

61.1420

NUMBER

OF 19.....

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, late of the
City of Toronto, Canada, Deceased.

Record of Proceedings

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Toronto, Canada,
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London Agents for Appellant.

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Trusts Corporation et al Respondents.*

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The Toronto General Trust Corporation,
et al.*

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Toronto, Canada,
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one of the Respondents.*

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*London Agents for Respondent,
Annie Louise Carlyle.*

MACOOMB PRESS
TORONTO

RECORD OF PROCEEDINGS.

IN THE PRIVY COUNCIL

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

IN THE MATTER OF the Estate of William Robert Patton, Deceased.

RECORD OF PROCEEDINGS.

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PART I.

PROCEEDINGS, JUDGMENTS, &c.:

Originating Notice of Motion to Weekly Court by Executors of William Robert Patton, Deceased.

IN THE SUPREME COURT OF ONTARIO.

IN THE ESTATE OF WILLIAM ROBERT PATTON, late of the City of Toronto, Esquire, Deceased.

TAKE NOTICE that the Court will be moved on behalf of The Toronto General Trusts Corporation, Thomas W. Carlyle, and Annie Louise Carlyle, executors of the last Will and Testament of the above named William Robert Patton, deceased, on Monday, the fifth day of November, 1928, at the hour of eleven o'clock in the forenoon or so soon thereafter as Counsel can be heard for the determination of the following questions arising in the administration of the estate of the said deceased—

1. Is William Robert Patton entitled to have paid to him the sum of Five hundred dollars a year during his lifetime as directed in clause (c) of the last Will and Testament of the said deceased?

2. Is the said William Robert Patton entitled to have paid to him from and after the death of Robert George Patton and thereafter during the lifetime of the said William Robert Patton the annuity of one thousand five hundred dollars per year paid to the said Robert George Patton during his lifetime?

AND TAKE NOTICE that upon the said Motion will be read the affidavit of James Lang filed and the exhibits therein referred to.

DATED this 24th day of October, 1928.

Malone, Malone, Sedgewick and Montgomery,
255 Bay Street, Toronto, Solicitors
for the above-named Executors.

To—Kappele and Kappele, Solicitors for
30 William Robert Patton; Macdonald and
Macdonald, Solicitors for Annie Louise
Carlyle, and to Thomas W. Carlyle,
Mrs. M. J. Macdonald, Joseph Churchill Patton,
George C. Patton, Robert George
Patton and all others having any interest
under the said Will.

RECORD

*In the
Supreme
Court of
Ontario*

No. 1
Originating
notice of
motion to
weekly
court by
executors
of William
Robert
Patton,
deceased,
24th Octo-
ber, 1928

RECORD

In the
Supreme
Court of
Ontario

No. 2
Affidavit
of James
Lang,
20th
October,
1928

AFFIDAVIT OF JAMES LANG.

In Support of Originating Motion Filed by The Toronto General Trusts Corporation et al Executors.

IN THE SUPREME COURT OF ONTARIO.

IN THE ESTATE OF WILLIAM ROBERT PATTON, late of the City of Toronto, Esquire, Deceased.

I, JAMES LANG of the City of Toronto in the County of York make oath and say:—

1. I am Estates Manager of The Toronto General Trusts Corporation and have knowledge of the matters herein deposed to. 10

2. Now produced and shown to me marked Exhibit "A" to this my affidavit is the probate of the last Will and Testament of the above named William Robert Patton, deceased. The said Will contains the following provisions:—

"(c) To invest and keep invested the proceeds of my estate in such Securities as Trustees are by the Laws of the Province of Ontario allowed to invest trust funds, and from and out of said income so derivable from my estate, provided my Son, Robert George Patton, now residing in Cologne, Germany, is and remains up to the date of his death, a British Subject, and is and proves himself to be of the 20 Lutheran Religion, to pay to my said Son, Robert George Patton, annually for and during the term of his natural life, the sum of One thousand five hundred dollars (\$1,500.00) in quarterly payments, 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 a year, payable quarterly, it being my wish and intention that until my said Grandson 30 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. In case of the decease of the Mother of the said William Robert Patton, before the said William Robert Patton attains the age of twenty-five years I direct that said payments so to be made for the benefit of my said Grandson shall be paid by my Trustees above-mentioned for his maintenance, education, care and advancement in life; 40

