IN THE PRIVY COUNCIL. 61, 1930 No. 127 of 1929.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

IN THE MATTER of the ESTATE of WILLIAM ROBERT PATTON, Deceased.

BETWEEN—
WILLIAM ROBERT PATTON (Defendant) *Appellant*

— AND —

THE TORONTO GENERAL TRUSTS CORPORATION and ANNIE LOUISE CARLYLE (as Executors), ANNIE LOUISE CARLYLE and MARY JOSEPHINE MACDONALD - - - - - *Respondents.*

THOMAS W. CARLYLE

APPELLANT'S CASE.

Case for the Appellant

RECORD

1. This is an Appeal by William Robert Patton, hereinafter called the Appellant, a grandson, and a beneficiary under the Will, of William Robert Patton, deceased, from the Judgment of the Appellate Division of the Supreme Court of Ontario pronounced on the 5th day of April, 1929, p. 21 dismissing the Appellant's Appeal from the Judgment of the Honourable Mr. Justice Middleton, pronounced on the 7th day of November, 1928, p. 15 upon an originating motion brought by the respondent, The Toronto General Trusts Corporation, et al, (hereinafter called the trustees) for p. 1 construction of the Will of the said deceased, holding that in the events which had happened, the Appellant was not entitled to take either of the annuities of $500.00 or $1,500.00 a year bequeathed to him by the deceased.

2. The portions of the Will to be specially considered are Clauses (c) Ex. A, p 26 and (d), parts of which read as follows:

(c) To invest and keep invested the proceeds of my estate . . . and provided and so long as my Grandson, William Robert Patton, the son of my said son, Robert George Patton, is and remains until the date of his death, a British Subject, and is and proves himself to be until the date of his death, of the Lutheran Religion, to pay to my said Grandson, William Robert Patton, for and during the term of his natural life, the sum of Five Hundred Dollars ($500.00) a year, payable quarterly; it being my wish and intention that until my said Grandson attains the age of twenty-five years, said annuity is to be paid to his mother, to be controlled by her for the benefit and interest of my said Grandson, until his twenty-fifth year, and on attaining the said age of twenty-five years, I direct that said annuity shall be paid to my Grandson direct.

RECORD

(d) On the decease of my said son, Robert George Patton, the above mentioned annuity so to be paid to him, provided the conditions on which said annuity is given have been fulfilled shall be then paid to my said Grandson, William Robert Patton, for and during the term of his natural life, on condition as above mentioned that he is and remains a British Subject, and is and proves himself to be of the Lutheran religion.

p. 11

3. The Honourable Mr. Justice Middleton in his reasons for Judgment held that, the Appellant in order to take the annuities bequeathed to him in clauses c and d, of the Will, must have complied with the conditions of being and proving himself to be a Lutheran at the time of the
p. 14, l. 10-30 Testator's death, even though then only an infant, and that as the Appellant had not fulfilled such conditions at that time the gifts of the two annuities to him failed.

4. Upon an appeal by the Appellant to the Appellate Division of the Supreme Court of Ontario the Court being equally divided in opinion the appeal was accordingly dismissed without costs.

5. The Appellant is the only direct descendant and heir of the Testa-
p. 5, l. 32 tor; and attained his majority on the 5th day of January, 1927. He was,
p. 24, l. 40 therefore, thirteen years old when the Testator died. The Appellant's
p. 24, l. 13 parents at the time of the Testator's death were educating him as a
p. 5, l. 10 Roman Catholic. The evidence is to the effect that the Testator knew
p. 5, l. 12 this; that the Appellant was unable by reason of his minority and the exer-
p. 6, l. 31 cise by his parents of authority over him to comply with the said Will
p. 6, l. 37 (though willing to do so) until arriving at the age of twenty-one years,
p. 7, l. 30 when the Appellant openly and formally adopted the Lutheran religion in
p. 4, l. 17 compliance with the conditions in the said Will; also that the Appellant's father died on the Fourth day of July, 1928.

