JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 4 OF 1968

BEFORE: The Hon. Mr. Justice Fox
The Hon. Mr. Justice Smith
The Hon. Mr. Justice Graham-Perkins

BETWEEN JOSEPHINE LUCILLE DACOSTA - Plaintiff/Appellant

AND MICHALENE EVADNE WARBURTON ET AL - Infant Defendants

AND THELMA KENNY - Guardian ad Litem/ Respondent

Mr. V.O. Blake, Q.C. and Mr. H.D. Carberry for the Appellant
Mr. W. Frankson and Mr. A. Gilman for the Guardian ad litem/Respondent

31st May, 1st, 2nd, 4th June, 1971

FOX, J.A.

This is an appeal from an order of the Master in which he answered questions in an originating summons as to the construction of a will. After the usual opening directions the will continued as follows:

"I give and bequeath to my wife Josephine Lucille my property known as 52 North Street Kingston. I give and bequeath to my said wife all my wood-work and all other Machinery which I may at the time of my demise be in possession of and all my other personal effects. I give to my said wife Josephine Lucille whatever money I may have in the Bank of Nova Scotia, Kingston. I direct my said Executor Josephine Lucille that in the event of her selling the property known as 52 North Street she must give to my Grandchildren by my daughter Thelma Kenny ONE QUARTER of the proceeds from such sale after expenses have been paid. I direct that after my deceased and in the event of the decease

of my wife the said Josephine Lucille before the property mentioned above is sold, the said property shall revert to my Grandchildren by my daughter Thelma Kenny."

The will devised real estate to the plaintiff without any words of limitation. Prima facie, therefore, by virtue of the provisions of s. 23 of the Wills Law, Cap. 414, that devise effected an absolute gift of the fee simple unless a contrary intention appears by the will. A contrary intention does so appear. It is manifest by those clauses in the will which show that the testator wished to provide for his grandchildren either by way of a portion of the proceeds of any sale of the property by the plaintiff during her life time, or by a gift over to them at her death failing such sale. Why should not this contrary intention prevail? That is the question. The Master thought that the answer was supplied by the decision of the British Caribbean Court of Appeal in Jackman v Edwards (1965) 8 W.I.R. 331. In that case, a Testator made several dispositions by his will. Paragraph 6 was as follows:

"I give and bequeath to my wife, Mary Anna Matilda Jones, my lime kilns, the house and land bought from the Burtons, and that part of Boyce's land extending from the brow to the foot of the hill; and should she not dispose of them before her death, four-sevenths shall, after her death, go to my daughter Mary Alexandra Edwardina, her heirs and assigns, and three-sevenths to my daughter Annie Augusta, her heirs and assigns; and should either of them die without issue her share shall go to her sister."

The trial judge, Stoby C.J. held that the widow took an absolute interest. In his judgment (vide Edwards v. Coppin and others - 1961-62 - 4 W.I.R. 386) he referred to s. 24 of the Wills Act 1837 (7 W. 4 & 1 Vict. c. 26) which provides similarly to our s. 23, and said that since the section made words of limitation unnecessary "a testator be he layman or lawyer who says 'I give and bequeath to my wife' means what every human being except lawyers would think that he means even without the consideration of the Wills Act, that is,

that he is giving his property to his wife absolutely." (390 ibid). The learned Chief Justice did not think that the words "should she not dispose of them before her death" had the effect of creating a life interest. They were "intended to do what many husbands try to do and that is to control his wife from the grave" (390 ibid). The words, he said, expressed a "pious hope" merely. The judgment of the British Caribbean Court of Appeal was given by Archer P. He noticed that in the gifts over to the daughters, the words "her heirs and assigns, had been employed. This was language of the "fullest amplitude". In the devise to the wife no such expression had been used, and so 'unless the testator is to be accused of a capricious use of words, for which there is no warrant, the different phraseology employed in dealing with the same property in the two dispositions in para. 6 must have some significance and the extent of the interest which he intended his wife to have cannot be the same as the extent of the interest he was leaving to his daughters" (330 ibid). Archer P. thought that the wife was given "something more than a life interest but less than the fee simple absolute" (332 ibid). He held that she took a life interest coupled with a power of disposal during her life time, and as she had not disposed of it, the property passed to the testator's daughters. Mr. Blake suggested that the decision of the British Caribbean Court of Appeal was wrong and should not be followed by this court. His submissions involved a development of the view of Stoby C.J. with emphasis upon the doctrine of repugnant conditions.