(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 the condition as above-mentioned that he is and remains a British Subject and is and proves himself to be of the Lutheran Religion;

10 (e) On the decease of my said Grandson, William Robert Patton, he having remained a British Subject up to the time of his death and having proved himself to be and remaining of the Lutheran Religion up to the time of his death, I direct that the money so set apart for the payment of said annuity to his father and himself, shall be paid and distributed by my Trustees among such of the lawful issue (child or children) of my said Grandson as he shall by his last Will and Testament appoint or direct;

20 (f) In the event of either my said Son or Grandson not having remained until the date of their death, British Subjects and of the Lutheran Religion, I direct that the bequests herein made for their benefit, shall absolutely cease and be of no effect, and that the said money above-mentioned so set apart for their use and benefit, shall revert and become part of the residue of my estate."

3. Now produced and shown to me marked Exhibit "B" to this my affidavit is a file consisting of three affidavits made respectively by William Robert Patton, Robert George Patton, and Carl Wendland and an affidavit in German by Councillor of Justice Heinz Schrammen and a translation thereof and a certificate in German certifying that the said Heinz Schrammen is duly admitted to practise as an attorney at law in the County and District Court at Cologne all of which documents have been furnished to The Toronto General Trusts Corporation by the solicitor for William Robert Patton, the grandson of the said deceased.

4. The said William Robert Patton, grandson of the said deceased, claims that he is entitled to the annual payment of Five hundred dollars a year provided to be paid to him under the conditions set forth in the Will during the lifetime of his father, Robert George Patton.

5. The Toronto General Trusts Corporation desires that the rights of the said William Robert Patton, grandson of the said deceased, should be determined in order that the said The Toronto General Trusts Corporation as executors of the Will of the said deceased may properly administer the estate of the said deceased.

40 6. Now produced and shown to me marked Exhibit "C" to this my affidavit are letters received from William Robert Patton by The Toronto General Trusts Corporation as follows:—

RECORD
In the
Supreme
Court of
Ontario

No. 2
Affidavit
of James
Lang,
20th
October,
1928
—Continued

RECORD

In the
Supreme
Court of
Ontario

26 September, 1919
March 8th, 1922
July 12th, 1922, and
September 14th, 1922.

No. 2
Affidavit
of James
Lang,
20th
October,
1928
—Continued

7. In one or more of the letters marked Exhibit "C" above mentioned there is reference to a letter written to Robert George Patton by the above named deceased to be delivered to the said Robert George Patton after the decease of the above named William Robert Patton. Upon a claim being made by William Robert Patton, grandson of the said deceased, the solicitors for The Toronto General Trusts Corporation asked the solicitor for the said William Robert Patton, grandson of the said deceased, to furnish them with a copy of the said letter. The said solicitors have now been furnished with what purports to be a photostatic copy of the said letter and a typewritten copy thereof and a typewritten translation thereof, which documents are now produced and shown to me marked Exhibit "D" to this my affidavit.

8. The Toronto General Trusts Corporation have been notified of the death of Robert George Patton at Cologne, Germany, on the fourth day of July, 1928, and the said William Robert Patton, grandson of the said deceased, now claims that he is entitled to the benefits provided for him in the Will upon the death of the said Robert George Patton and that he is qualified and entitled to receive the same.

9. The solicitor for the said William Robert Patton, grandson of the said deceased, has requested The Toronto General Trusts Corporation to apply to the Court for the determination of the questions raised by the said William Robert Patton.

SWORN before me at the City of
Toronto in the County of York this
20th day of October, 1928.

JAMES LANG.

R. S. CASSELS,
A Commr., &c.

30

AFFIDAVIT OF ROBERT GEORGE PATTON.

Furnished by Appellant to, and Filed on Originating Motion by, The
Toronto General Trusts Corporation, et al Executors.

IN THE SURROGATE COURT OF THE COUNTY OF YORK.

IN THE ESTATE OF William Robert Patton, late of the City of Toronto,
Canada, Deceased.

