TESTAMENTARY CONDITIONS IN RESTRAINT OF RELIGION

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1. The Problem Stated

Consider the situation of a Jewish testator, proud of his heritage, who wishes to leave his assets to his daughter while at the same time ensuring that his property does not descend to non-Jews. So he inserts a condition in his will that his daughter is to forfeit her benefit should she marry a person "not of the Jewish faith". It would be inconceivable to him that his daughter could subvert his intentions, clearly expressed, and marry an English Wesleyan without foregoing her legacy. Yet the House of Lords held in *Clayton* v. *Ramsden*[1] that she could, on the ground that the condition was void for uncertainty, leaving the gift to take effect freed from it. Whether a person is "of the Jewish faith" was a matter of degree, and the testator had failed to give any indication as to what degree of faith was required to prevent forfeiture.[2]

Now consider the situation of a staunchly Protestant testator who wishes to ensure that his property remains in the hands of descendants who share his religious convictions. So he provides for forfeiture should his beneficiary "be or become a Roman Catholic". Could not the beneficiary's advisers argue that whether a person is or has become a Roman Catholic is also a question of degree, and that this condition is also void for uncertainty, the testator not having indicated what degree of faith was required to prevent forfeiture? No, for in *Blathwayt* v. *Cawley*[3] the House of Lords distinguished *Clayton v. Ramsden*[4] by restricting its application to conditions requiring adherence to the *Jewish* faith, and declined to extend it to conditions relating to other religions or branches of religions.[5] Thus, a

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1 [1943] A.C. 320.

2 *Id.* at 325, 329 and 334 (Lord Wright dissenting, at 331).

3 [1976] A.C. 397; [1975] 3 W.L.R. 684; [1975] 3 All E.R. 625.

4 [1943] A.C. 320.

5 [1976] A.C. 397 at 424, 425 (Lord Wilberforce, with whom Lords Simon and Fraser agreed on this point) and 429 (Lord Cross). See also at 441 (Lord Edmund-Davies).

clause providing for forfeiture in the event of a beneficiary "being or becoming a Roman Catholic" was held sufficiently certain.

It is the purpose of this article to examine the law of uncertainty as it relates to conditions in wills, with particular reference to testamentary conditions requiring a beneficiary to adhere to, embrace or eschew certain religious beliefs. For convenience of terminology, I have adopted Lord Greene, M.R.'s description of such conditions as conditions "in restraint of religion".[6]

2. When is a Condition Uncertain?

It may be of assistance to look first at what the courts mean when they hold a condition to be "uncertain". There would appear, both from the point of logic and from a consideration of the authorities, two ways in which a clause may fail for uncertainty: it may, as a matter of semantics be incapable of interpretation, or, being capable of interpretation, leave doubt as to its application to the facts of the case. In other words, a distinction may be drawn between uncertainty of expression and uncertainty of operation.[7]

A condition does not fail for uncertainty of expression simply because it lacks clarity of expression. In such cases it is the duty of the court to endeavour to construe the testator's meaning in the light of the ordinary canons of construction.[8] The mere fact that the wording is so unclear as to require a reference to the court does not render the condition void for uncertainty.[9] It is only when a meaning cannot be properly ascribed to

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[6] *In re Samuel. Jacobs* v. *Ramsden* [1942] Ch. 1 at 30.

[7] *In re Viscount Exmouth. Viscount Exmouth* v. *Praed* (1883) 23 Ch. D. 158 at 164 *per* Fry, J.; *Re Wilson's Will Trusts. Tryon* v. *Bromley-Wilson* [1950] 2 All E.R. 955 at 963 *per* Lord Evershed, M.R. (See also *sub. nom. Bromley* v. *Tryon* [1952] A.C. 265 at 276 *per* Lord Simonds, L.C.); *In re Murray. Martins Bank Ltd.* v. *Dill* [1955] Ch. 69 at 77 *per* Lord Evershed, M.R.; *In re Gape. Verey* v. *Gape* [1952] Ch. 743 at 748 *per* Lord Evershed, M.R.; *Re Brace. Gurton* v. *Clements* [1954] 2 All E.R. 354 at 358 *per* Vaisey, J.; *In re Neeld. Carpenter* v. *Inigo-Jones* [1962] Ch. 643 at 675 *per* Upjohn, L.J.; *In re Denley's Trust Deed. Holman* v. *H.H. Martyn & Co. Ltd.* [1969] 1 Ch. 373 at 388, 389 *per* Goff, J.; *Perpetual Trustee Co. Ltd.* v. *Wansey* (1945) 46 S.R. (N.S.W.) 226 at 227, 228; *Wemyss* v. *Wemyss's Trustees* [1921] S.C. 30 at 41.

[8] *In re Neeld. Carpenter* v. *Inigo-Jones* [1962] Ch. 643 at 675 *per* Upjohn, L.J., where the "respectable antiquity" of a name and arms clause assisted in holding it sufficiently certain (*cf. In re Lewis' Will Trust. Whitelaw* v. *Beaumont* [1951] W.N. 591 at 592, [1951] 2 T.L.R. 1032 at 1034, 1035 (Vaisey, J.); *In re Bouverie. Bouverie* v. *Marshall* [1952] Ch. 400 at 404 (Vaisey, J.); *In re Wood's Will Trusts. Wood* v. *Donnelly* [1952] Ch. 406 at 411 (Wynn-Parry, J.) and *In re Kersey. Alington* v. *Alington* [1952] W.N. 541 at 542 (Danckwerts, J.) — all of which were overruled by *In re Neeld*).

[9] *Re Wilson's Will Trusts* [1950] 2 All E.R. 955 at 964 *per* Lord Evershed, M.R. *Per* Jessel, M.R. in *In re Roberts. Repington* v. *Roberts-Gawen* (1881) 19 Ch. D. 520 at 529: "The duty of the Court is to put a fair meaning on the terms used, and not, as was said in one case, to repose on the easy pillow of saying that the whole is void for uncertainty". It is not sufficient, to paraphrase Sargant, J., that it is uncertain enough to make one uncertain whether it is certain enough: *In re Boulter. Capital and Counties Bank* v. *Boulter* [1922] 1 Ch. 75 at 83.

the language used by the testator that the condition fails for uncertainty of expression.[10]

Having ascertained the meaning of the words used by the testator, the condition may nevertheless fail because of uncertainty of operation: it may not be possible to ascertain how the condition is to be applied to the facts of the case.[11] As in the case of uncertainty of expression, a condition is not void for uncertainty of operation merely because there is *some* difficulty in ascertaining its application to the facts: the Court's task is to endeavour to assign efficacy to it, and it is only when no such efficacy can be given that the condition is uncertain.[12]

It is now well established that uncertainty on this ground may be overcome by vesting in trustees the power to make a decision, binding on the parties, as to whether or not the events have occurred which will

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[10] The authorities are numerous. See, for example, *Fillingham* v. *Bromley* (1823) Turn. & R. 530 at 536; 37 E.R. 1204 at 1206 (condition against "neglecting to reside and live" at certain place); *Sifton* v. *Sifton* [1938] A.C. 656 at 675, 676 ("continue to reside in Canada"); *In re Field's Will Trusts. Parry-Jones* v. *Hillman* [1950] Ch. 520 at 523, 524 ("shall occupy my freehold property"); *In re Crabtree. Fidelity Trustee Co.* v. *Crabtree* [1954] V.L.R. 492 at 497, 498 ("ceasing to reside with"); *Gardiner* v. *Gardiner* [1920] St. R. Qd. 154 at 156 ("reside thereon"); *Re Jordan. The Tasmanian Permanent Executors and Trustees Association Limited* v. *Symmons* [1948] Tas. S.R. 59 at 63 ("reside in Tasmania"); *Jeffreys* v. *Jeffreys* (1901) 84 L.T. 417 at 418, 419 ("associate, correspond, or visit with" certain persons); *In re Gassiot. Broughton* v. *Rose-Gassiot* (1907) 51 *Sol. J.* 570 ("retain the name of"); *In re Sandbrook. Noel* v. *Sandbrook* [1912] 2 Ch. 471 at 477 ("live with their father"); *In re Reich. Public Trustee* v. *Guthrie* (1924) 40 T.L.R. 398 ("willingly adopt or carry on any profession or professional calling"); *In re Lowe. Westminster Bank Ltd.* v. *Lowe* (1939) 83 *Sol. J.* 421. ("renews her acquaintance with"); *In re Jones. Midland Bank Executor and Trustee Co. Ltd.* v. *Jones* [1953] Ch. 125 at 128-130 ("social or other relationship with"); *In re Hudson* [1912] V.L.R. 140 (death of beneficiary "before he . . . shall have actually received" his share) — *cf. Re Payne* [1968] Qd. R. 287 (death "before acquiring his legacy"); *Field* v. *Field* [1939] St. R. Qd. 46 at 52, 53 (death of beneficiary before "final distribution" of estate) and at 62 (complete gift to beneficiary with super-added clause "with liberty to buy and resell"); *Re Hannah's Will. Shields* v. *A.-G.* (1939) 34 Tas. L.R. 45 ("£1,000 to and between such Assyrians as shall be living in Tasmania and shall desire to return to Syria"); *In re Brewis. Brewis* v. *Brewis* [1946] V.L.R. 199 (beneficiary not to "marry a member of the family of W.J.C." and not to "cease to occupy" certain realty); *Union Trustee Co. of Australia Ltd.* v. *Howe* [1945] St. R. Qd. 144 (property to be divided among 7 children "Ivy and Henry to get the most"); *Re Boland. Boland* v. *A.-G.* [1950] St. R. Qd. 45 at 49 ("any deserving Roman Catholic institution"). *Re Shaw. Shaw* v. *Shaw* [1955] St. R. Qd. 284; *Re Brown* [1962] Q.W.N. Case 45 at 106 ("to R.M. in trust as agent for a finance company to be formed"); *In the Estate of Banks, Deceased* [1966] S.A.S.R. 290 at 293 ("to remain in the family"); *In re Berry, Deceased* [1968] S.A.S.R. 286 at 289, 291 (house "to remain in the B family"). In most of these cases, no distinction was drawn between uncertainty of expression and of operation: in any given case, the distinction is often very fine.

[11] *In re Viscount Exmouth. Viscount Exmouth* v. *Praed* (1883) 23 Ch. D. 158 at 166, and authorities cited *supra* n. 7. "The fact that the language of the will is not uncertain has, of course, no necessary bearing upon the question whether when particular events have happened there may not be some difficulty in saying whether or not they fall within that which is contemplated by the will": *per* Tomlin, J. in *In re Wilkinson. Page* v. *Public Trustee* [1926] Ch. 842 at 849, 850; *Perpetual Trustees Executors & Agency Co. of Tasmania Ltd.* v. *Walker* [1953] A.L.R. 397 at 407, 408; *In re Noonan* [1904] S.A.L.R. 151 at 157.