I do not think that a pronouncement upon the validity of the judgment of the British Caribbean Court of Appeal is necessary for a decision in this case. The judgment and that of Stoby C.J. are based upon considerations which arose out of particular phraseology which is absent in the will before us. The considerations in each judgment were not identical. Stoby C.J. pursued a line of thinking which eventually let in the doctrine of repugnant conditions. He did not specifically say so, but upon a close examination of his judgment it is beyond question that he recognised the relevance

of the proposition that where there was a devise in fee, a subsequent condition which purported to alter the normal process of devolution by creating a gift over at the moment of devolution was repugnant to the absolute estate previously given, and void. This was the premise, inarticulate perhaps, but evident nevertheless, of his final decision. Archer P., on the other hand, interpreted the words of the will in such a way as to give the wife an estate in the nature of a life interest. Having arrived at this initial conclusion, reflections upon the doctrine of repugnant conditions must thereafter have been perceived as irrelevant and unnecessary.

It is possible to prefer the thinking of Stoby C.J. above that of Archer P. This, however, would not be decisive of the question before us. The approach of other judges in similar cases may help, but cannot relieve this court of its primary obligation to construe the particular words of the will in this case. The first question is to determine the extent and nature of the estate intended to be given to the wife. These matters combine to provide the unmistakable answer. Firstly, by the use of the words "I give and bequeath to my wife", the testator must have meant, as Stoby C.J. said, to give 52 North Street to his wife absolutely. Secondly, in effecting an absolute gift to his wife of all his personal estate, the testator used the words "give and bequeath". These same words were employed in making the devise to her of 52 North Street. If a consistent meaning is given to them, this also shows that the testator intended to give the fee simple to his wife. Finally, as a corollary to, and as further evidence of this intention is the circumstance that although the testator contemplated that his widow would have power to sell the property, he left this power unfettered in all respects. He must have expected her to be able to make a satisfactory conveyance of the fee simple free from all restrictions. I hold therefore, that upon a proper construction of the will, she was given the fee simple absolute in 52 North Street. She could sell the property and keep the entire proceeds for herself. She could devise it by will or allow it to

devolve in accordance with the laws of intestacy. The direction in the will to give a part of the proceeds to the grandchildren in the event of sale during the plaintiff's life time, and the attempted gift over to the grandchildren failing such sale are incompatible with the incidents of ownership and void. The doctrine of repugnant conditions defeats the intention to benefit the grandchildren at the same time that it validates the absolute gift to the wife.

Mr. Frankson suggested that the plaintiff took the fee simple absolute as a trustee and not as absolute owner. There is no express direction in the will to this effect. Nevertheless a gift which would fail at law may be upheld in equity. In appropriate circumstances a trust will be implied. Equity will then say that the legal owner must hold the property in trust for others. But there is a basic rule. There must be a clear intention to create a trust. This is the first of three certainties which are necessary for the existence of a trust. Technical words are not required to show an intention to create a trust. In each case, the words, and actions, of the settlor or testator must be examined to see whether it was his intention to impose an obligation of trust. Such intention is not necessarily established upon proof of an intent in a donor to benefit a donee. The essential question is whether this intent to benefit can be construed as a trust in favour of the donee. This principle is illustrated in Jones v. Lock (1865) L.R. 1 Ch. App. 25. There, a father gave to his nine month old son a £900 cheque payable to himself saying, "look you here, I give this to baby.....". The child was about to tear up the cheque when the father took it away and put it in an iron safe. The father died and the cheque was found among his effects. The question was whether the child was entitled to the cheque or whether it formed part of the father's estate. It was held, firstly, that there had not been an effective gift of the cheque to the child because it had not been endorsed. Secondly,

there was no evidence that the father intended to declare himself a trustee of it and to burden himself with a trustee's duties in respect of it. The child therefore took nothing.