6. It is to be noted that the Testator does not use merely the words,
p. 26, l. 19 "provided my grandson is . . . of the Lutheran religion", but uses the words
p. 26, l. 38 "is and proves himself to be of the Lutheran religion". It is submitted that the addition of the words "proves himself to be" indicates that the Testator meant that the Appellant was required to determine (apart from his parents) that his religion should be Lutheran, in order to comply with the conditions imposed by the Testator.

p. 6, l. 31

7. But the Appellant being an infant thirteen years old at the Testator's death was not able to himself personally adopt or in contemplation of law to be or prove himself to be, of any religion until arriving at the age of twenty-one years, when the evidence shows he did openly and
p. 6, l. 37 unquestionably adopt the Lutheran religion.

8. As the Testator clearly intended that the Appellant in order to take the Annuities in question must personally (apart from his parents) determine, and prove himself, to be of the Lutheran religion, and as it was impossible for the Appellant to determine and prove himself to be of the

Lutheran religion until he became of the full age of twenty-one years, it is submitted that the Testator in contemplation of law, could not have intended that the Appellant, in the contingency of the Appellant being a minor at the Testator's death, should be bound by the condition in question until arriving at the age of twenty-one years, and then becoming able to personally determine his religion for himself, apart from his parents, as the Testator, apparently, desired should be done. The Testator clearly could not have intended to require the Appellant, then an infant, to do what was impossible for the time being for him to do. RECORD

9. If the condition in question was intended by the Testator to operate during the infancy and disability of the Appellant, it would be reasonable to expect that it should be expressed in the form of a direction that he should be brought up as a Lutheran, putting thus a requirement upon the Appellant's father which he was capable of performing, the performance of which would operate for the Appellant's benefit. In the absence of such language we are surely not to attribute mere caprice to the Testator as an impelling motive to impose conditions to operate during the minority of the Appellant when he could not comply therewith.

10. It is submitted that the Testator must have had a definite motive or purpose in laying down the condition in question and that it must naturally have been because he considered the Lutheran his own religion was best for the spiritual well-being of his grandson. To hold, therefore, that the Testator meant that the condition must be complied with at the time of the Testator's own death, when the Appellant was only thirteen years old and under disability and unable to comply therewith until arriving at the age of twenty-one years, would be to actually defeat the obvious purposes and intentions and wishes of the Testator, and to place a construction upon his Will which he could not reasonably or in the very nature of the surrounding and inherent facts and circumstances and evidence presented to the Court, have intended.

11. It is further submitted that such a construction should be placed upon the said Will as will make the conditions in question reasonably operative and the Testator's entire dispositions valid, rather than to defeat the very large and substantial benefits conferred on the Appellant grandson and extending to the great grandchildren of the Testator.

12. Then referring to the $1,500.00 annuity, it being upon the death of the Testator's son Robert that the Appellant is to enjoy this annuity, it is submitted that it is upon his death that the Appellant is first called upon to prove himself to be of the Lutheran religion in order to enjoy his gift, because the annuity is only then to be paid to him on the condition that "he is and proves himself to be of the Lutheran religion." p. 26, l. 38

13. It is submitted that an entirely unnecessary significance has been given by the Judgment appealed from to the words, "as above mentioned", contained in clause (d) of the Will; that the ordinary reasonable p. 26, l. 37

RECORD

and proper significance of these words as so used is simply to emphasize the terms of the condition (as being the same condition already expressed
p. 26, l. 16 in regard to the $500.00 Annuity) upon which the grandson is to receive the $1,500.00 Annuity on the death of the Testator's own son provided he then "is and proves himself to be of the Lutheran religion."

14. As to the $1,500.00 annuity the effect given by the Judgment appealed from to the words, "as above mentioned", is the same as if the Testator had used the words, "has proved himself to be of the Lutheran religion at the time of my death", that is, is to give the same effect to the words of the condition as if the Testator had used the past tense, whereas
p. 26, l. 37 the Testator uses the present tense, namely:—"provided . . . he is and remains a British Subject and is and proves himself to be of the Lutheran religion". It is submitted that the fact that the Testator has used the present tense makes it necessary, if the plain, literal construction of the context is to be followed, to hold that the fulfilment of the condition is to take place at the time of the death, not of the Testator but, of the Testator's son Robert.