[12] See *In re Gape. Verey* v. *Gape* [1952] Ch. 743 at 748.

cause the condition to operate.[13] The argument is that by this device it is the forming of the trustees' opinion which causes the gift to vest or divest (as the case may be) and not the uncertain condition itself. The authority usually cited for this proposition is *In re Coxen*[14] although it is doubtful whether the decision goes so far. The testator devised a dwelling house upon trust to allow his wife to reside therein, with a condition subsequent that it was to fall into residue "if in the opinion of my trustees she shall have ceased permanently to reside therein". Jenkins, J. held that as a matter of definition the phrase "ceased permanently to reside" was sufficiently certain and precise,[15] and went on to say he saw "no reason why a judge of fact should not on any given state of facts be perfectly capable of deciding whether it has or has not happened".[16] Of course, it would be the opinion of the trustees, and not merely the fact of ceasing to reside, which would bring about forfeiture, and in that sense the court would be relieved of the perhaps difficult task of deciding whether or not there had been a cesser of residence, but there was no inherent impossibility in having to decide such a question of fact. A court *could* have interpreted events had it been required to do so, and the question of whether the trustees' decision could save such a condition from failure for uncertainty of operation did not strictly arise.[17] The condition was valid independently of the reference to the trustees' discretion.[18] But all this is not to deny that in appropriate circumstances the vesting of a power of binding decision in trustees may save a gift from failing for uncertainty of operation,[19] only that *In re Coxen* does not go so far as some have assumed.[20]

There is another aspect of the decision of Jenkins, J. in *In re Coxen*[21]

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[13] See, e.g., *Halsbury*, 3rd Ed., Vol. 39, p. 923; *cf. Williams on Wills*, 4th Ed., p. 284.

[14] *In re Coxen. McCallum* v. *Coxen* [1948] Ch. 747.

[15] *Id.* at 761, finding support in *In re Wright* [1907] 1 Ch. 231, *In re Wilkinson* [1926] Ch. 842 at 849, *In re Talbot-Ponsonby's Estate* [1937] 4 All E.R. 309 at 312, and a general statement in *Sifton* v. *Sifton* [1938] A.C. 656 at 675 to the effect that decisions on the interpretation of similar phrases in different wills must be treated with care. See also the "residence" cases referred to *supra*, n. 10.

[16] [1948] Ch. 747 at 761.

[17] *Id.* at 762.

[18] See comments by Dixon, C.J. in *Perpetual Trustees Executors & Agency Co. of Tasmania Ltd.* v. *Walker* [1953] A.L.R. 397 at 406; but *cf.* his approach in *The Trustees of Church Property* v. *Ebbeck* (1960) 104 C.L.R. 394 at 405.

[19] E.g., within the rule in *Brown* v. *Higgs* (1799) 4 Ves. Jun. 708, (1800) 5 Ves. Jun. 495 (1803) 8 Ves. Jun. 561, (1813) 18 Ves. Jun. 192 [31 E.R. 366 and 700, 32 E.R. 473 and 34 E.R. 290]: see *Re Kozminsky* [1966] V.R. 299 at 301 and authorities there cited. See also *Church Property Trustees, etc.* v. *Ebbeck* (1960) 104 C.L.R. 394 at 413: "If a description is not itself inherently uncertain and has an objective meaning, but its application to cases upon the periphery of its denotation could give rise to difficulty or debate, then committing the decision to some specified person may make its validity the more sure".

[20] The misconception as to the *ratio* in *In re Coxen* has arisen, it is respectfully submitted, as a result of *In re Field's Will Trusts* [1950] Ch. 520, where Harman, J. said of *In re Coxen* that the residence requirement there was sufficiently certain because the court could tell what was the opinion of the trustees: *id.* at 523. That, as has been pointed out above, was not what was decided in *In re Coxen.*

[21] [1948] Ch. 747.

which may be noted here, namely that making the trustees' opinion the criterion cannot save a condition from failure for uncertainty of expression. In such circumstances, the testator has "insufficiently defined the state of affairs on which the trustees [are] to form their opinion".[22] Thus, in *In re Jones*[23] a condition provided for forfeiture if the beneficiary should at any time "in the uncontrolled opinion of" his trustees "have social or other relationship with" a certain person. Danckwerts, J. was unable to give any clear meaning to the phrase "social or other relationship with", and, following *In re Coxen*,[24] held that "the mere fact that the decision of this question is referred to the trustees' opinion does not overcome the difficulty of uncertainty, if uncertainty as to the event involving forfeiture exists".[25] Other cases have endorsed this principle, that if the thing about which a trustee is to be satisfied is described in terms leaving it uncertain about what it is he is to be satisfied, the condition is still void for uncertainty.[26] It is no longer open to argue that the vesting in trustees of a discretion to decide whether a state of affairs exists can cure an inherent uncertainty in the definition of that state of affairs.[27]

3. Uncertainty and Conditions Subsequent

The classic statement of the approach taken by the Courts in deciding whether a condition subsequent is sufficiently certain is that of Lord Cranworth in *Clavering* v. *Ellison*:

> . . . where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine.[28]

In most instances where questions of the uncertainty of a condition subsequent have arisen, the court has been content simply to adopt Lord Cranworth's *dictum,* in the process, perhaps, according it an inviolability

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[22] *Id.* at 761, *obiter.*

[23] [1953] Ch. 125.

[24] [1948] Ch. 747 at 761.

[25] [1953] Ch. 125 at 130.

[26] *In re Burton's Settlements. Scott* v. *National Provincial Bank Ltd.* [1955] Ch. 82 at 95; *Church Property Trustees, etc.* v. *Ebbeck* (1960) 104 C.L.R. 394 at 405; *In re Hains. Hains* v. *Elder's Trustee and Executor Company Limited* [1942] S.A.S.R. 172 at 176 ("if in the . . . discretion of my trustee my said son shall by his habits and/or mode of living or for any other reason be deemed by my trustee to be unfit to undertake the management of my residuary estate").

[27] *Cf.* "Defeasance Clauses Importing Opinion of Trustees" (1949) 22 *A.L.J.* 413.

[28] (1859) 7 H.L.C. 707 at 725, 11 E.R. 282 at 289. See also in the Court below (1856) 3 Drew. 451 at 469, 61 E.R. 975 at 982: " . . . the contingency should be so expressed as not to leave it any degree doubtful or uncertain what the contingency is which is intended to defeat the prior estate" (Kindersley, V.-C.). See also *Kiallmark* v. *Kiallmark* (1856) 26 L.J. Ch. 1 at 4 (Kindersley, V.-C.).

properly reserved only for statutory formulae.[29]

In some cases, however, attempts have been made to explain or rephrase the test. It will be observed that Lord Cranworth's test is expressed in strong terms: the Court must be able to see the determining event *precisely and distinctly.* The stringency of this criterion has sometimes been emphasised when re-formulations have been attempted. Thus, Farwell, J. said that the test was "whether you can predicate with certainty what the individual may or may not do".[30] In *Clayton* v. *Ramsden,* Lord Romer expressed the view that in drafting a defeasance clause a testator should define the events which effect a forfeiture "with the greatest precision and in the clearest language", while Lord Russell of Killowen thought that it should be such that the persons affected "can from the outset know with certainty the exact event on the happening of which their interests are to be divested".[31] And in Australia the test has been expressed as whether "in all conceivable circumstances" the donee could judge whether a particular event or a particular contemplated act would amount to a breach.[32]

But there have also been, from time to time, re-formulations which seem to be less stringent than Lord Cranworth's original test. Thus, in *In re Sandbrook*[33] Parker, J. thought that conditions subsequent must be such that the Court could say "with reasonable certainty" upon what events forfeiture would occur. Then, in *In re Hanlon,*[34] Eve, J. said that to work a forfeiture there must be shown a breach of a defined line of

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[29] See *Duddy* v. *Gresham* (1878) 39 *L.T.* 48 at 49; *In re Viscount Exmouth. Viscount Exmouth* v. *Praed* (1883) 23 Ch. D. 158 at 165; *Re Tyler and the Charitable Trusts Acts* (1901) 45 *Sol. J.* 204 at 205; *Re Moore's Trusts. Lewis* v. *Moore* (1906) 96 *L.T.* 44 at 45; *In re Lanyon. Lanyon* v. *Lanyon* [1927] 2 Ch. 264 at 268, 269 (but note Russell, J.'s discussion of *In re Viscount Exmouth, supra,* partly disapproved by Privy Council in *Sifton* v. *Sifton* [1938] A.C. 656 at 671 — *cf.* Re Wilson's Will Trusts, *Tryon* v. *Bromley-Wilson* [1933] 2 All E.R. 955 at 963); *In re Borwick. Borwick* v. *Borwick* [1933] Ch. 657 at 668; *Re Tegg, Public Trustee* v. *Bryant* [1936] 2 All E.R. 878 at 881; *Sifton* v. *Sifton* [1938] A.C. 656 at 675; *Bromley* v. *Tryon* [1952] A.C. 265 at 273, 277; *In re Bouverie. Bouverie* v. *Marshall* [1952] Ch. 400 at 403, 404; *In re Jones. Midland Bank Executor and Trustee Co. Ltd.* v. *Jones* [1953] Ch. 125 at 126; *In re Allen. Faith* v. *Allen* [1953] Ch. 810 at 816; *In re Murray. Martins Bank Ltd.* v. *Dill* [1955] Ch. 69 at 76, 77; *In re Lowry's Will Trusts. Barclays Bank Ltd.* v. *United Newcastle Upon Tyne Hospitals Board* [1967] Ch. 638 at 648; *In re Brewis. Brewis* v. *Brewis* [1946] V.L.R. 199 at 202.

[30] *Jeffreys* v. *Jeffreys* (1901) 84 *L.T.* 417 at 418.

[31] [1943] A.C. 320 at 332 and 326 respectively. (See also *Hopper* v. *Corporation of Liverpool* (1944) 88 *Sol. J.* 213 at 215.) *Cf. per Lord Wright* [1943] A.C. 320 at 329: "I have wondered why this peculiar stringency should have been insisted upon in these cases. The modern idea, perhaps, is that the beneficiary should be in a position to know beyond a peradventure what he is to do or not to do if he is to avoid a forfeiture".

[32] *In re Harris. National Trustees Co.* v. *Sharpe* [1950] A.L.R. 353 at 357 (Fullagar, J.) See also *In re Crabtree. Fidelity Trustee Co.* v. *Crabtree* [1954] V.L.R. 492 at 496: "The language used must be sufficiently precise and definite to define the event or events, on the happening of which a forfeiture is to take place, so that it may be ascertainable at any point of time whether the condition has taken effect or not".

[33] *In re Sandbrook. Noel* v. *Sandbrook* [1912] 2 Ch. 471 at 477.

[34] *In re Hanlon. Heads* v. *Hanlon* [1933] Ch. 254 at 259. See also *In re Donn. Donn* v. *Moses* [1944] Ch. 8 at 10 *per* Uthwatt, J.: "there must be reasonable certainty with regard to all the possible events in which a forfeiture can take place".

conduct which the parties concerned "must reasonably have known" would work a forfeiture.[35] Indeed, it may be that the modern approach is to relax the strictness of the test. In *In re Neeld*,[36] Lord Evershed, M.R., after referring to Lord Cranworth's classic statement of principle, expressed the opinion that it did not follow that it was necessary for the validity of a condition subsequent that it be of such "an exactly precise character" that the question whether divesting will take place upon the happening of postulated events "must be capable at once of a clear and easy answer". It was, he said, sufficient that "upon a fair construction of the language used according to its ordinary sense", the court could arrive at a clear conclusion "what truly is the obligation which the donor of the estate intends to impose". There was no need for the language used to be "of so exactly precise a character" that no question could ever sensibly arise on the actual facts as they have occurred whether a divesting has or has not taken place.

4. Conditions Subsequent and Religious Belief

It was not until the 1930's that questions began to be raised as to whether conditions subsequent requiring a person to adhere to, embrace or eschew certain religious beliefs were void for uncertainty. Until that time there had been a long line of English decisions proceeding on the unexpressed assumption that such conditions were sufficiently certain. Where such conditions (whether subsequent, precedent or "qualifications") were attacked, it was almost always on the ground of public policy. There is no need to canvass these decisions in detail. The more notable are summarised briefly below.[37] There were a considerable number of Austra-

[35] See also *McCausland* v. *Young* [1949] N.I. 49 at 98 *per* Babington, L.J.: " . . . the parties concerned must reasonably have known what acts of theirs would amount to a breach of the defined line of conduct".