A second certainty is as to the beneficiaries of the trust. The trustee must be able to identify these. If identification is uncertain, the trust will fail. The third certainty is as to the subject matter of the trust. The subject matter in this case is identified. It is 52 North Street. But this is the only one of the three essential certainties which have been established. Construing the words employed by the testator, it is impossible to conclude that he intended to create a trust. Undoubtedly he wished to benefit his grandchildren. Nevertheless, if he desired further, and intended that this wish was to be carried out by the imposition upon his widow of the imperative obligations of a trustee, this intention should have been expressed in mandatory form or with otherwise sufficient clarity. As it is, considering the will as a whole, there is every indication that the testator intended that the plaintiff should have complete freedom of action with regard to the enjoyment, disposition, and management of the property. These are the recognised incidents of absolute ownership. There is nothing in the will to show that these incidents were meant to be cut down by those burdens and limitations which are intrinsic to a trust. The requirement of certainty of objects is also missing. If the property is sold during the life time of the plaintiff, one quarter of the proceeds of sale must be given to the grandchildren. There is no direction as to the destination of the balance. The beneficiaries are not specified. These could be the plaintiff, or the testator's daughter, Thelma Kenny, or both. The onus of showing that the objects are certain is on the party who alleges the validity of the trust. Re Saxone Shoe Co. Ltd's. Trust Deed [1962] 1 W.L.R. 943. That certainty may appear on a balance of probabilities. Proof to such a standard is not available in this case, and for this reason also the argument in favour of a trust is untenable. Where words attached to a gift fail to create a trust the gift takes effect as an absolute gift.

Lambe v. Eames (1871) L.R. 6 ch. App. 597.

For these reasons I agreed that the appeal should be allowed. The first question in the originating summons is as follows -

> "That it may be determined whether upon the true construction of the Testator's said Will property known as No. 52 North Street, in the parish of Kingston, is given to Josephine Lucille DaCosta absolutely for her own use and benefit".

The Master has answered this question in the negative. The other five questions arose as a result of this reply. They were answered accordingly. This Court was of the unanimous view that the Master was in error and that the first question should be answered in the affirmative. The Court ordered as follows -

> The appeal is allowed. The order of the Master, save in respect of costs is set aside. The answer to the first question in the originating summons is in the affirmative, that is to say, upon the true construction of the Testator's will, the property known as 52 North Street, Kingston is given to Josephine Lucille DaCosta in fee simple. The costs of this appeal is to be paid out of the estate. There will be a certificate for two counsel for the plaintiff (widow) in her personal and representative capacity, and a certificate for one counsel for the guardian ad litem.

SMITH, J.A.

The learned Master, it is clear, based his judgment on the decision in Jackman v. Edwards, (1965) 8 W.I.R. 329. In his notes of the reasons for his decision he, here and there, used language which Archer, P. used in the Jackman case. It is unwise to base a decision on a previous case in which no principle of law is established but which is based purely on questions of fact or on the construction of a particular document. Reliance on such a case serves little or no purpose. Lindley, L.J. said so in In re Williams, Williams v. Williams, (1897) 2 Ch. 12 where, at p. 22, he said:

> "The case is in my opinion one of great difficulty, and I am quite aware that there are decisions in the books which if followed would be in the daughter's favour. But our task is to construe the will before us, and other cases are useless for that purpose except so far as they establish some principle of law".

No principle of law was established in the Jackman case. It merely reiterates the well known rule of construction applicable to wills that the intention of a testator must be ascertained from the words he has used and effect given to that intention where no rule of law is opposed to it. Though the dispositions in the will which were in question in that case bear some resemblance to those under consideration in this case, other dispositions in that will, which have no counterpart in this, were used as aids in construing the questioned dispositions. In my view, the Master fell into error in following the Jackman case.

I think that the first question to be decided in this case is the nature and extent of the estate in No. 52 North Street which was given to the widow. If the legal effect of the devise is that she obtained absolute ownership of the property then the attempts to benefit the grand-children out of the same property would clearly be void for repugnancy. Mr. Frankson, for the grand-children, did not agree with this approach. He submitted that the first obligation of

The clear intention disclosed, he submitted, is that the testator intended to benefit his widow and his grand-children. Having discovered this intention, he said, one now looks at the devise in question. He contended that because of the intention to benefit the grand-children and of the fact that no words of limitation accompany the devise, the widow takes a limited estate only. As I have indicated, I do not think this is the proper approach.

