. Here there is none. As to whether property of this kind can legitimately form the subject of a *wakf*, we need only say that moveables, in our opinion, may; and if moveables, there seems no sound reason in these days, to exclude from that category, funded moneys. It is not necessary, however, in the view we take of the whole matter, to express a considered opinion upon this point.

As to the evidence, the statement in the will might be relevant and strong evidence that the testator really had intended to devote a sum of Rs. 7,000 to the endowment of the school. But we do not think that without some corroboration it is conclusive that he did so. The corroboration consists in the fact that a school was started and carried on with fluctuating success. But

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there is nothing to show what expenses were incurred. It is impossible to say from this record that a specific sum of Rs. 7,000 ever was given up to the school, or that the *wakif* ever renounced absolutely all his beneficial interest therein. Strictly speaking, this part of the case is inseparably connected with the consideration of the questions whether there ever had been a declaration, or a delivery. And the evidence is, in our opinion, clearly insufficient to support either of those allegations. For these reasons, we are of opinion that there was no valid *wakf* of the Rs. 7,000. We must add that had our inclination been the other way, we should have felt obliged to reserve judgment till the minor grandson had been properly represented. As the case was presented to us, his counsel was engaged to uphold the *wakf*. But that was plainly opposed to the minor's interest as also to that of the widow. For, had it been a valid *wakf*, it would have reduced *pro tanto* the estate to be shared. In that estate the plaintiffs appear to be entitled to two-thirds, the widow to an eighth, and we think, as at present advised, though we need not go further into this, the minor to the residue.

There remains then in dispute only the sum of Rs. 3,000 bequeathed in the will to the same school. We are unable to discover any ground for declaring such a bequest to be invalid, provided that it does not exceed one-third of the whole estate. The argument that it fails because the fund it was intended to supplement fails, does not need serious consideration.

The result is that we think the decree of the Court below must be amended. The plaintiffs, as far as appears on this record, are entitled to two-thirds of the estate after deducting the house, and Rs. 3,000. Always provided that such deductions do not exceed one-third of the whole. Costs to come out of the estate.

Decree amended.

G. B. R.