[36] *In re Neeld. Carpenter* v. *Inigo-Jones* [1962] Ch. 643 at 666, 667.

[37] *Clavering* v. *Ellison* (1856) 3 Drew. 451 at 482, 483, 61 E.R. 975 at 987; (1857) 8 De G.M. & G. 662 at 674, 679, 44 E.R. 545 at 550, 552; (1859) 7 H.L.C. 707 at 724, 11 E.R. 282 at 289, 290; beneficiaries to be "educated . . . in the Protestant religion according to the rites of the Church of England" (A.H. Simpson, C.J. in Eq. in *Re Hamilton. Brett* v. *Hamilton* (1909) 9 S.R. (N.S.W.) 223 at 228 apparently regarded *Clavering* v. *Ellison* as holding that this condition was void for uncertainty — which is clearly not the decision in that case); *Hodgson* v. *Halford* (1879) 11 Ch. D. 959 at 966, 967: forfeiture in event of beneficiary marrying a person "who does not profess the Jewish religion or [is] not born a Jew"; *Hay* v. *Brown* (1883) 10 R (Ct. of Sess.) 460: forfeiture on ceasing "to profess the Roman Catholic religion"; *In re Knox* (1889) 23 L.R. (Ir.) 542 at 554: "marry a Protestant wife, the daughter of Protestant parents, and who have always been Protestants" (*per* Naish, L.J.: "Conditions of this kind, requiring a legatee or devisee to marry persons of a particular religious denomination, and forfeiting their interests if they do not, have been repeatedly held valid, and it is now too late to question their validity".); *Wainwright* v. *Miller* [1897] 2 Ch. 255 at 260: "a member of the Roman Catholic Church or any sisterhood"; *In re Joseph. Pain* v. *Joseph* [1908] 1 Ch. 599 (reversed on other grounds [1908] 2 Ch. 507): "professing the Jewish faith"; *Re Burchill's Contract* (1912) 46 I.L.T.R. 35: "marry a Roman Catholic"; *Patton* v. *Toronto General Trusts Corporation* [1930] A.C. 629: "of the Lutheran religion"; *In re May. Eggar* v. *May* [1932] 1 Ch. 99 (see also at [1917] 2 Ch. 126) at 109, 110, 113: "become a Roman Catholic"; *In re Wright. Public Trustee* v. *Wright* (1937) 54 T.L.R. 153: forfeiture on becoming a Roman Catholic or marrying a Roman Catholic; *In re Morrison's Will Trusts. Walsingham* v. *Blathwayt* [1940] Ch. 102: "be or become a Roman Catholic or marry a Roman Catholic".

lasian and Canadian authorities which pointed the same way.[38] In none of these cases was it argued, as now, in retrospect, it appears it was open to argue, that the conditions were void for uncertainty, and in several the Courts had no hesitation in declaring interests forfeited for breach of the condition. Declarations of that kind cannot, of course, be made where a condition is void for uncertainty.

In the 1930's, however, a trend began appearing in English decisions which, some believed, cast doubt on the certainty of conditions in restraint of religion. It appeared first in *In re Borwick*[39] where a condition subsequent provided for forfeiture should any grandchild before attaining a vested interest "be or become a Roman Catholic or not be openly or avowedly Protestant". Bennett, J. held the condition void as against public policy on the ground that it tended to interfere with a parent's duties in the religious instruction of his children.[40] But he also went on to hold the condition void for uncertainty. His judgment on this ground was brief, and has been explained[41] on the basis of the peculiar doctrine that an infant below the age of discretion is not in law capable of choosing his religion, at least in so far as his present or future property rights may

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[38] In Australasia, see *National Trustees Executors and Agency Co. Ltd.* v. *Keast* (1895) 22 V.L.R. 447 at 456: a Court of Equity will enforce a trust to bring up children "in the Roman Catholic Faith"; *Evans* v. *Torpy* (1898) 19 N.S.W.R. (Eq.) 91 at 93: forfeiture if beneficiary should "marry any Roman Catholic or member of the Church of Rome"; *O'Brien* v. *Trustees, Executors and Agency Co. Ltd.* (1899) 6 A.L.R. C.N. 2: "bring up and educate all his children in the Roman Catholic faith"; *Birtwistle* v. *Myers* (1899) 25 V.L.R. 306: children to be "brought up in the Roman Catholic faith"; *In re Carleton* (1909) 28 N.Z.L.R. 1066: "a member or adherent of the Roman Catholic Church"; *In re Gunn* (1912) 32 N.Z.L.R. 153: children to be brought up "in the Protestant Faith"; *In the Will of Moss. Fox* v. *Moss* [1919] V.L.R. 192: forfeiture on marriage to a person not "professing the Jewish religion"; *Grayson* v. *Grayson* [1922] St. R. Qd. 155: forfeiture on marriage to a person "professing the Roman Catholic Faith or religion"; *Mainwaring* v. *Mainwaring* (1923) 23 S.R. (N.S.W.) 531: forfeiture on marriage to a person "not of the Protestant religion"; *In re Found. Semmens* v. *Loveday* [1924] S.A.S.R. 301 at 304: forfeiture on marriage to a person "belonging to the Roman Catholic Church or holding the faith and beliefs of that church"; *Re Jones. Jones* v. *Baxter* (1929) 30 S.R. (N.S.W.) 26: forfeiture should beneficiary "embrace the Roman Catholic faith or marry a Roman Catholic"; *Saywell* v. *Saywell* (1932) 32 S.R. (N.S.W.) 155: forfeiture if beneficiary should marry "members of the Roman Catholic Church"; *Re Rubin. Rubin* v. *Rubin* (1936) 40 W.A.L.R. 1 at 3: forfeiture on marriage to a non-Jew. See also *Perpetual Trustee Co.* v. *Hogg* (1936) 36 S.R. (N.S.W.) 61; *In re Cuming. Nicholls* v. *Public Trustee* (1945) 72 C.L.R. 86 at 92 *per* Latham, C.J.: "There may be difficulty in some circumstances in determining whether or not a person is of a particular religious faith though, until recently . . . the courts appear to have found no inherent difficulty in solving the problem". See also *In re Finkelstein* [1944] V.L.R. 123 as explained in *In re Harris. National Trustees Co.* v. *Sharpe* [1950] A.L.R. 353 at 357. In Canada, see *Re Forbes. Harrison* v. *Commis* [1928] 3 D.L.R. 22 at 24, 25: "confirmed as a member of the Church of England"; *Re Patton* [1938] 1 D.L.R. 796; *cf. Re Landry* [1941] 2 D.L.R. 779 at 780 purporting to follow *In re Blaiberg* — but see *infra* n. 53, in regard to the correct interpretation of *In re Blaiberg*.

[39] *In re Borwick. Borwick* v. *Borwick* [1933] 1 Ch. 657.

[40] Following *In re Sandbrook. Noel* v. *Sandbrook* [1912] 2 Ch. 471.

[41] By Lord Greene, M.R. in *In re Samuel. Jacob* v. *Ramsden* [1942] 1 Ch. 1 at 26.

be affected by his decision,[42] but it seems quite open to interpret Bennett, J.'s decision as based on the uncertainty of the phrases used with respect to religion. It was not possible, he said, for a Court at the date of the settlement, "to see precisely and distinctly what facts and circumstances would make it possible to say of an infant affected by the condition that he had either become a Roman Catholic or was not openly or avowedly Protestant".[43] Whatever interpretation is correct, it appears that Bennett, J. thought the condition void, not for uncertainty of expression, but for uncertainty of operation. There was no suggestion that the terms "Roman Catholic" or "Protestant" were uncertain, only that no two people could have agreed whether the grandchildren *in fact* fell within these designations.

The next case is *Re Tegg,*[44] where the beneficiaries were required to "at all times conform to and be members of the Established Church of England". Farwell, J. held the condition void for uncertainty, but with the express reservation that had the testator been content simply to say that the beneficiaries "should be members of the Established Church of England", the condition might have been "a matter of some certainty".[45] What was uncertain was the requirement that they "at all times conform to". It was impossible to say, at the date of the testator's death, "whether any particular act or omission would be enough to render this condition operative".[46] The case certainly cannot be regarded as authority for the proposition that a condition subsequent requiring a person to be a "member of the Established Church of England" is void for uncertainty either of expression or operation.[47]

Farwell, J. had a similar problem before him several years later in *In re Blaiberg's Will Trusts.*[48] A codicil to the testator's will declared that beneficiaries' interests were to be forfeited if they should "cease or fail to profess, or intermarry with any person who shall not profess the Jewish faith". Farwell, J. held the condition subsequent uncertain, but a close reading of the judgment makes it clear that what was uncertain was not the phrase "Jewish faith", but "cease or fail to profess".[49] The requisite certainty of expression was present in the phrase "the Jewish faith":

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[42] See *In re Edwards. Lloyd* v. *Boyes* [1910] 1 Ch. 541 at 550, 551 and *In re May. Eggar* v. *May* [1917] 2 Ch. 126 at 130. But *cf. In re May. Eggar* v. *May* [1932] 1 Ch. 99 at 106. 113; *Public Trustee* v. *Gower* [1924] N.Z.L.R. 1233 at 1253 and *In re Cuming. Nicholls* v. *Public Trustee* (1945) 72 C.L.R. 86 at 93, 94, 100.

[43] [1933] 1 Ch. 657 at 668.

[44] *Re Tegg. Public Trustee* v. *Bryant* [1936] 2 All E.R. 879.

[45] *Id.* at 881.

[46] *Ibid.*

[47] See also *Re Mills' Will Trusts. Yorkshire Insurance Co. Ltd.* v. *Coward* [1967] 1 W.L.R. 837; [1967] 2 All E.R. 193

[48] *In re Blaiberg's Will Trusts. Hyman* v. *Blaiberg*, unreported, December 14, 1938, referred to in *In re Blaiberg. Blaiberg* v. *De Andia Yrarrazaval* [1940] 1 Ch. 385 at 389-391.

[49] [1940] 1 Ch. 385 at 390.

what was lacking was certainty in "cease or fail to profess".[50]

A different codicil to the same will come before Morton, J. in *In re Blaiberg*.[51] The testator had provided for forfeiture in the event of a beneficiary marrying a person not "of the Jewish faith". Morton, J. referred extensively to the judgment of Farwell, J. and concluded that if the Court were unable to determine whether a person "professed" a faith, *a fortiori* it could not determine whether he was "of" that faith. That, he said, was "a matter of belief", and whether a particular man holds those beliefs was not "a matter which a Court can ascertain with certainty".[52] Here again, a close reading of the judgment supports the view that Morton, J. had no difficulty in ascribing certainty of expression to the term "Jewish faith":[53] what caused the condition to fail was the evidentiary problem of establishing whether a person held that faith. That was not, he thought, the kind of enquiry a Court was competent to undertake.[54] But, he said, it was possible that the Court *could* ascertain as a matter of objective fact the beliefs which make a man of the Jewish faith,[55] although whether there would be any difference of opinion between witnesses called to establish those beliefs, he did not know.

Finally, in *In re Evans*,[56] Farwell, J. had before him a condition subsequent providing for forfeiture if a beneficiary should "become a convert to the Roman Catholic religion". He was able to distinguish his earlier decision in *In re Blaiberg's Will Trusts* (1938) by pointing out that in the earlier case it was the requirement of "professing" that caused failure for uncertainty: here a definite overt act was called for, involving renunciation of the beneficiary's previous faith and admission into the Roman Catholic faith. No doubt the decision is open to the criticism that the essential element of conversion is faith, not submission to ceremonial procedures, and so ought to involve the same evidentiary difficulties re-

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[50] *Id.* at 391: "Whether a person who, while outwardly professing to be a member of the religion, in fact was not a member of it, would forfeit under this clause, I know not, and it would, I think, be impossible to ascertain". But *cf. Trustees of Church Property, etc.* v. *Ebbeck* (1960) 104 C.L.R. 394 at 413, where Windeyer, J. felt no difficulty in defining a condition that a beneficiary "profess the Protestant faith"; and *In the Will of Moss. Fox* v. *Moss* [1919] V.L.R. 192 at 195, where the Court accepted that a beneficiary had married a person who did not "profess" the Jewish religion.