By the application of the provisions of s. 23 of the Wills Law (Cap. 414), the widow obtained the fee simple estate in No. 52, NorthStreet, unless the will shows a contrary intention. Mr. Frankson contended that a contrary intention appears in the directions for the benefit of the grand-children, so the widow does not take the fee simple. Mr. Blake, for the widow, said that any contrary intention, if it exists, is to be found in the clauses of the will which seek to benefit the grand-children but that these amount to restrictions in law upon the rights of a fee simple owner and are, therefore, repugnant and void. One has to be careful here of arguing in a circle. It seems to me that any direction in a will which has the effect of cutting down a prima facie fee simple estate created by s. 23 can properly be said to be repugnant to that estate. But such a direction is not necessarily void for repugnancy. Take a case where a testator says: "I give my property at Billy Dunn to my wife". This is followed by other bequests and devises. Then the will says: "on the death of my wife my property at Billy Dunn shall go to my son John and his heirs". Surely, this last devise is repugnant to the prima facie fee simple created by s. 23 in the wife's favour! But it nevertheless shows a contrary intention and the wife gets a life interest only. It could not, ex hypothesi, be said that the devise to the son is void for repugnancy therefore the wife takes the fee simple. In other words, it must first be established that an absolute interest has been created before the question of repugnant conditions can arise.

In my opinion, the contrary intention referred to in s. 23 is not so much a disposition or direction which shows an intention that some person other than the original devise should benefit, as one from which it can reasonably be inferred that the testator did not intend

that the devisee should take the whole estate or interest in the real estate devised which he had power to dispose of by will. Such an inference can only be drawn, in my view, if it can be ascertained with certainty that a recognisable estate or interest, inconsistent with the estate or interest previously devised, has been created in favour of some other person.

Both of the directions, in the will under consideration, which seek to benefit the grand-children are made conditional upon events which may never take place. The widow is not obliged to sell No. 52 North Street, and may decide not to sell it. If it is not sold there will be no proceeds of sale in which the grand-children can share. It is to be noticed that the condition relating to sale is directed to the widow in her capacity as "executor". The implication seems to be that if it becomes necessary in that capacity to sell the grand-children shall be paid one-quarter of the proceeds of sale after expenses. If it is not sold by her as executrix but transferred to herself in her personal capacity it seems that the condition relating to sale does not bind her and she would be free to sell and retain the entire proceeds. If she disposes of the property during her life-time there will be nothing for the grand-children to take at her death. So they may never take a vested interest in the property or its proceeds and it is within the power of the widow to prevent them doing so.

I hold that the conditions under which the grand-children are to benefit are too uncertain to amount to a contrary intention such as can validly displace or cut down the prima facie fee simple estate created by s. 23 in favour of the widow. The widow, therefore, takes the fee simple free from the conditions, which now become repugnant.

Fox, J.A. has dealt fully in his judgment with Mr. Frankson's contention that the widow took the fee simple in the property as trustee. For the reasons given by Fox, J.A., I agree that no valid trust can be said to have been created.

It is for these reasons that I agreed that the appeal should be allowed in the terms stated.

GRAHAM-PERKINS, J.A.

George DaCosta (hereinafter called 'the deceased'), died on the 7th of December 1966 leaving a will in the following terms:

> "THIS IS THE LAST WILL AND TESTAMENT OF me GEORGE DaCOSTA of 52 North Street, Kingston 14 in the County of Surrey Jamaica W.I. I HEREBY revoke all wills and testamentary instruments heretofore by me made. I appoint Josephine Lucille DaCosta of 52 North Street Kingston 14 ..... to be the Executor of this my will. I direct my Executor to pay my just debts and funeral and testamentary expenses. I give and bequeath to my wife Josephine Lucille my property known as 52 North Street Kingston. I give and bequeath to my said wife all my wood-work and all other machinery which I may at the time of my demise be in possession of and all my other personal effects. I give to my said wife Josephine Lucille whatever money I may have in the Bank of Nova Scotia Kingston. I direct my said Executor Josephine Lucille that in the event of her selling the property known as 52 North Street she must give to my grand-children by my daughter Thelma Kenny one-quarter of the proceeds from such sale after expenses have been paid. I direct that after my decease and in the event of the decease of my wife the said Josephine Lucille before the property mentioned above is sold, the said property shall revert to my grand-children by my daughter Thelma Kenny."

This will, dated the 17th August 1966, was duly proved and probate thereof issued to Josephine Lucille DaCosta, the Executrix therein named (and hereinafter called 'the widow'). At the date of the deceased's death there were then living, his daughter Thelma Kenny, the mother of eight children.

