TRUSTEES OF CHURCH PROPERTY OF THE DIOCESE OF NEWCASTLE AND ANOR v. EBBECK AND OTHERS[1]

Wills—Construction—Condition attached to gift—Validity—Uncertainty—Public policy

In this originating summons the executrix of the will asked the court to determine the validity of a proviso to gifts in remainder under a trust established by the testator in which she had a life interest.

The testator, so far as is material, provided, after a life interest to his widow that the trustees should hold on trust for three named sons subject to the proviso

> that the devise and bequest to each of my said sons shall be upon condition that he and his wife shall at the date of the death of my said wife . . . profess the Protestant faith and accordingly,

he declared 'that if at the date aforesaid my trustees shall not be satisfied that any son of mine and his wife profess the Protestant faith then and in every such case such son' should forfeit his interest in the estate. He further provided that the decision of the trustees as to whether any son and his wife professed the Protestant faith should be final. Any forfeited interest was to be held in trust for four charitable objects.

At the date of the testator's will two of the sons were already married to Roman Catholic wives and the third son was engaged to marry a Roman Catholic, and subsequently did so. The wife and three sons survived the testator.

In answer to the question asked by the originating summons Else-Mitchell J. held[2] that the condition was a condition subsequent defeating, if it were to operate, the vested interests of the sons. He further held that the proviso was void for uncertainty. He did not think that the provision that the beneficiaries were to satisfy the trustees of their faith made the condition any more certain than if there had not been any such provision.[3]

The High Court was of opinion, however, that although the proviso was indeed a condition subsequent it was not void for uncertainty. Dixon C.J. and Windeyer J. held nevertheless that the condition was void because it offended against public policy.

The court felt that matrimony was a holy and noble estate which ought to be protected by the law. But there were differences as to how this was to be best done. Dixon C.J. was unrepentant of his dissenting judgment in *Ramsay v. The Trustees and Executors and Agency Co. Ltd.*[4] In that case a sum was directed to be held on trust and the income to be paid to a named son for so long as he was married to his present wife, and, on the termination of that period, to him absolutely. Latham C.J., Starke and McTiernan JJ. thought that there was nothing inimical to public policy in this provision because it resulted in no real threat to the son's

[1] (1961) 34 A.L.J.R. 413; High Court of Australia; Dixon C.J., Kitto and Windeyer JJ.
[2] (1959) 76 W.N. (N.S.W.) 399, *sub. nom. Ebbeck v. Ebbeck.*
[3] *Ibid.* 401. [4] (1947) 77 C.L.R. 321.

marriage. Latham C.J. took the view[5] that it would be highly improbable that the son would use improper means to terminate the marriage. Dixon J.[6], however, took the view then, as he did in the instant case, that once a condition is seen to be contrary to the deep rooted principles of the law then the court does not examine the likelihood of it providing an effective inducement to contravene that principle of law. In the present case, reasserting this opinion which, notwithstanding the support of Simonds J. in *Re Caborne,*[7] is contrary to the High Court authority of *Ramsay's* case,[8] Dixon C.J. adopts the view that if the tendency of the condition is to promote discord between the spouses that is enough to allow the court to say that it is contrary to public policy.[9] Kitto J. asked not whether the tendency of the condition was to create discord, but whether it was such discord as would lead to separation or divorce.[10] It may be thought that Windeyer J. has flung his net widely, in asserting,

> In my view the policy of the law is not merely that marriages should not break up by divorce or separation. It is rather that the *consortium* of matrimony and all that means, should not be interfered with, hampered or embarrassed . . .

as widely as Dixon C.J. did in *Ramsay's* case, but he accepts without reservation the majority decision on the facts in that case.[11]

The Court was fully aware of the fact that public policy was a slippery base on which to build reasoning; Windeyer J. made this explicit.[12] It is clear, however, that the court will not flinch from so building in the appropriate case. But one is tempted to wonder in the present case how far the court was influenced by an objection not arising because of any real risk to the marriage, but because a testator was unreasonably trying to rule his family from his grave. Windeyer J. denounced the attempts of people to interfere where spouses are of different religious persuasions.[13] Lord Atkin, in *Clayton v. Ramsden,*[14] said,

> For my own part I view with disfavour the power of testators to control from their grave the choice in marriage of their beneficiaries and should not be dismayed if the power were to disappear, but at least the control by forfeitures imposed by conditions subsequent must be subject to the rule as to certainty prescribed by this House in *Clavering v. Ellison.*[15] . . .

This may be an example of a much wider objection felt by the judiciary when dealing with problems such as that created by the present case.

It is well established that provisions prescribing religious persuasions are not contrary to public policy if they are expressed with sufficient certainty. Provisions that the donee shall not marry a Christian or become one,[16] become a nun,[17] be a Roman Catholic[18] or a Lutheran[19] have all been held valid. But the courts have recently sought to avoid the effect

[5] *Ibid.* 329. [6] *Ibid.* 333. [7] [1943] Ch. 224. [8] (1947) 77 C.L.R. 321.
[9] (1961) 34 A.L.J.R. 413, 415. [10] *Ibid.* 417. [11] *Ibid.* 420-421.
[12] *Ibid.* 420. [13] *Ibid.* 421. [14] [1943] A.C. 320, 325.
[15] (1859) 7 H.L.C. 707, 725, *per* Lord Cranworth.
[16] *Hodgson v. Halford* (1879) 11 Ch. D. 959.
[17] *Re Dickson's Trust* (1850) 1 Sim. (N.S.) 37.
[18] *Re May* [1917] 2 Ch. 126; [1932] 1 Ch. 99.
[19] *Patton v. Toronto General Trusts Corporation* [1930] A.C. 629.