[51] [1940] 1 Ch. 385.

[52] *Id.* at 391.

[53] Although Lord Greene, M.R. seems to have thought otherwise: *In re Samuel* [1942] 1 Ch. 1 at 32; *infra* n. 61.

[54] See also *In re Orr* [1940] S.A.S.R. 395 at 398, where Angas Parsons, J. said of a condition subsequent providing for forfeiture on marriage to "one of the Roman Catholic religion": "The Roman Catholic religion necessarily includes not only matters of ritual, but also of belief, and it seems to me that the Court does not possess the inquisitorial powers necessary to determine whether such a condition of forfeiture has arisen".

[55] [1940] 1 Ch. 385 at 391.

[56] *In re Evans. Hewitt* v. *Edwards* [1940] 1 Ch. 629.

ferred to by Morton, J. in *In re Blaiberg*,[57] but, nevertheless, there is nothing in the decision to support the argument that there is uncertainty of expression in the term "the Roman Catholic religion".

Thus, at the time *Clayton* v. *Ramsden*[58] came to be decided there was little, if any, scope for argument that conditions in restraint of religion were void for uncertainty. The condition in that case contained two limbs, providing for forfeiture in the event of the beneficiary marrying a person "not of Jewish parentage and of the Jewish faith". The first limb, "of Jewish parentage", was unanimously held to be too uncertain,[59] and the two limbs forming one composite condition,[60] it was not strictly necessary to consider whether the second limb, "of the Jewish faith", was also too uncertain. The majority of their Lordships, nevertheless, went on to express the view that the second limb was also void for uncertainty, on the basis, as expressed at the beginning of this article, that the testator had failed to indicate what degree of faith was required to prevent forfeiture. What is remarkable about the decision is that, with one exception, none of the Law Lords made any reference to the not inconsiderable number of previous cases where conditions as to religious faith had been considered.[61] Further, it seems to the writer that although the majority did not expressly distinguish between uncertainty of expression and uncertainty of operation, that distinction can be inferred from the judgments. Lord Romer (with whom Lords Atkin and Thankerton agreed) recognized that people who accept every tenet of, and observe every rule of practice and conduct prescribed by, the Jewish religion, are "of the Jewish faith".[62] It must follow that the phrase "the Jewish faith" is not

[57] See *per* Lord Greene, M.R. in *In re Samuel* [1942] 1 Ch. 1 at 30. There is authority that, even if a condition subsequent as to religious faith *per se* is void for uncertainty, a condition subsequent requiring the doing of an *overt act* in relation to that religious faith will be good: see *In re Cuming. Nicholls* v. *Public Trustee* (1945) 72 C.L.R. 86 at 92, 98, 99: "provided she shall have *renounced* the Roman Catholic religion" (condition precedent); *Re Delahey* [1951] 1 D.L.R. 710 at 714, 715: "become *members* of the Roman Catholic Church" (condition subsequent); *In re Selby's Will Trusts* [1965] 3 All E.R. 386 at 391. See also *In re Perry Almshouses* [1898] 1 Ch. 391 at 400 ("membership"); *In re Allen. Faith* v. *Allen* [1953] Ch. 116 at 118, 124 and, on appeal, [1953] Ch. 810 at 827, 831-34. Perhaps *Re Mills' Will Trusts. Yorkshire Insurance Co. Ltd.* v. *Coward* [1967] 2 All E.R. 193 can be explained on this ground. See also 24 *A.L.J.* 248 at 249 where it is suggested that a condition subsequent requiring the beneficiary to "attend once a week at a church service of the Church of England" or to "remain registered as the holder of a seat in a given synagogue" would be sufficiently certain, since there can be no doubt as to whether a beneficiary has or has not observed it.

[58] [1943] A.C. 320.

[59] On the ground that the testator had not stipulated the "degree of Hebraic blood" a husband would have to possess. See *per* Lord Romer [1943] A.C. 320 at 333 (Lords Atkin and Thankerton agreeing), Lord Russell at 328, and Lord Wright at 330, 331.

[60] *Id.* at 325, 327, 330 and 333.

[61] Lord Russell of Killowen referred to *In re Blaiberg*, but only to say that the decision of Morton, J. in that case "though seemingly based on the difficulty of ascertaining the state of a man's mind, may well stand on the ground of uncertainty of the words there in question" ([1943] A.C. 320 at 329).

[62] *Id.* at 334.

void for uncertainty of expression. The difficulty which presented itself to Lord Romer was that not everybody was so vigorous in the practice of their faith: there are degrees of observance, and the testator had failed to indicate what degree of observance was sufficient to bring about a forfeiture. Thus the condition was certain of expression, but uncertain in operation: how was evidence to be directed to establish whether a person was *of* the Jewish faith when the testator had failed to specify the *degree* of required observance? There is nothing in Lord Romer's judgment to suggest that the phrase "the Jewish faith" is, of itself, uncertain of expression.[63]

Similarly, although his judgment on the uncertainty question was very short, Lord Russell of Killowen, after adverting to the different varieties of Judaism (which might therefore create problems of uncertainty of expression), seemed to base his decision on the ground that the condition failed for uncertainty of operation: the testator had given no indication of the required degree of attachment to the faith, and so "the requirement that a person shall be of the Jewish faith seems to me too vague to enable it to be said with certainty that a particular individual *complies* with it".[64] It seems correct to say, therefore, that the majority based their decision not so much on the problem of identifying the tenets of the Jewish faith as of ascertaining the degree of *adherence* to those tenets required by the testator.

In the light of subsequent development of the law, it may be that the dissenting judgment of Lord Wright was the more perceptive. He did not regard the words "of the Jewish faith" as of insufficient clearness and distinctness. They connoted "a specific fact", equally with "Christian faith". He was not impressed with the argument that the words "of the Jewish faith" referred to a state of mind or of religious conviction which was incapable of proof.[65] To Lord Wright, "states of mind are capable of proof like other matters of fact".[66] That was the approach taken below by the Court of Appeal, where it was pointed out that whether a person holds a particular faith is a matter of fact to be ascertained in the same way as all matters of fact, namely, by evidence, and is a question "which on the evidence no jury should have any difficulty in deciding".[67] And surely that is the correct approach, for the proof of the state of a man's mind may be difficult but it is not impossible.[68] The civil courts do not baulk

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[63] This interpretation of Lord Romer's judgment appears to have been accepted by Lord Evershed, M.R. in *In re Allen. Faith* v. *Allen* [1953] Ch. 810 at 820.

[64] [1943] A.C. 320 at 329, emphasis added.

[65] *Id.* at 331.

[66] *Ibid.*

[67] *Sub nom. In re Samuel. Jacobs* v. *Ramsden* [1942] 1 Ch. 1 at 29, 30. See also *In re Cuming. Nicholls* v. *Public Trustee* (1945) 72 C.L.R. 86 at 93, 98.

[68] *In re Gape. Verey* v. *Gape* [1952] Ch. 743 at 749.

at the problem in other areas, and there is no reason why they should do so here.[69]

As pointed out above, the decision of the House on the question of uncertainty was strictly *obiter,* and its authority is not enhanced by the the brevity of reasons and lack of citation of authority.[70] But being a decision of the House of Lords it has been applied as a precedent by inferior courts in a number of subsequent cases. In some of these cases there is an apparent confusion of the concepts of uncertainty of expression and uncertainty of operation. The first case was *In re Donn*[71] where a condition subsequent provided for forfeiture in the event of marriage to a person "not of the Jewish faith". Uthwatt, J. held the condition uncertain, following the *dicta* in *Clayton* v. *Ramsden,*[72] but in doing so appears to have confused uncertainty of expression with uncertainty of operation. He was clearly of opinion that Lord Romer had regarded the words "the Jewish faith" as "being themselves, without exposition, uncertain in their meaning"[73] (which, it has been suggested above, was not the view of Lord Romer), but then proceeded to hold that the condition was uncertain because "no indication is provided of the degree of faith or degree of acceptance of the Jewish faith"[74] required by the testator. That is a statement that the condition failed for uncertainty of operation, not of expression, and inherent in it is the assumption that it *would* have been possible for the testator to render the clause certain by specifying the degree of faith required. And that involves the assumption that the words "the Jewish faith", are, of themselves, sufficiently certain of expression. Then came *Re Moss's Trusts,*[75] where Vaisey, J., again purporting to apply *dicta* in *Clayton* v. *Ramsden,*[76] clearly held that the phrase "the Jewish faith" was uncertain of expression.[77] Whether it was also uncertain of

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[69] E.g., see cases dealing with whether a person has adopted a particular domicile of choice: *Winans* v. *Attorney-General* [1904] A.C. 287, and *In re Coxen. McCallum* v. *Coxen* [1948] Ch. 747 at 761. For cases in other areas where there appears to be no difficulty in ascertaining a person's religious persuasion, see *Shore* v. *Wilson* (1942) 9 Cl. & F. 355 at 531, 8 E.R. 450 at 520; *Yelverton* v. *Longworth* (1864) 10 Jur. (N.S.) 1209 at 1215; *In re De Wilton. De Wilton* v. *Montefiore* [1900] 2 Ch. 481 at 490 (but see *Ogden* v. *Ogden* [1908] P. 46); *In re Cohen. National Provincial and Union Bank of England* v. *Cohen* (1919) 36 T.L.R. 16; *Public Trustee* v. *Gower* [1924] N.Z.L.R. 1233 at 1267; *Hirsch* v. *Protestant Board of School Commissioners of Montreal* [1928] A.C. 200; *Keren Kayemeth Le Jisroel Ltd.* v. *Commissioners of Inland Revenue* [1931] 2 K.B. 465 at 494. There seems no reason in principle why there should be any less difficulty in ascertaining the state of mind in such cases as these than in cases arising under conditions in wills: see the comments of Birkett, L.J. in *In re Allen. Faith* v. *Allen* [1953] Ch. 810 at 827.

[70] But see comments of Lord Wilberforce in *Blathwayt* v. *Cawley* [1976] A.C. 397 at 425.

[71] *In re Donn. Donn* v. *Moses* [1944] Ch. 8.

[72] [1943] A.C. 320.

[73] [1944] Ch. 8 at 11, 13.

[74] *Id.* at 13.

[75] *Re Moss's Trusts: Moss v. Allen* [1945] 1 All E.R. 207.

[76] [1943] A.C. 320.

[77] [1945] 1 All E.R. 207 at 209: "'The Jewish Faith,' whatever be the sense in which the words are used, is an expression of complete uncertainty".

operation did not therefore arise. The third case was *Re Krawitz's Will Trusts*,[78] where Vaisey, J., held uncertain a condition subsequent providing for forfeiture on marriage to a person who did not "practise" the Jewish religion". It was the word "practise" which lacked altogether "that precision which is essential to the validity of a condition subsequent".[79] He expressly recognised that one of the defendants was in fact an adherent of the Jewish religion, by both conduct and conviction,[80] a statement which could not be made unless the phrase "Jewish religion" was sufficiently certain of expression.

Clayton v. *Ramsden* has been applied in a number of decisions in Australia and New Zealand.[81] Here too, it is respectfully submitted, there is apparent the same lack of precision in distinguishing between uncertainty of expression and uncertainty of operation.