In view of certain apparent inconsistencies in the will, the widow, on the advice of her legal advisers, sought, by way of an Originating Summons in which the deceased's eight grandchildren were

named as the defendants, the determination of four questions, the first of which read as follows:

> "That it may be determined whether upon the true construction of the testator's said will the property known as No. 52 North Street, in the parish of Kingston, is given to Josephine Lucille DaCosta absolutely for her own use and benefit; "

The second question canvassed the view as to what interest the wife took, if she did not take an absolute interest, in the event of her selling the property in her lifetime, or in the event of her dying without having sold the property. The third question, assuming a finding that the plaintiff did not take an absolute interest, sought a declaration as to the interest taken by the grandchildren in the event of the executrix selling the property, or in the event of her not selling. The fourth question, assuming a finding that the grandchildren took an interest under the will, sought a declaration in either of the events mentioned in the third question as to the date at which the list of grandchildren who were to take an interest was to be determined, and as to which of such grandchildren were to take an interest and the proportions in which they should take.

The summons came on for hearing before Master Chambers (as he then was), and the questions above noted were debated in extenso. In the end the Master expressed his conclusion thus:

> "The intention is therefore clear that the testator intended that his grandchildren should benefit if certain named conditions occurred. For example, if No. 52 North Street was not sold during the lifetime of his widow then the grandchildren who were then alive or en ventre sa mere at the moment of the death of Mrs. Josephine DaCosta would be tenants in common of the fee simple aboslute. If the property were sold by the widow, she should take three-quarters of the net proceeds absolutely and one-quarter of the net proceeds of sale should be for the grandchildren absolutely share and share alike. Such grandchildren would be ascertained after and at the moment the sale was completed. The gift to the wife was a gift with the power of disposal by sale, limited to her lifetime."

It would appear from the record that in reaching his conclusion the Master relied almost entirely, if not entirely, on the decision of the British Caribbean Court of Appeal (Archer, P., Jackson, Hanschell, JJ.A.) in Jackman v. Edwards (1966) 8 W.I.R. 329, a case which was not cited in argument by any of the counsel appearing. It will, therefore,be neeessary to examine this case rather closely and I will do so later in this judgment.

Before the Master, Messrs. Blake and Carberry contended, on behalf of the widow in her capacity as executrix, as also in her personal capacity, that it was manifest, on a true construction of the will, that the deceased intended to devise 52 North Street (hereinafter called 'the house') for an estate in fee simple. It was argued further that the directions contained in the latter part of the will were repugnant to the devise of the fee simple and, therefore, void and of no effect. Mr. Frankson, on the other hand, argued for the defendants that effect must be given to the testator's clear intention that the grandchildren should benefit either (a) on a sale of the house during the widow's lifetime, or (b) on her death prior to such sale. Mr. Frankson argued further that the widow took no more than a life interest in the house. In support of the arguments advanced by counsel several authorities were cited but it appears, as noted earlier, that the Master preferred to be guided by Jackman v. Edwards (supra). It is somewhat unfortunate that the Master did not draw counsel's attention to this case before delivering his judgment. It may well be that had he done so and given counsel an opportunity to examine this case and to address him thereon he would have arrived at a different conclusion.

On the appeal from the Master's findings and Order coming on for hearing before this court Mr. Blake, who with Mr. Carberry, appeared for the widow in her dual capacity as executrix and devisee, repeated and elaborated on his submissions before the Master. Mr. Frankson's approach, however, appeared to be quite different from that which he pursued in the court below. Before this court he argued that the widow took, not a life interest, but the fee simple in trust for herself for life - assuming she did not sell - with a gift over to the

grandchildren in fee on her death. During Mr. Frankson's submissions, each member of this court posed certain questions indicating the very real difficulties involved in construing the directions contained in the will so as to create a trust. Mr. Frankson conceded in the end, and in my view very properly so, that the argument in favour of the creation of a trust was quite obviously untenable. In view of this concession it is now only necessary to examine the relevant principles of law and to see how they apply to the will before us.

Section 23 of the Wills Law Cap. 414 (Laws of Jamaica, Revised Edition 1953) provides:

> "Where any real estate shall be devised to any person without any words of limitation such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will."

The deceased sought to dispose of his house in the following terms:-

> "I give and bequeath to my wife Josephine Lucille my property known as 52 North Street Kingston."