15. It is further submitted that the letter, Exhibit "D", from the
Ex. D, p. 33, l. 20 Testator to his son Robert, and not to be delivered to him until after the Testator's decease, clearly shows that the Testator intended and expected both his son and his grandson, the Appellant, to have an opportunity to comply with the conditions in question. This letter states that the Testa-
p. 33, l. 33 tor's son "will receive a copy of my Last Will and Testament," and further states "you may now understand the provisoes of my Will and act accordingly". The words "act accordingly", seeing that the letter in
p. 33, l. 40 question was not to be and was not delivered to the Testator's son till after the Testator's death, could not possibly or at all reasonably be held to mean anything else than that the Testator expected and intended that his son and his grandson would be entitled to comply with or conform to the Testator's said wishes, "provisoes" and conditions, and that only if they neglected or refused to do so(after the Testator's death) they were to be disinherited.

16. The Appellant attained his majority and complied with the con-
p. 5, l. 30-33 dition in clause (d) during the lifetime of his father, and hence before the $1,500.00 Annuity became payable to him.

17. It is, therefore, submitted that the Appellant is entitled to receive payment of the $500.00 Annuity as and from the date of the Testator's death, and payment of the $1,500.00 Annuity as and from the date of the death of the Appellant's father, and further that the Appeal of the Appellant ought to be allowed with costs of this Appeal and of the Appeal to the Appellate Division of the Supreme Court of Ontario for the following, among other,

REASONS.

(1) Because the Testator could not reasonably have meant and obviously did not mean that the conditions in question should be binding on the Appellant during his infancy.

(2) Because the Appellant while an infant could not "prove himself to be" of the Lutheran religion under the circumstances in question.

(3) Because if the Testator had wished the gift to be conditional on the Appellant's parents bringing him up in the Lutheran religion, he could and would have said so.

(4) Because full and proper effect and significance has not been given to the words "proves himself to be."

(5) Because, as to the $1,500.00 Annuity, the words, "as above mentioned", in no way require the effect to be given to them, which has been done.

(6) Because, the words used in clause (d), clearly and reasonably admit of a construction making the gift to the Appellant valid and operative and that construction should therefore be placed thereon.

(7) Because the use of the present tense in clause (d), upon a literal construction thereof, must be taken to signify that the time for qualifying for the $1,500.00 annuity was the death of the Testator's son Robert, and not the Testator's own death.

(8) Because to construe the Will as necessarily speaking from the death would obviously be to defeat the quite apparent aims, purposes and intentions of the Testator, in laying down such a condition as to the Appellant's religion.

(9) Because the use of the additional words, "proves himself to be", clearly imply something to be done by the Appellant (apart from his parents) which the Appellant, under the circumstances in question was accordingly excused from complying with during his infancy.

(10) Because there can be no reasonable doubt, that the Testator's sole object in imposing the conditions in question, as to the religion of his son and of the Appellant, was to cause them each severally to determine to adopt, and to adopt and adhere to his own, the Lutheran, religion, which object was fully attained.

(11) Because the letter, Exhibit "D" by the Testator to his son Robert, clearly and unquestionably shows that he expected and intended that both his son and his grandson should have a chance or opportunity of complying with the conditions in question after the Testator's death.

(12) Because the Appellant in fact fully complied with the conditions in the said Will as soon as it was possible for him to do so, and that undoubtedly was what, and all that, the Testator required or intended should be done.

J. H. FRASER.

No. 127 of 1929.

In the Privy Council.

ON APPEAL

From the Appellate Division of the Supreme Court of Ontario.

IN THE MATTER of the ESTATE of WILLIAM ROBERT PATTON, Deceased.

Between—

WILLIAM ROBERT PATTON

(Defendant) Appellant

— and —

THE TORONTO GENERAL TRUSTS CORPORATION, and ANNIE LOUISE CARLYLE (as Executors), ANNIE LOUISE CARLYLE and MARY JOSEPHINE MACDONALD

Respondents.

Case for Appellant

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