5. Conditions Precedent and Religious Belief

Despite occasional comments that the test of certainty is the same whether a condition is precedent or subsequent,[82] it is now clear that conditions precedent are not subject to the requirements of the rule expressed by Lord Cranworth in *Clavering* v. *Ellison*,[83] and that, for the purposes of the law relating to uncertainty, conditions precedent do not require the same degree of precision as conditions subsequent.

Whereas, in the case of a condition subsequent the forbidden field

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[78] *Re Krawitz's Will Trusts. Drawitz* v. *Crawford* [1959] 3 All E.R. 793.

[79] *Id.* at 796.

[80] *Ibid.*

[81] See *Perpetual Trustee Co. Ltd.* v. *Wansey* (1946) 46 S.R. (N.S.W.) 226 at 228: "marry out of the Jewish faith" — probably held uncertain for uncertainty of expression; *In re Solomon. Solomon* v. *Solomon* [1946] V.L.R. 115 at 122, 123: "of Jewish faith" — several conditions, some precedent, all held void for uncertainty; *In re Ettleston. Ettleson* v. *Webster* [1946] V.L.R. 217 at 220: marry "anyone not of the Jewish religion" — phrase "Jewish faith" and "Jewish religion" void for uncertainty of expression; *In re Winzar. Public Trustee* v. *Winzar* (1953) 55 W.A.L.R. 35: term "Protestant religion" not void for uncertainty (first condition) but "*following* any other religion but Protestant" held uncertain (second condition); *In re Crane. Equity Trustees Executors & Agency Co. Ltd.* v. *Crane* [1950] V.L.R. 192 at 194, 195: children to be brought up "according to the rites of the Church of England" — requirement of "bringing up" uncertain ("What degree of connection with the Church of England or what amount of compliance with its rites is required?"): education not to be "in a Roman Catholic School or Institution" — not void for uncertainty. See also the earlier case of *Equity Trustees Executors & Agency Co. Ltd.* v. *Moss* (1931) 37 A.L.R. 281 at 282, where a Jewish mother left property to her sons subject to forfeiture should they "marry out of their persuasion" — held to be "so very vague and uncertain that it is impossible to say what it means". For instances of the application of the rule in *Clayton* v. *Ramsden* in New Zealand, see *In re Lockie. Guardian Trust and Executors Co. of New Zealand Ltd.* v. *Gray* [1945] N.Z.L.R. 230 at 239-246: "remain a Protestant", "adhere to the Protestant faith"; *In re Biggs. Public Trustee* v. *Schneider* [1945] N.Z.L.R. 303 at 307, 308: "adherent of . . . the Church of England"; *In re Myers. Perpetual Trustees Estate and Agency Co. of New Zealand Ltd.* v. *Myers* [1947] N.Z.L.R. 828 at 834: "contracting marriage outside of the Jewish faith".

[82] See *In re Biggs. Public Trustee* v. *Schneider* [1945] N.Z.L.R. 303 at 307; *Trustees of Church Property, etc.* v. *Ebbeck* (1960) 104 C.L.R. 394 at 411. In Scotland, it appears to be the law that no greater degree of certainty is required for a condition subsequent than for a condition precedent: see *Wemyss* v. *Wemyss's Trustees* [1921] S.C. 30 at 41, 43.

[83] (1859) 7 H.L.C. 707 at 725, 11 E.R. 282 at 289.

which the beneficiary must not enter on pain of forfeiture of his interest must be, so it is said, precisely and exactly marked out, in the case of a condition precedent it is sufficient for the person affected to be able to say: "Whatever the boundaries of the field, here at any rate I am or am not (as the case may be) within the field".[84] The case usually regarded as establishing that proposition is the Court of Appeal decision in *In re Allen*.[85] Before considering that case, it is worth noting that *In re Allen* had in fact been anticipated on a number of occasions.[86] In particular, in the Victorian case of *In re Harris*[87] it had been held that a gift to persons subject to a condition precedent (or qualification) that they "remain of the Jewish faith" and not marry "outside the Jewish faith" was not void for uncertainty. Fullagar, J. there based his decision on the opinion that *Clayton* v. *Ramsden* was simply an example of the special rule relating to conditions subsequent enunciated in *Clavering* v. *Ellison,* and that the condition in *Clayton* v. *Ramsden,* as in the case before him, was neither void for uncertainty for all purposes, nor "unintelligible or meaningless or incapable of application to given facts". Such a condition was not to be treated as void for uncertainty where it was a condition precedent or formed part of the "description" of the objects of a gift.[88]

The testator in *In re Allen*[89] had devised property to the eldest of the sons of his nephew "who shall be a member of the Church of England and an adherent to the doctrine of that Church". All three members of the Court were prepared to treat the condition as precedent, or, more correctly, as a description or qualification, so that performance necessarily preceded vesting.[90] Lord Evershed, M.R. began by asserting that the basis of the decision in *Clayton* v. *Ramsden* was the "strictness of the special rule as to conditions subsequent",[91] but that "no such general or academic test" was called for where the formula was a condition precedent or a qualification.[92] A formula involving questions of degree may be fatal to a condition subsequent, but will not necessarily be so to a condition precedent. In the latter case, he said, "All that the claiming devisee

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[84] See *In re Whiting. Whiting* v. *The Equity Trustees Executors and Agency Co. Ltd.* [1957] V.R. 400 at 403.

[85] *In re Allen. Faith* v. *Allen* [1953] Ch. 810.

[86] See *In re Mylne. Potter* v. *Dow* [1941] Ch. 204: requirement that beneficiary under a trust "be a Protestant in religion and a whole-hearted believer in . . . ", not being a condition subsequent, not subject to strict construction of forfeiture clauses. In Australia, see *In re Cuming. Nicholls* v. *Public Trustee* (1945) 72 C.L.R. 86 at 92, 98; *Perpetual Trustee Co. Ltd.* v. *Wansey* (1946) 46 S.R. (N.S.W.) 226 at 227. In New Zealand, see *In re Myers. Perpetual Trustees Estate and Agency Co. of New Zealand* v. *Myers* [1947] N.Z.L.R. 828 at 834. In Canada, see *Re Going* [1950] 4 D.L.R. 652 at 654: "members and adherents in good faith and standing in a Protestant church" (affirmed on appeal [1951] 2 D.L.R. 136 at 137); followed in *Re Mercer* [1954] 1 D.L.R. 295 at 299.

[87] *In re Harris. National Trustees Co.* v. *Sharpe* [1950] V.L.R. 182; [1950] A.L.R. 353.

[88] [1950] V.L.R. at 186-89.

[89] [1953] Ch. 810.

[90] *Id.* at 815, 816, 826 and 831.

[91] *Id.* at 816.

[92] *Id.* at 817.

has to do is at the relevant date to establish, if he can, that he satisfies the condition or qualification whatever be the appropriate test".[93] A condition precedent will not be declared void for uncertainty so as to defeat all possible claimants unless the terms of the condition are such that "it is impossible to give them any meaning at all" or that "they involve repugnancies or inconsistencies in the possible tests which they postulate, as distinct, for example, from mere problems of degree".[94] An example of a condition incapable of any reasonable, clear meaning might be, he said, one requiring a beneficiary to be "a pure blooded Englishman".[95] But generally speaking, the principles applicable to conditions precedent differed materially from those applicable to conditions subsequent,[96] and a condition precedent, requiring a beneficiary to be a member of the Church of England and an adherent to the doctrine of that Church was not void for uncertainty.

Pausing here for a moment, it is interesting to consider the example given by the Master of the Rolls to illustrate the distinction being drawn by him. He postulated a condition subsequent divesting an estate should the beneficiary not be "a tall man". Such a condition subsequent, he said, would be void for uncertainty, for tallness is a matter of degree and the testator has not indicated by what standard it is to be judged.[97] On the other hand, he said, such questions might have no application where the condition was precedent: a claimant who was 6 ft. 6 ins. tall might fairly say that he satisfied the testator's requirement judged by any reasonable standard.[98] But, to interpolate, why cannot it equally be said that a claimant 6 ft. 6 ins. tall could establish that he was "a tall man" for the purposes of a condition subsequent? It is true that there may be areas of peripheral uncertainty, where, for example, the claimant is 6 ft. tall, but those same areas of uncertainty are present where such a person attempts to show compliance with a condition precedent.[99] Accepting that a beneficiary subject to a condition subsequent must be able to see precisely and distinctly *from the outset* upon the happening of what event his interest will determine, surely a beneficiary who is 6 ft. 6 ins.

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[93] *Ibid.*

[94] *Id.* at 818. See also *per* Buckley, J. in *Re Selby's Will Trusts. Donn* v. *Selby* [1965] 3 All E.R. 386 at 391: a condition precedent is not void for uncertainty unless it is such that "it is clearly impossible for anyone to qualify" or "it would obviously be impossible for the Court in any instance to answer the enquiry whether a particular claimant qualified". For an example of a condition precedent held incapable of interpretation, see *Re Wecke. Montreal Trust Co.* v. *Sinclair* (1958) 15 D.L.R. (2d) 655 at 658 ("understand farming"); but *cf. Re Cowley* [1971] N.Z.L.R. 468 at 471, 472 ("actively engaged in farming").

[95] [1953] Ch. 810 at 817.

[96] *Ibid.*

[97] See the comment by Vaisey, J. in *Re Brace. Gurton* v. *Clements* [1954] 2 All E.R. 354 at 359: "In *Clayton* v. *Ramsden*, in the course of argument, I remember that one of their Lordships said that a condition subsequent must never be a condition in which a standard has to be applied. . . . If one is required to apply a standard and is not told what standard to apply, the condition is not one which can be properly imposed."

[98] [1953] Ch. 810 at 817.

[99] *Ibid.*

tall can safely categorize himself from the outset as "a tall man". In other words, there is no reason why a condition subsequent, which clearly applies to the facts as they have turned out (and which the beneficiary could clearly have foreseen would have applied to such facts as actually occurred) should be held unenforceable because the application may have been doubtful had events not turned out that way. That of itself is not to fly in the face of the undoubted authority[100] that the validity of a condition subsequent is to be judged from the outset. To revert to the condition in *Clayton* v. *Ramsden,* whether or not it is possible to predict of *all* possible suitors that they are "of the Jewish faith", a beneficiary can clearly foresee that a Rabbi does fall within the description and that an English Wesleyan does not. To hold the condition void because of possible difficulty of application in *some* fact situations is to confuse uncertainty of expression with uncertainty of operation. If the phrase "a member of and an adherent to the doctrine of the Church of England" (or "of the Jewish faith") is sufficiently certain where appearing as a condition precedent, it cannot be wanting in certainty of expression — its only defect must be in the uncertainty of its operation in all possible circumstances. It should not, therefore, be held to be inoperative where it clearly does apply to events as they actually turn out, merely because it is characterized as a condition subsequent.

Returning to *In re Allen,* Birkett, L.J. adopted the same approach as the Master of the Rolls and held the condition sufficiently certain. It is apparent from his judgment, however, that he regarded the phrases "a member of the Church of England", and "an adherent to the doctrine of the Church of England" as having quite definite meanings and containing no inherent uncertainty. Although he made reference to the differing tests of certainty for conditions precedent and subsequent,[101] his decision need not have turned on that. As to the first limb of the condition, he concluded that "a definite and certain meaning can be given to the words 'a member of the Church of England', and if it be right that the words are a description or a qualification or a condition precedent, then a claimant to the gift ought not to be debarred from trying to show that he fulfils the qualification".[102] But such was the certainty he professed to be able to find in the phrase that the same result should have followed had the condition been subsequent. Similarly, as to the second phrase, he was able to give "a sensible and definite meaning" to "adherent" and "the doctrine of" the Church,[103] and any claimant was to be allowed to try

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[100] See *Jeffreys* v. *Jeffreys* (1901) 84 L.T. 417 at 418; *Re Moore's Trusts. Lewis* v. *Moore* (1906) 96 L.T. 44 at 47; *Re Tegg. Public Trustee* v. *Bryant* [1936] 2 All E.R. 878 at 881. *Cf. Clavering* v. *Ellison* itself, where neither Lord Campbell, L.C. nor Lord Cranworth felt any hesitation in enquiring as to whether, as events had turned out, the condition requiring education "in the Protestant religion, according to the rites of the Church of England" had been performed: (1859) 7 H.L.C. 707 at 722-24 and 727 (11 E.R. 282 at 288-89 and 290).