Clearly, the gift as worded contains no words of limitation. Prima facie, therefore, the gift as expressed would attract the provision of sec. 23 of Cap. 414. Put another way, the terms of the gift would operate to pass the fee simple to the widow unless the deceased demonstrated a contrary intention in some other part of the will. Indeed, quite apart from the clear mandate in sec. 23, it is not without significance that the deceased, in framing the gifts of his wood-work, machinery, his other personal effects, and monies standing to his credit in the Bank of Nova Scotia, to his widow, used the expressions "I give and bequeath", and "I give", words unequivocally calculated to pass an absolute interest in the subject matter of the gifts. With regard to the house he used words which, to a layman, would be equally calculated to pass an absolute unqualified interest. Further, the deceased clearly recognised the right or the power in the widow to dispose of the house at any time she chose. There is in the will no

restriction or qualification imposed by the deceased on the right of the widow, in the event that she elects for any reason appearing to her to be good and sufficient to deal with the house in any way other than sale - e.g. by mortgage, lease, or by gift inter vivos. For these reasons it appears quite unobjectionable to conclude that the deceased intended the fee simple to pass to the widow - and this, apart from sec. 23.

Now, is there anywhere in the will a demonstration by the testator of a contrary intention, i.e. an intention not to pass the fee simple to the widow, but rather some smaller interest? For the answer to this question I turn to the only two provisions in the will from which Mr. Frankson argued that such a contrary intention appears. Those provisions are:

> "I direct my said executor Josephine Lucille that in the event of her selling the property known as 52 North Street she must give to my grandchildren by my daughter Thelma Kenny one-quarter of the proceeds from such sale after expenses have been paid. I direct that after my decease and in the event of the decease of my wife Josephine Lucille before the property mentioned above is sold the said property shall revert to my grandchildren by my daughter Thelma Kenny."

On the face of these directions I have not the least doubt that the deceased intended that the grandchildren should derive some material benefit from the house in either of the two possible events contemplated by him. <u>In the possible event</u> of a sale by the widow <u>as executrix</u> he undoubtedly intended that the grandchildren should receive one-quarter of the proceeds of such sale. He does not, however, say to whom the balance is to go. <u>In the other possible event</u>, i.e., the death of the widow, qua widow, before a sale (by the widow qua executrix) it is equally clear that the deceased intended that the house should "revert" to the grandchildren. Perhaps the use of the word "revert" is not particularly happy but its use in my view makes his intention no less clear. But the possible events contemplated by the deceased

were clearly events over which he deliberately refrained from attempting any control. Certainly he did not seek to impose any imperative obligation on the widow to sell, nor did he require her to devise the house by her will to the grandchildren. The crucial question is - can these directions be given any effect? I have not the least difficulty in asserting that these two directions are manifestly void.

It will be useful to restate certain well established principles which the Master, in his apparent anxiety to follow Jackman v. Edwards (supra), appears to have ignored. Firstly, it is beyond debate that where a testator seeks to attach to an absolute gift a condition or qualification that may be characterised as repugnant, such condition or qualification will not be allowed to take effect notwithstanding that in the result the intention of the testator will be defeated. Secondly, it is fundamental to the proprietorship of an estate in fee simple that the right to convey that estate by way of sale shall be enjoyed unhindered. Inherent in this right is the further right in the vendor to receive the entire proceeds of sale. Where, therefore, a testator seeks to deny to a beneficiary the right to receive the entire proceeds of sale on a conveyance inter vivos of the subject matter of the gift, such a denial necessarily involves a restriction or abridgement of an essential feature of the ownership of the fee simple. Such a restriction or abridgement will be held to be repugnant and void. Thirdly, every owner of an estate in fee simple has, as another essential right, the right to enjoy that estate during his life and on his death either to dispose of it in any manner he chooses, or to allow the laws of intestate succession to determine its devolution. Where, therefore, a testator seeks to effect a change in the normal incidents of intestate succession or to make a gift over to take effect at the moment of devolution such an attempt will not be upheld.