of these decisions by abandoning a liberal interpretation of the testator's words in favour of the restrictive rule in *Clavering v. Ellison.*

The general rule in construing a will is to discover the intention of the testator from the words he has used. Where he has imposed a condition which the court is prepared to construe as a condition precedent, the intended beneficiary has an opportunity to satisfy the trustees or the court that, on any reasonable view, he fulfils the qualifications demanded by the testator, and should therefore be entitled to the gift. But where it is construed as a condition subsequent, the court, in accordance with the rule in *Clavering v. Ellison,*[20] demands to be shown precisely when and how the condition will operate to divest an estate, if it operates at all. A very high degree of certainty is required and, in general, the court will not wait to see whether the event which in fact occurs can reasonably be said to fall within or outside the events contemplated as terminating the estate.

The artificiality of this approach can be seen by comparing a case such as *In re Allen*[21] with *Clayton v. Ramsden.*[22] In the former case the Court of Appeal had only slight difficulty, following *In re Perry Almshouses,*[23] in holding that 'a member of the Church of England' had a certain meaning, but in the latter case the House of Lords could gain no meaning at all from 'of the Jewish faith and of Jewish parentage'.

This bifurcation of cases results ostensibly from the distinction between a condition precedent and a condition subsequent. In *Clayton v. Ramsden*[24] the House of Lords, following *Clavering v. Ellison,*[25] thought that the words were not sufficiently certain to cause divestment of an estate. If, as Evershed M.R. pointed out in *Re Allen,*[26] the condition had been framed as a condition precedent the words would have been sufficiently certain and the result different. Romer L.J. took the view that the words were too vague even as a condition precedent.[27]

The High Court, in the instant case, argued that the proviso was certain, but, if it were not, then the provision that the decision of the trustees was final gave it greater certainty than had there been no such provision.

Dixon C.J. said,

> . . . the true meaning of the condition is . . . that the trustees shall be satisfied that the donee professes the protestant religion. It is the trustees' satisfaction that forms the condition and not the fact of professing the protestant faith, be the fact defined sufficiently for the purposes of every condition subsequent or not.[28]

But if one is to follow *Clayton v. Ramsden,*[29] it is entirely uncertain what the trustees have to satisfy themselves about.[30] Although in the present case, in the fact situation as it will eventually arise, there should be no real difficulty.

The other limb of the attack of Dixon C.J. on the argument that the

[20] (1859) 7 H.L.C. 707. [21] [1953] 3 W.L.R. 637. [22] [1943] A.C. 320.
[23] [1898] 1 Ch. 391. [24] [1943] A.C. 320. [25] (1859) 7 H.L.C. 707.
[26] [1953] 3 W.L.R. 637, 645. [27] *Ibid.* 658. [28] (1961) 34 A.L.J.R. 413, 416.
[29] [1943] A.C. 320.
[30] A similar result followed in *Re Jones* [1953] Ch. 125.

proviso was uncertain, was to say in effect[31] that the characterization of this particular proviso as either precedent or subsequent was irrelevant. What was important was the manner in which it operates. Here the proviso could only operate, at one point of time, that is at the termination of the life estate, and its effect at that time would in this case be the same whether it be a condition precedent or subsequent. This approach, although denying the major premises of the judgment of Evershed M.R. in *Re Allen*,[32] does, it is submitted, present a sensible answer to the problem glossing over the distinction between the construction of a condition precedent and subsequent. It appears completely irrational that although the net result may be the same, there should be two modes of interpretation.

In this case therefore the High Court thought it would be unreal to say that the phrase 'Protestant faith' was uncertain. Even though there is no one doctrine of Protestantism, for that very reason the Court felt that the true intention of the testator was not to prescribe a set of beliefs but, trying rather to distinguish the faith he wished the donees to have and share with their wives-to-be, other than that of the Roman Catholic church. Having effectively blocked this route the Court sought a means of escape.

The law has long attached special considerations to marriage. These are rights of the spouses *inter se* and in their relationship to others. Even though a method of divorce is provided the courts still, as the present case shows, consider it of primary importance that the union should be maintained. Indeed this was the only justification Kitto J. could find[33] for the decision of Vaisey J. in *Re Fry*[34] where he held that a condition requiring a married woman to bear the testator's surname was void *inter alia* because it was contrary to public policy.

In the instant case it was clearly open to the High Court to hold that the proviso offended public policy and was thus void. Difficulties may arise if in future cases there are provisions relating to the religious persuasion of the donee. Whereas in the past, because of the use of the rule about conditions subsequent, it has been possible to hold that such conditions are void for uncertainty, now, it could be argued, a liberal interpretation of the condition should be permitted. In the instant case this did not make any difference because the gift was void on the grounds of public policy. But it could happen that, in some circumstances, a liberal interpretation should be allowed and the result does not offend against public policy. The court, it may appear, will be again faced with the choice of perpetuating the different interpretations of conditions, depending on whether they are precedent or subsequent, or giving effect to a condition which dictates the donee's religion to him if he wishes to participate in the donor's generosity. The rule in *Clavering v. Ellison*[35] may not yet have out-lived its usefulness. The testator may again have to speak by the card or his equivocation may still undo him.

J. G. LARKINS

[31] (1961) 34 A.L.J.R. 413, 415-416. [32] [1953] 3 W.L.R. 637.
[33] (1961) 34 A.L.J.R. 413, 418. [34] [1945] Ch. 348. [35] (1859) 7 H.L.C. 707.