[101] [1953] Ch. 810 at 825, 827.

[102] *Id.* at 827.

[103] *Id* at 829, 830.

to bring himself within the scope of the words. It does not seem to be reading too much into the judgment to assume that the certainty ascribed to the words ought to have allowed them to stand had the condition been subsequent. Romer, L.J. dissented on the ground that although the first limb of the condition was sufficiently certain, he could not tell what the testator meant by "the doctrine of" the Church of England, nor what degree of adherence was involved.[104]

In re Allen has since been adopted on a number of occasions as authority for the proposition that a condition in restraint of religion which would be void for uncertainty when subsequent may well be sufficiently certain when precedent. The English cases are well known.[105] There are, however, two English decisions seemingly at variance with *In re Allen,* namely *In re Tarnpolsk*[106] and *In re Walter's Will Trusts.*[107] In the first, the testator gave property to certain persons on the condition precedent of their being married, "marry" being defined in the will as "marry according to the rites of the Jewish faith a person of Jewish race and religion". Danckwerts, J. considered that the words "of Jewish race" were void for uncertainty, it being "impossible for a possible candidate to show with reasonable certainty that he satisfies the test which the testator has attempted to lay down".[108] It is clear that his Lordship regarded the condition as being on all fours with the "Jewish parentage" limb of the condition in *Clayton* v. *Ramsden* and as such was uncertain whether precedent or subsequent. It may well be true that a condition as to "race" is inherently less certain than a condition as to "religion" or "faith", and on this basis the case may well be distinguishable from *In re Allen.*[109] The second decision, *In re Walter's Will Trusts,* is however more dubious. There the condition precedent held void for uncertainty required claimants to "marry in the Jewish faith". According to the very brief report of the decision, Plowman, J. was of opinion that the testator had not given any indication as to whether performance of the condition required "personal belief" or "rites and ceremonies only" and the gift therefore failed. It seems doubtful that the phrase "the Jewish faith" is any less definite than that considered in *In re Allen.*

A case which merits separate discussion in the context of *In re Allen*

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[104] *Id.* at 834, 835. Romer, L.J.'s discussion of *Clayton* v. *Ramsden* is interesting in that he considered the House in that case would have come to the same conclusion even if the condition had been precedent ([1953] 1 Ch. 810 at 837), an interpretation contrary to that of Lord Evershed, M.R. (*Id.* at 816).

[105] *Re Selby's Will Trusts. Donn* v. *Selby* [1965] 3 All E.R. 386 at 389-392: condition precedent that no beneficiary should take "who shall marry out of the Jewish faith"; *In re Abrahams' Will Trusts. Caplan* v. *Abrahams* [1969] 1 Ch. 463 at 472: "professing the Jewish faith". For an application of *In re Allen* in the context of charitable trusts, see *In re Lysaght. Hill* v. *Royal College of Surgeons* [1966] 1 Ch. 191 at 206; and for an application completely outside the realm of religious conditions, see *In re Leek. Darwen* v. *Leek* [1967] 1 Ch. 1061 at 1076.

[106] *Re Tarnpolsk. Barcleys Bank Ltd.* v. *Hyer* [1958] 3 All E.R. 479.

[107] (1962) 106 *Sol. J.* 221; (1962) 233 *L.T.* 187.

[108] [1958] 3 All E.R. 479 at 481.

[109] See *per* Cross, J. in *In re Abrahams' Will Trusts* [1969] 1 Ch. 463 at 472, and *per* Whitford, J. in *In re Tuck's Settlement* [1976] 2 W.L.R. 345 at 357, 358.

is the decision of Harman, J. in *Re Wolffe's Will Trusts.*[110] The testatrix directed her trustees to transfer a fund to her grand-daughter on her marriage "to a person of the Jewish faith and the child of Jewish parents", with a proviso that should she marry a person "not of the Jewish faith and not the son of parents of the Jewish faith" then one-sixth only of that fund was to be transferred to her. The grand-daughter later married a person conceded to be outside the required description. Harman, J. preferred to regard the initial gift as a limitation which had not been fulfilled and the proviso as an alternative limitation which had been fulfilled, thus entitling the grand-daughter to one-sixth of the fund.[111] He was, however, also prepared to consider them on the assumption that they were conditions precedent. He began by recognizing that if this were a condition subsequent it would have been void for uncertainty, as a result of *Clayton* v. *Ramsden,* leaving the legatee to take the gift without complying with the condition; but, he said, where the condition is precedent, no gift vests until the condition be performed.[112] A condition such as the one imposed by this testatrix was, he said, impossible in law.[113] Stopping at this point, it is clear that Harman, J. regarded the decision in *Clayton* v. *Ramsden* as a binding authority that such a condition as the one before him would be void for uncertainty whether a condition subsequent or precedent, the importance of characterization of the condition as subsequent or precedent lying in whether the beneficiary took free of the condition (subsequent) or whether performance preceded vesting (precedent). The condition here being precedent, and performance being impossible in law, the normal rules as to the impossibility of conditions precedent were to be applied.[114] The initial gift to the grand-daughter of the whole fund therefore failed to take effect.

Harman, J. delivered his judgment about six weeks before the Court of Appeal delivered its decision in *In re Allen.* (Had he had the benefit of *In re Allen,* he would no doubt have held that performance of the condition was not impossible, and would have required the grand-daughter to prove that she had married within the terms of the condition. On either basis, the end result would have been the same). But his decision on the effect of the proviso, by which he held that the grand-daughter was entitled under the gift of the one-sixth of the fund, is, with respect, more doubtful. What he held, in effect, was that a condition

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[110] *Re Wolffe's Will Trusts. Shapley* v. *Wolffe* [1953] 2 All E.R. 697.

[111] *Id.* at 699, 700, following *In re Wilkinson. Page* v. *Public Trustee* [1926] Ch. 842 at 848, 849.

[112] [1953] 2 All E.R. 697.

[113] "One cannot marry a Jew in the eyes of the law . . . by reasoning from the peculiar doctrine which covers conditions subsequent that it is impossible to say whether a man is a Jew or of Jewish parentage".

[114] The impossibility was unknown to the testatrix, and performance of the condition was the sole motive of the bequest: following *In re Moore. Trafford* v. *Maconochie* (1888) 39 Ch. D. 116 at 128, as applied in *Re Piper. Dodd* v. *Piper* [1946] 2 All E.R. 503 at 505 and *In re Elliot. Lloyds Bank Ltd.* v. *Burton-on-Trent Hospital* [1952] Ch. 217 at 221, 222.

that a person be *not* "of the Jewish faith" is not void for uncertainty. It is difficult to see how a condition that a person be "not of the Jewish faith" is more certain than a condition that a person be "of the Jewish faith", or, to adopt the words of one commentator, how a man "can be shown not to be a Jew, but cannot be shown to be a Jew".[115] This aspect of Harman, J.'s decision has received its share of judicial criticism.[116]

The principle in *In re Allen* has been followed on a number of occasions by the Australasian courts. Indeed there is no evidence in those courts of the divergence of opinion which appeared in the two English cases referred to above, after *In re Allen,* with regard to the effect of conditions precedent in restraint of religion.[117]

6. Summary of the Position so Far

From the authorities discussed to this point, the following points emerge:

(a) Until the early 1930's conditions in restraint or religion, whether precedent or subsequent, were assumed to be certain both of expression and operation.

(b) A number of decisions in the 1930's seemed to doubt this assumption, and certain particular conditions in restraint of religion were held void for uncertainty. It is arguable, however, that such conditions were uncertain of operation only and were not uncertain of expression.

(c) In *Clayton* v. *Ramsden* the House of Lords by a majority held void for uncertainty a condition subsequent providing for forfeiture should the beneficiary marry a person not "of the Jewish faith". Statements made by several members of the House in that case, and by judges in later decisions in which it has been

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[115] (1953) 17 *Conv.* (*N.S.*) 420 (A. Kiralfy).

[116] See *Re Selby's Will Trusts. Donn* v. *Selby* [1965] 3 All E.R. 386 at 392 *per* Buckley, J.: "The question whether a man is of the Jewish faith or not can only admit of two answers, either he is or he is not, and the answer to the one question answers the other, for they are mutually exclusive concepts"; *In re Abrahams' Will Trusts. Caplan* v. *Abrahams* [1969] 1 Ch. 463 at 471, 472.

[117] For the Australasian authorities, see, in addition to *In re Harris*: *In re Kearney. The Equity Trustees Executors and Agency Co. Ltd.* v. *Kearney* [1957] V.R. 56 at 61-64: property to be divided amongst such named persons as should "be Roman Catholics and not have married Protestants"; *In re Whiting. Whiting* v. *The Equity Trustees Executors & Agency Co. Ltd.* [1957] V.R. 400 at 403, 404: condition precedent that no grantee "shall intermarry with a Roman Catholic or with the child of Roman Catholic parents or of a Roman Catholic mother or father or with any person who has at any time attended as a scholar or student at any Roman Catholic institution . . . "; *Re St. George. Perpetual Trustee Co. Ltd.* v. *St. George* (1964) 80 W.N. (N.S.W.) 1423 at 1424: condition precedent disbarring potential beneficiary who had been educated or brought up as a Roman Catholic and at 21 or marriage should still be of such faith. In New Zealand, see *Re Balkind* [1969] N.Z.L.R. 669 at 671: condition precedent requiring membership "of the Hebrew Congregation". For two cases, decided before *In re Allen,* seemingly inconsistent with the decision in *In re Allen,* see *In re Solomon. Solomon* v. *Solomon* [1946] V.L.R. 115: condition precedent requiring beneficiary to be "of the Jewish Faith" held void for uncertainty, and *In re Finkelstein* as noted in [1944] V.L.R. 123.

applied, leave it open that such a condition may fail for uncertainty of operation only, not for uncertainty of expression.

(d) Whatever be the true basis for the failure of such a condition subsequent, a condition precedent in the same terms will most probably not be void for uncertainty — *In re Allen.*

Now it is true that in the reported English decisions the only kind of conditions in restraint of religion which have been held void when subsequent, but valid when precedent, relate to the *Jewish* faith or religion.[118] There appear to be no reported decisions in England after *Clayton* v. *Ramsden* expressly holding void for uncertainty conditions subsequent in restraint of *other* religious faiths. But the underlying assumption in the decisions concerning conditions subsequent, and indeed in the decisions concerning conditions precedent,[119] seems to have been that conditions subsequent in restraint of *all* religions were regarded as infected by the same uncertainty that rendered void conditions subsequent in restraint of the Jewish faith. The only exception to this general interpretation of the effect of *Clayton* v. *Ramsden* was *Re Mills' Will Trusts*[120] where Stamp, J. refused to hold void for uncertainty a condition subsequent providing for forfeiture should the beneficiary not be "a member of the Church of England or of some Church abroad professing the same tenets". The decision may be able to be distinguished by reason of the *membership* requirement,[121] and in any case the *Clayton* v. *Ramsden* line of authority was not referred to.