Of the many cases cited in argument I will refer to three only. In re Elliott, Kelly v. Elliott(1896) 2 Ch. 353, a testator gave certain real property to Mary Ann Kelly the plaintiff subject to the payment of his debts, and, after appointing her executrix, continued, "on any sale by the said Mary Ann Kelly of the said tea

plantations I will and direct her to pay my brother the sum of £1,000 out of the proceeds of such sale, also the further sum of £500 out of the proceeds of such sale to" the testator's sister. Chitty, J., in holding that the direction to pay these legacies imposed no obligation on the plaintiff to sell, and that this direction was repugnant and void, and that the property, therefore, belonged to the plaintiff absolutely, said, at pp. 356 to 357,

> "Consistently with the language used she could mortgage the plantations, let them, settle them, and give them by instrument inter vivos or by will free from any claim on the part of the testator's brother or sister. I think he meant neither more nor less than just what he said - if she thought fit to sell, she was to pay the two sums to his brother and sister. To hold otherwise would, in my opinion, be acting on conjecture only, and would be making a will for the testator, and a will which he did not intend to make. Had he intended to give these sums to his brother and sister in any event, it would have been simple for him to give the legacies to them and the residue of his property to the plaintiff. A testator of the humblest capacity knows how to give a pecuniary legacy. Further, if he meant to impose on the plaintiff the obligation of selling, within what time did he mean that she should sell? There is no indication of any sort that she is to sell at the expiration of a year or at any other time during her life. No interest is given on the sums which are to be paid out of the proceeds. This shows that he meant her to sell, if at all, when she thought fit. The result, in my opinion, is that no obligation is imposed on the plaintiff to sell, and that the testator's intention was simply that the sum should be paid, and should only be paid, out of the proceeds, if and when she thought fit to make a sale. The brother and sister have no charge on the plantations.

> The other question is whether the clause, as thus interpreted is valid.....It appears to me that the testator has attempted to create a new kind of estate unknown to the law. The owner of property has as an incident of his ownership the right to sell and to receive the whole of the proceeds for his own benefit. But this testator says that if the owner sells a part only of the proceeds shall belong to her, and the residue shall go to other persons. This direction is, I think, repugnant and void."

In re Ashton, Ballard v. Ashton (1920) 2 Ch. 481, the head note reads ;-

> "A gift over by will or real and personal property in the event of the original absolute donee dying mentally unfit to manage his own affairs is repugnant and void as tending to contravene the law by providing a different devolution of the property from that prescribed by law in the event of an absolute owner dying intestate."

At pp. 485-486 Sargant J. said:

> "It is of course clear that under the extreme freedom of disposition allowed to testators by our law a gift by will which is absolute in the first instance may in general be modified by subsequent words cutting down or divesting the gift on any contingency the testator may think fit to select. <u>But the contingency must not be so selected as to run counter to the general policy of the law.</u> Thus gifts over on any of the following contingencies, amongst others, are bad - namely, (a) any contingency that is too remote, (b) the contingency of any marriage whatsoever, <u>(c) the contingency of alienation</u>, (d) the contingency of bankruptcy, or (e) <u>the contingency of intestacy</u>. The effect of recognising the contingent gift would in the third instance be to deprive the owner of a necessary right of property at the very moment when he seeks to exercise this right, and would in the fourth and fifth instances be to alter

one of the legal incidents of property by providing that, on the occurrence of the very contingency on which the law prescribes a certain course of devolution, this particular item of property shall follow a different course of devolution. And accordingly in either the third, fourth or fifth instance the gift over on the contingency is held to be repugnant to the ownership previously vested in the donee and to be void.

Here, if the gift over had been conditional to take effect on the intestacy of the donee it would clearly have been repugnant. Is it repugnant because it is a gift over on the death of the donee under such circumstances as will most probably, though not certainly, result in an intestacy? It seems to me that this question must be answered in the affirmative.

In the judgment of Turner, L.J. in Holmes v. Godson (8 D.M.& G. 159, 160) the principle is stated in the following words: 'The law, which is founded on principles of public policy for the benefit of all who are subject to its provisions, has said that in the event of an owner in fee dying intestate the estate shall go to his heir, and this disposition' - that is, the disposition by the testator in that particular case - 'tends directly to contravene the law and to defeat the policy on which it is founded'. The disposition in the present case falls, in my judgment within the mischief pointed out in this passage."