I, Robert George Patton, of the City of Cologne in the Republic of
Germany, Esquire, make oath and say:

(1) I am the son of the said William Robert Patton, Deceased, referred to in his last Will and Testament dated the 22nd day of December,

No. 3
Affidavit
of Robert
George
Patton,
6th
February,
1928

1917, and in which Will The Toronto General Trusts Corporation of Toronto and Thomas W. Carlyle are named as Executors and Trustees and have full knowledge of the matters herein deposed to.

(2) I am the Father of William Robert Patton, a grandson of the said deceased, and referred to in his said last Will and Testament.

(3) I have read over the Will of the said William Robert Patton, deceased, and am familiar with its terms and conditions.

(4) My said son, William Robert Patton, is at the present time and always has been a British Subject.

10 (5) At the time my said Father made his said Will, and thereafter down to the date of my said Father's death, my said son William Robert Patton was, as I verily believe to the knowledge of my said Father, a British Subject and a minor domiciled at the City of Cologne, Germany, and was being brought up a Roman Catholic by religion.

(6) My said son, William Robert Patton, at the date of my said Father's death was still an infant under the age of twenty-one years, and although, as I verily believe, perfectly willing to change his religion from that of the Roman Catholic to the Lutheran religion, was unable to do so by reason of his minority, but subsequently, immediately upon
20 arriving at the age of twenty-one years renounced the Roman Catholic faith and adopted the Lutheran religion, referred to in my father's said Will.

(7) I verily believe that the object of my said Father in preparing his said Will and laying down the conditions therein, in reference to my said son, as he did, was to influence my said son to abandon the Roman Catholic faith and adopt the Lutheran religion, which object or purpose of my said Father was, I believe then fully accomplished when my said son immediately upon arriving at the full age of twenty-one years formally adopted the Lutheran religion.

30 (8) Ever since attaining the age of twenty-one years my said son has remained and still is a member of the Lutheran religion or faith.

(9) My said son, William Robert Patton, became of the full age of twenty-one years on the fifth day of January, 1927.

(10) I verily believe that my said son has in all respects duly complied with and conformed to the wishes and intentions and conditions correctly understood and interpreted contained in my father's said Will, and always has and still does so comply with and conform to such wishes and conditions correctly understood and interpreted, as aforesaid, and is, as I verily believe, justly and truly entitled to receive and be paid the
40 annuities and moneys and full benefits given to him by my Father's said Will.

RECORD

In the
Supreme
Court of
Ontario

No. 3
Affidavit
of Robert
George
Patton,
6th
February,
1928

—Continued

In the
Supreme
Court of
Ontario

No. 3
Affidavit
of Robert
George
Patton,
6th
February,
1928

—Continued

No. 4
Affidavit
of William
Robert
Patton,
6th
February,
1928

(11) I have myself conformed to the conditions set out in my Father's said Will in regard to myself, and have been in receipt, and still am in receipt of the benefits and moneys left to me by my Father's said Will.

SWORN before me at the City of Cologne, in the Republic of Germany, the sixth day of February, 1928.

"R. G. PATTON."

"A. G. FALLOWFIELD,"

British Vice-Consul.

(Seal)

10

AFFIDAVIT OF WILLIAM ROBERT PATTON.

Furnished by Appellant to, and Filed on Originating Motion by, The Toronto General Trusts Corporation et al Executors.

IN THE SURROGATE COURT OF THE COUNTY OF YORK.

IN THE ESTATE OF William Robert Patton, late of the City of Toronto, Canada, Deceased.

I, WILLIAM ROBERT PATTON, of the City of Cologne, in the Republic of Germany, Esquire, make oath and say:—

(1) I am the grandson of the said Testator, William Robert Patton, deceased, and am familiar with the portion of my said grandfather's Will which relates to myself. 20

(2) At the time my said grandfather made his said Will, and since then down to the time of his death, and since then down to the present time, I was and am, a British Subject and domiciled at the City of Cologne, in the Republic of Germany, all of which facts I verily believe my said grandfather was fully cognizant of.