This underlying assumption in the English authorities has found expression as the basis of some Australasian decisions.[122]

We are thus left with the situation that where a testator imposes a condition in restraint of religion in two places in his will, in one as a condition precedent and in the other as a condition subsequent, it will be valid and void for uncertainty respectively.[123] That can hardly accord

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[118] Void, when subsequent: *Clayton* v. *Ramsden* [1943] A.C. 320; *In re Donn. Donn* v. *Moses* [1944] Ch. 8; *Re Moss's Trusts. Moss* v. *Allen* [1945] 1 All E.R. 207; *Re Krawitz's Will Trusts. Krawitz* v. *Crawford* [1959] 3 All E.R. 793; valid, when precedent: *Re Selby's Will Trusts. Donn* v. *Selby* [1965] 3 All E.R. 386; *In re Abrahams' Will Trusts. Caplan* v. *Abrahams* [1969] 1 Ch. 462.

[119] See *In re Allen* [1953] Ch. 810 at 816-18, 819, 825, 837; *Re Selby's Will Trusts. Donn* v. *Selby* [1965] 3 All E.R. 386 at 388-392; *In re Abrahams' Will Trusts. Caplan* v. *Abrahams* [1969] 1 Ch. 463 at 472.

[120] *Re Mills' Will Trusts. Yorkshire Insurance Co. Ltd.* v. *Coward* [1967] 1 W.L.R. 837; [1967] 2 All E.R. 193.

[121] *Supra* n. 57.

[122] For cases where conditions subsequent relating to the faiths *other* than the Jewish faith have been held void for uncertainty, see *In re Crane. Equity Trustees Executors & Agency Co. Ltd.* v. *Crane* [1950] V.L.R. 192: "rites of the Church of England"; *In re Lockie. Guardian Trust and Executors Co. of New Zealand Ltd.* v. *Gray* [1945] N.Z.L.R. 230: "remain a Protestant", "adhere to the Protestant faith"; *In re Biggs. Public Trustee* v. *Schneider* [1945] N.Z.L.R. 303: "adherent of . . . the Church of England".

[123] As indeed happened in *In re Abrahams' Will Trusts. Caplan* v. *Abrahams* [1969] 1 Ch. 463 at 470.

with the testator's intentions,[124] and can only serve to hold the law up to ridicule.[125]

7. Reality Revisited

It is pleasing to note that despite this general trend of English authority, Courts in some other jurisdictions refused to be swayed from an innate belief that conditions in restraint of religion, whether precedent or subsequent, on whatever other grounds of policy they might be objectionable, ought not generally to be held void for uncertainty.

Thus, in Ireland, it was held in *In re McKenna*[126] that a condition subsequent providing for forfeiture on marriage to a Roman Catholic was not void for uncertainty. Gavan Duffy, P. drew the distinction between uncertainty of expression and uncertainty of operation, and said that difficulty of proof as to whether a condition has or has not been fufilled is irrelevant in a question as to whether the testator has used sufficient certainty of expression.[127] There could be no doubt, he said, about the meaning of the expression "Roman Catholic". Questions of theological definition were not in issue: what had to be construed were "the plain words used by a plain man in a sense plain to all of us", and he had no intention of making the law "justly ridiculous" by declaring "a current expression, which the People knows and understands, to be unintelligible in the High Court of Justice of Ireland".[128] Whatever difficulties the House of Lords might have felt with the phrase "of the Jewish faith" (and he preferred the approach of Lord Greene in the Court below[129]) Gavan Duffy, P. discerned no difficulty in knowing the meaning of the words "Roman Catholic" on the lips of the ordinary citizen.[130]

Then, in 1948, the Northern Ireland Court of Appeal held that a condition subsequent in a re-settlement *inter vivos* providing for forfeiture should the holder "become a Roman Catholic or profess that he or she is of the Roman Catholic religion" was not void for uncertainty.[131] In the Court below, Black, J. had considered that the decision in *Clayton* v. *Ramsden,* where the condition concerned the "Jewish faith", did not automatically lead to the conclusion that the condition in the will before

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[124] See *per* Whitford, J. in *In re Tuck's Settlement Trusts. Public Trustee* v. *Tuck* [1976] 2 W.L.R. 345 at 351, 352.

[125] Although Fullagar, J. in *In re Harris. National Trustees Company* v. *Sharpe* [1950] A.L.R. 353 at 359 thought differently. But *cf. In re Kearney. The Equity Trustees Executors and Agency Co. Ltd.* v. *Kearney* [1957] V.R. 56 at 61.

[126] *In re McKenna. Higgins* v. *Governor and Company of the Bank of Ireland* [1947] I.R. 277.

[127] *Id.* at 285.

[128] *Ibid.*

[129] *Sub nom. In re Samuel. Jacobs* v. *Ramsden* [1942] Ch. 1 at 13, describing it as "a permanent contribution to jurisprudence": [1947] I.R. 277 at 286.

[130] [1947] I.R. 277 at 286. See also *In re Blake. Blake* v. *Lombard* [1955] I.R. 89, where beneficiaries were required to be brought up "in the Roman Catholic faith": Dixon, J. followed *In re McKenna,* and held that uncertainty as to whether the condition had been fulfilled in particular circumstances was irrelevant to the question of whether there was any uncertainty in the condition itself — in any case, the condition was precedent, and came within the principle of *In re Allen.*

[131] *McCausland* v. *Young* [1949] N.I. 49. The Court was not fully constituted, only two Lord Justices sitting.

him was necessarily void for uncertainty: one had to consider each case in view of the precise words used.[132] He regarded the condition as disjunctive, not "composite" in the sense of the condition in *Clayton* v. *Ramsden,* so that as long as either limb was sufficiently certain the condition would not fail for uncertainty. With regard to the first limb, Black, J. had before him detailed evidence of eminent canonists that there could be doubt in some rare circumstances whether a person had fulfilled all the necessary canonical prerequisites so as to "become a Roman Catholic". But, he said, such evidentiary problems do not mean that the phrase is uncertain of expression.[133] In any case, the class of persons who "professed" the Roman Catholic religion, within the second limb, was wider than the class of persons who might "become" Roman Catholics, and would cover persons whose membership of the church might (according to the canonists) be doubtful, and as there was no uncertainty in the expression "profess the Roman Catholic religion",[134] the condition was not void for uncertainty.[135] Although the position in regard to other religions might be different, a Roman Catholic was a person who accepted the authority of the Roman Catholic Church in matters of faith. No doubt, he said, difficulties might arise as to whether in any given situation a person has in fact professed that he accepts the authority of the Church, but that did "not constitute any uncertainty as to the meaning of the condition itself".[136] The Court of Appeal agreed with the result reached by Black, J., but for somewhat different reasons. Andrews, L.C.J. regarded the evidence of the canonists, as to their interpretation of the condition, as of no real assistance. It was the words of the settlor, not of the canonist, which the Court had to construe, and it would be wrong "to interpret the words of the settlor by reference to criteria of the canon law with which he was in all probability quite unfamiliar".[137] In his opinion neither limb was uncertain either of expression or of operation, and in any case, the possibility of difficulty of proof arising in any individual case would not render a condition void "if it is clear, distinct and certain in itself".[138] Babington, L.J. was of the some opinion. There was, he said, no uncertainty as to the acts which would work a forfeiture, though there might be "a failure of proof as to whether or not these acts have taken place".[139]

Reference has already been made to the decision of the High Court of Australia in *In re Cuming.*[140] The testatrix there had given property on trust for her grand-daughter upon the following condition precedent:

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[132] [1948] N.I. 72 at 81.
[133] *Id.* at 92.
[134] See the comments of Black, J., *id.* at 88-91, and *cf. In re Blaiberg's Will Trusts. Hyman* v. *Blaiberg, supra* n. 48.
[135] [1948] N.I. 72 at 93, 94.
[136] *Id.* at 89.
[137] [1949] N.I. 49 at 57.
[138] *Id.* at 60, 61.
[139] *Id.* at 98.
[140] *In re Cuming. Nicholls* v. *Public Trustee* (1945) 72 C.L.R. 86.

"provided she shall have renounced the Roman Catholic religion . . . . " The basis of the Court's decision was that the condition required the performance of an overt act, namely renunciation, and that it was not therefore void for uncertainty,[141] but in the course of his judgment Dixon, J. (as he then was) evinced the same kind of approach as Andrews, L.C.J. in *McCausland* v. *Young*. It had been asked by counsel how much of the faith in question, which, and how many, of its doctrines and tenets must be renounced? The answer, said Dixon, J., "lies in the evident fact that the difference in religious faith to which *this testatrix* directed the condition attached to the gift is that between Roman Catholicism and Protestantism".[142]

Finally, there is the important decision of the High Court of Australia in *Ebbeck's Case*.[143] The testator left the residue of his estate on trust for his wife for life and after her death for his sons, subject to a condition that at the date of death of the testator's wife each son and his wife should "profess the Protestant faith", with a proviso that the gift would be forfeited if at that date "my trustees shall not be satisfied that any son of mine and his wife profess the Protestant faith". The majority of the members of the Court considered the condition was void as against public policy, so that a finding on the question of uncertainty was strictly unnecessary, but all members of the Court went on to consider the question of uncertainty. They were prepared to accept a characterisation of the condition as subsequent,[144] and held that it was not void for uncertainty.[145] The judgments merit separate discussion.

Dixon, C.J. thought it "unreal" to maintain that a condition that the sons should profess the Protestant religion at the time the life estate determined was void for uncertainty. The unreality was even more striking when it was seen that it was the trustees' satisfaction, and not the fact of professing the Protestant faith, which formed the basis of the condition.[146] Whatever the difficulties inherent in determining whether a beneficiary qualifies as being of the Jewish religion, there were no like difficulties in determining whether a son had ceased to profess the Protestant faith. This was not to disregard problems arising from "dictionary" definitions of the term "Protestant". The task, he said, was not to show how "absolute" the courts are and to defeat the testator's intentions on the principle that he must speak by the card or equivocation will undo him, but to attempt "to ascertain his intentions and to apply them accord-

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[141] *Supra* n. 57.

[142] (1945) 72 C.L.R. 86 at 98, emphasis added.

[143] *The Trustees of Church Property of the Diocese of Newcastle* v. *Ebbeck* (1960) 104 C.L.R. 394.

[144] *Id.* at 404, 406 and 411.

[145] See also *In re Cross. Law* v. *Cross* [1938] V.L.R. 221 at 226 where Martin, J. held a condition subsequent that a beneficiary "remain in the Protestant faith" was void for uncertainty, but apparently because of the word *remain* and not because of uncertainty in the phrase "the Protestant faith".