The next case to which I refer is Shaw v. Ford (1877-8) 7 Ch. Div. 669. It is unnecessary to refer to the facts. At pp. 673-4 Fry, J. said:

"Prima facie, and speaking generally, an estate given by will may be defeated on the happening of any event; but that general rule is subject to many and important exceptions. One of those exceptions may, in my opinion, be expressed in this manner, that any executory devise, defeating or

abridging an estate in fee by altering the course of its devolution, which is to take effect at the moment of devolution and at no other time, is bad. The reason alleged for that is the contradiction or contrariety between the principle of law which regulates the devolution of the estate and the executory devise which is to take effect only at the moment of devolution, and to alter its course. I am not bound to enquire into the logical sufficiency of the reason given, because it appears to me that the exception is well established by the cases of Gulliver v. Vaux (8 D.M. & G. 167); Holmes v. Godson (Ibid. 152); and Ware v. Cann (10 B.& C. 433). Another exception to the general proposition which I have stated is this, that any executory devise which is to defeat an estate, and which is to take effect on the exercise of any of the rights incident to that estate, is void; and there again the alleged reason is the contrariety or contradiction existing between the nature of the estate given and the nature of the executory devise over. A very familiar illustration is this, that any executory devise to take effect on an alienation or an attempt at alienation, is void, because the right of alienation is incident to every estate in fee simple as to every other estate."

I respectfully adopt the above quoted extracts as accurate statements of the principles of law to be applied to the directions in the will. I am of the clear view that the first direction offends against the principle as enunciated in Kelly v. Elliott (supra) and Shaw v. Ford (supra). As to the second direction it is my view that this flies in the face of the principle enunciated in Ballard v. Ashton (supra) and Shaw v. Ford (supra).

I come now to Jackman v. Edwards (supra). By his will a testator sought to dispose of certain property in the following terms:

"I give and bequeath to my wife, Mary Anna Matilda Jones, my lime kilns, the house and land bought from the Burtons, and that part of Boyce's land extending from the brow to

the foot of the hill; and should she not dispose of them before her death, four-sevenths shall, after her death, go to my daughter Mary Alexandra Edwardina, her heirs and assigns, three-sevenths to my daughter Annie Augusta, her heirs and assigns; and should either of them die without issue, her share shall go to her sister."

The case came before Stoby, C.J., (vide 4 W.I.R. 386, sub nom Edwards v. Coppin), who came to the conclusion that the wife took the fee simple absolute. At p. 389 the learned Chief Justice said:

"The sole point on which the court's decision is required concerns a proper legal interpretation to be placed on the will of Alexander Massiah Jones."

It is clear that he did not regard the problem as one involving the application of the law relating to repugnant conditions. To the extent that his conclusion rested entirely on the interpretation which, in his view, the terms of the will required, I incline to the view that it may not be open to objection. Insofar, however, as this conclusion avoids any consideration of the law applicable to repugnant conditions I would say, with respect, that it is a singularly unhappy decision. The case then came before the British Caribbean Court of Appeal. The appeal was allowed, the court holding, again as a matter of construction, that under the will the testator's wife took a life interest coupled with a power of disposal during her lifetime, and as she had not disposed of it the property passed to the testator's daughters.

In fairness to the four judges before whom this case was argued - at first instance and on appeal - it is desirable to observe, as Mr. Blake pointed out, that it is a remarkably curious feature that of the six counsel who appeared not a single one adverted to the principles of law relating to repugnant conditions. The extraordinary result was that a total of four judges and six counsel proceeded on the hypothesis that the only relevant consideration was a question of interpretation pure and simple. In these circumstances I regard the decision of the British Caribbean Court of Appeal as unhappily per incuriam. Archer, P.,

who delivered the judgment of the court said, at p. 331:

> "It is well to begin by reaffirming the cardinal rule as to the effect of a will, namely, that the intention of the testator must be given effect to so far as the law allows."

The remarkable paradox is that in its application of the cardinal rule the court quite unaccountably gave effect to the testator's intention in spite of the prohibition involved in the rule against repugnant conditions. Archer, P., held that the gift over to the testator's daughters should take effect in the absence of any rule of law to the contrary. Clearly, there was a rule of law to the contrary. Unfortunately, however, the court either ignored, or, as appears more probably, was strangely unaware of, that rule.

It is indeed fortunate that the courts of Jamaica are not bound by the decision in Jackman v. Edwards. In my view this case was wrongly decided, and it follows that the Master erred in preferring it to the several authorities which were cited to him and which he had no opportunity to examine.

For the above reasons I agreed that the appeal should be allowed and that the judgment of the Master be set aside, save in respect of costs. I also agreed that the answer to the first question should be in the affirmative, i.e. that the widow takes the house absolutely for her own use and benefit.

I also agreed that the widow in her personal and representative capacity should have her costs and that these should be paid out of the estate with a certificate for two counsel. In the case of the guardian ad litem I agreed that she should have her costs with a certificate for one counsel.