[146] (1960) 104 C.L.R. 394 at 405, referring to *In re Jones, supra* n. 23 and *In re Coxen, supra* n. 14.

ing to law". In the view of the Chief Justice, "his intention is clear enough and gives rise to no difficulty in its application".[147]

Kitto, J. said that the expression "profess the Protestant faith" might well be uncertain if used in a sense which assumed the existence of an ascertainable catalogue of beliefs known collectively as the Protestant faith. There was, of course, no such catalogue, and it would thus be wrong, *prima facie* at least, to construe such a condition as intending to refer to a definite corpus of beliefs identifiable under that description. All that the condition here required was that the *propositus* hold himself out as belonging to the general body of Christians descended from churches which repudiated the papal authority and separated from the Roman communion during the Reformation.[148]

Windeyer, J. made reference to the fact that in the previous twenty years many cases had found uncertainty "lurking in phrases like this". But, he said, the Court would be shutting its eyes to the world around it and "ignoring the ordinary use of words in Australia" if it were to hold that the words of this will did not "clearly express a definite requirement that the testator had in mind".[149] No lawyer, he said, could say that the word "Protestant" could not have a meaning for legal purposes: it was used in many statutes, including the Act of Settlement, and "an expression that since 1701 has been certain enough for limiting the succession to the throne of England is certain enough for disposing of the estate of a resident of East Maitland in New South Wales".[150] The word "Protestant" could be defined, he said, as meaning those churches of Western Christendom that severed connection with Rome at the time of the Reformation.[151] The fact that there was not one specific body of doctrine or dogma that could be called *the* Protestant faith was not relevant. The question was: what did *this* testator mean? What the testator wanted "was that his sons and their wives should be Protestants. I think that this condition he imposed upon his beneficiaries was not uncertain".[152]

8. The Decision in Blathwayt v. Cawley

It is in this context that we return to the decision of the House of Lords in *Blathwayt* v. *Cawley*.[153] It will be recalled that the condition subsequent in that case provided for forfeiture should the beneficiary "be or become a Roman Catholic". The House held that the condition was not void for uncertainty, two of their Lordships making important pronouncements on the way such conditions subsequent in restraint of religion should be approached. Lord Wilberforce (with whom Lords Simon of Glaisdale and Fraser of Tullybelton agreed on this point) said

147 *Id.* at 405, 406. See note (1961) 35 *A.L.J.* 1.
148 *Id.* at 406.
149 *Id.* at 411.
150 *Id.* at 412.
151 *Ibid.* A similar definition was adopted by Dwyer, C.J. in *In re Winzar. Public Trustee* v. *Winzar* (1953) 55 W.A.L.R. 35 at 38.
152 (1960) 104 C.L.R. 394 at 414.
153 [1976] A.C. 397.

that he was "clearly" of opinion that the condition was not void for uncertainty. He referred to some of the many decisions where clauses referring to Roman Catholicism had expressly or impliedly been regarded as valid, and said that the contrary would have been "barely arguable" but for the views expressed in *Clayton* v. *Ramsden*. But that was a case relating to the Jewish faith, and without wishing to whittle away the decisions of the House by fine distinctions, he did not consider himself "obliged, or, indeed justified, in extending the conclusion there reached, as to uncertainty, to other clauses relating to other religions or branches of religions".[154] *Clayton* v. *Ramsden*, he concluded, did not lay down any new general principle that all conditions subsequent relating to religious belief were void for uncertainty, but was a "particular decision on a condition expressed in a particular way about one kind of religious belief or profession".[155] It did not apply to Roman Catholicism.

One matter which should be referred to at this point is the "argument from statute" used by Lord Wilberforce. He referred to the fact that the legislature had for centuries used clauses referring to the Roman Catholic Church or faith.[156] It would, he thought, indeed be strange if language used by Parliament over long periods of time had in law no defined meaning. A similar comment could of course be made regarding the many statutes referring to the *Protestant* religion.[157] It has been said that the doctrine holding conditions in restraint of religion void for uncertainty is restricted to wills and settlements, and is inapplicable to statutes,[158] but one is tempted to ask, if the "argument from statute" can be applied to Roman Catholicism and to Protestantism, why cannot it also be applied to conditions relating to the *Jewish* faith, such as the one in *Clayton* v. *Ramsden*? There are an equally large number of statutes which refer to the Jewish faith:[159] is the legislature to be presumed in those statutes to be using expressions "so vague that no court could possibly ascertain what they mean"?[160]

Lord Cross of Chelsea said that had he been a member of the House in *Clayton* v. *Ramsden* he might well have joined Lord Wright in

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[154] *Id.* at 425.

[155] *Ibid.*

[156] *Id.* at 424, referring to the Bill of Rights and the Act of Settlement ("Popish religion") and the Roman Catholic Relief Acts of 1791 and 1829 ("professing the Roman Catholic religion"). See also *McCausland* v. *Young* [1948] N.I. 72 at 90, where Black, J. refers to the Places of Worship Registration Act 1855, s. 2; the Roman Catholic Charities Act 1860, s. 1; and the Test Abolition Act 1867, s. 2.

[157] See *Trustees of Church Property of the Diocese of Newcastle* v. *Ebbeck* (1960) 104 C.L.R. 394 at 412.

[158] *In re Harris. National Trustees Company* v. *Sharpe* [1950] A.L.R. 353 at 357.

[159] The following statutes were mentioned in argument in *In re Samuel. Jacobs* v. *Ramsden* [1942] 1 Ch. 1 at 4, 5: Ballot Act 1872 ("persons of Jewish persuasion"); Friendly Societies Act 1896; Charitable Donations Registration Act 1812; Shops (Sunday Trading Restriction) Act 1936; Workshop Regulation Act 1867, and Amendment Act 1871 ("Persons professing the Jewish religion"); Factories Act 1937; Jews Relief Act 1858. See also the argument on appeal, in [1943] A.C. 320 at 323.

[160] *In re Samuel. Jacobs* v. *Ramsden* [1942] 1 Ch. 1 at 32 *per* Lord Greene, M.R.

dissent and held valid the condition for forfeiture on marriage to a person "not of the Jewish faith". But that was, he said, a "vaguer conception" than being or not being a Roman Catholic, and acceptance of the majority view in *Clayton v. Ramsden* did not involve the consequence that a condition of forfeiture on becoming a Roman Catholic was void for uncertainty. He agreed with the judges of the Irish Republic and Northern Ireland[161] that "it would be an affront to common sense to hold that a condition for forfeiture if the beneficiary should become a Roman Catholic is open to objection on the ground of uncertainty".[162] The only other of their Lordships to discuss the condition was Lord Edmund-Davies, who found it necessary to say only that he "would not hold it void for uncertainty".[163]

9. Conclusion

What then is the present position with regard to conditions subsequent in restraint of religion? On the one hand, there is the clear decision of the House of Lords that a condition subsequent relating to the "Jewish faith" is void for uncertainty. There is some ground for believing that the decision in *Clayton* v. *Ramsden* rested at least partly on the policy consideration that testators ought not be allowed to control from the grave the marriage partners and religious convictions of their beneficiaries.[164] Be that as it may, there is now an equally clear House of Lords decision that a condition subsequent relating to Roman Catholicism is not void for uncertainty. And lastly there is the rule that conditions precedent in restraint of religion will generally not be void for uncertainty. The question remains as to the effect of conditions subsequent in restraint of faiths other than Jewish or Roman Catholic.

It is submitted that as a general rule all conditions subsequent in restraint of religion should be held certain of expression, and should be allowed to fail, if at all, on the ground of uncertainty of operation only, that is, where the beneficiary cannot show that he *in fact* falls within the designation. There may be isolated instances where a named but obscure religious faith cannot be identfied or defined at all, but such cases will be rare. Certainly a reference to any *established* religious faith should not fail for uncertainty of expression. If the term "Roman Catholic" has a sufficiently defined meaning, surely the term "Protestant", or "Methodist", or "Presbyterian", or any other established religion is equally sufficiently defined.[165] That, it is suggested, is inherent in the approach taken by the High Court in *Ebbeck's Case,* discussed above.

There are several reasons in support of this submission. Firstly, it has been pointed out above that an examination of the decisions con-

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[161] In *In re McKenna* and *McCausland* v. *Young* (*supra*).
[162] [1976] A.C. 397 at 429.
[163] *Id.* at 411.
[164] [1943] A.C. 320 at 325 *per* Lord Atkin and at 332 *per* Lord Romer.
[165] See *Re Mills' Will Trusts. Yorkshire Insurance Co. Ltd.* v. *Coward* [1967] 1 W.L.R. 827; [1967] 2 All E.R. 193, *supra* n. 120.

cerning conditions precedent after *In re Allen* must lead to the conclusion that there is no uncertainty of expression in most conditions in restraint of religion. If a potential beneficiary is to be allowed the chance to prove that he falls within the terms of a condition precedent those terms must, *ex hypothesi,* be sufficiently certain of expression. And if a condition is sufficiently certain of expression when precedent there is no reason in logic why it should be any different when subsequent. On this reasoning, any condition in restraint of religion which is certain when precedent should be similarly certain when subsequent. Where the confusion has arisen is in the unduly narrow view taken of the rule in *Clavering* v. *Ellison.* Granted that the beneficiary (or the court) must be able to see from the outset, precisely and distinctly, the event which will cause forfeiture, as long as the condition is certain of expression there is no reason why it should fail because its application *may* be doubtful in *some* possible fact situations. That approach is taken by the Court of Appeal of Northern Ireland in *McCausland v. Young,* discussed above.

Secondly, what the court has to do in each case is to ascertain what the *testator* meant when he referred to the particular religious faith. The task of the court is not to define the terms used by the testator in any "absolute" sense,[166] but to interpret them "as any ordinary English phrase", giving them "the meaning in which they would naturally be used by the [testator] — the meaning assigned to them in ordinary everyday speech".[167] As the point has been expressed in a recent New Zealand case in this area:

> With respect one can hope that . . . the more modern and liberal rule will in time prevail and that where the intention of the testator . . . is sufficiently clear the Courts will give effect to it without demanding an unrealistic decree (*sic*) of precision and detail in the definition of the conditions under which the objects of his bounty may receive or retain the benefits thereof.[168]

Testators have a clear understanding of such terms as "Jewish faith", "Protestant faith", or "Roman Catholic faith" — used as ordinary English phrases — and their understanding ought to be given effect to by the law.[169] That is the approach taken by the Irish case of *In re McKenna,* and by the High Court in *In re Cuming,* both of which cases are discussed above.

Finally, reference has been made earlier to the principle in *In re*

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[166] *In re Cuming. Nicholls* v. *Public Trustee* (1945) 72 C.L.R. 86 at 98.

[167] *McCausland* v. *Young* [1949] N.I. 49 at 57 *per,* Andrews, L.C.J.

[168] *Re Balkind* [1969] N.Z.L.R. 669 at 671, *per* Wilson, J., finding indications of such an approach in the judgments of the High Court in *Ebbeck's Case.* Similar remarks were made by Birkett, L.J. in *In re Allen. Faith* v. *Allen* [1953] Ch. 810 at 823. See also the sentiments of Lord Denning, M.R. in *Re Allsop* [1968] 1 Ch. 39 at 47.

[169] *Cf. In re Crane. The Equity Trustees Executors and Agency Co. Ltd.* v. *Crane* [1950] V.L.R. 192 at 196 ("be brought up according to the rites of the Church of England"): "It is one thing to understand the phrase for everyday purposes, and quite another to know precisely what is meant. . . ." But surely the testator *meant* the everyday understanding of the phrase.

Coxen,[170] namely, that uncertainty of operation may be cured by vesting in someone the absolute power to decide whether or not events have occurred which will bring the condition into play. It was also pointed out that such a device could not save a condition from failure for uncertainty of expression. There is recent authority to the effect that a condition subsequent providing for forfeiture on the ground, *inter alia,* of failure to adhere to "the Jewish faith" (and so clearly void for uncertainty under *Clayton* v. *Ramsden*) will be saved by vesting in someone the power to decide whether or not the beneficiary has failed to adhere to the Jewish faith.[171] Such a decision can only be correct if there is no uncertainty of expression in the phrase "the Jewish faith".

[170] [1948] Ch. 747, *supra* nn. 13-27.

[171] *In re Tuck's Settlement Trusts. Public Trustee* v. *Tuck* [1976] 2 W.L.R. 345 at 360 with particular reference to definition of "approved wife" and condition (3) of clause 3(c). See *Note* (1976) 40 *Conv.* (*N.S.*) 240. This solution to the problem raised by *Clayton* v. *Ramsden* has for some time been suggested by leading conveyancing precedent books, and is discussed at (1962) 233 *L.T.* 187-88.