(3) In regard to the condition in my grandfather's said Will that I should be a Member of the Lutheran religion I make oath and say that I was familiar with said condition and was always perfectly willing and anxious to comply therewith, but being a minor and still under the age of twenty-one years at the time of my said grandfather's death, I was not able or qualified by reason of the laws in force at the said City of Cologne, the place of my domicile, to adopt the Lutheran religion, and so comply with my grandfather's said Will, as literally construed, which, however, I verily believe, is not the way my grandfather intended his Will to be interpreted. 30

(4) Immediately upon attaining the age of twenty-one years, I formally adopted the Lutheran religion and have ever since remained and still am, solely a member of the said Lutheran religion, referred to in my grandfather's said Will.

(5) I have, as I verily believe fully complied in all respects with and completely conformed to all the conditions referred to in my grandfather's said Will, in regard to myself, in the way that my said grandfather, as I verily believe, intended or meant that the same should be complied with or conformed to, and I verily believe that I am justly and truly entitled to the moneys and benefits conferred upon me by my grandfather's said Will.

SWORN before me at the City of Cologne, in the Republic of Germany, the 6th day of February, 1928.

"A. G. FALLOWFIELD,"

British Vice-Consul. (Seal)

"WILLIAM ROBERT PATTON."

*In the
Supreme
Court of
Ontario*

No. 4
Affidavit
of William
Robert
Patton,
6th
February,
1928

—Continued

No. 5
Affidavit
of Carl
Wendland,
9th
February,
1928

AFFIDAVIT OF CARL WENDLAND.

Furnished by Appellant to, and Filed on Originating Motion by, The Toronto General Trusts Corporation et al Executors.

IN THE SURROGATE COURT OF THE COUNTY OF YORK.

IN THE ESTATE OF William Robert Patton, late of the City of Toronto, Canada, Deceased.

20 I, Carl Wendland, of the City of Cologne in the Republic of Germany, Clergyman, make oath and say:—

(1) I am a Clergyman of the Protestant Lutheran Church or religion of Germany, and am actively engaged at the present time in such profession of Clergyman at the said City of Cologne, and in charge of a Church or Congregation there.

(2) I am fully acquainted with William Robert Patton of the said City of Cologne, who is a son of Robert George Patton, of the same place, and who as I verily believe, is a son of William Robert Patton, late of the City of Toronto, Esquire, deceased.

30 (3) The said grandson, William Robert Patton, is a Member of the Lutheran Church, over which I am a Pastor at the said City of Cologne, and has been ever since the 30th day of January, 1927, and still is to my own personal knowledge, a Member of the Lutheran religion or faith.

(4) I am informed and verily believe that the date upon which the said William Robert Patton, grandson of the said Testator William Robert Patton, formally adopted the Lutheran religion was the date

*In the
Supreme
Court of
Ontario*

when the said grandson William Robert Patton attained the full age of twenty-one years.

No. 5
Affidavit
of Carl
Wendland,
9th
February,
1928
—Continued

SWORN before me at the City of Cologne, in the Republic of Germany, the ninth day of February, 1928.

CARL WENDLAND.

“A. G. FALLOWFIELD,”
British Vice-Consul. (Seal)

No. 6
Affidavit
of Heinz
Schrammen,
16th
February,
1928

AFFIDAVIT OF HEINZ SCHRAMMEN.

Furnished by Appellant to, and Filed on Originating Motion by, The10
Toronto General Trusts Corporation et al Executors.

IN THE SURROGATE COURT OF THE COUNTY OF YORK.

IN THE ESTATE OF William Robert Patton, late of the City of Toronto,
Canada, Deceased.

I, Councillor of Justice, Heinz Schrammen, of the City of Cologne, of Cologne on the Rhein, in the Republic of Germany, Attorney at law, make oath and say:

(1) I am an attorney at law practicing and familiar with the laws in force in the said City of Cologne, and have full knowledge of the matters herein deposed to. 20

(2) I have been engaged as such attorney in active practice for upwards of twenty-seven years (27).

(3) The German Civil Code which is in force since the 1st day of January, 1900, and which is also the law in force in the City of New York, provides in paragraph 1626:

“The infant (child) during minority is under parental power.”
Paragraph 1627:

“By reason of the parental power, the father has the right and the duty to care for the person and the estate of the infant (child).”
Paragraph 1631 provides: 30

“The care for the person of the infant (child) includes the right and the duty to bring up, to supervise and to determine as to the domicile of the infant (child).”

“The bringing up (education) of the infant (child) includes the religious education. During marriage, however, no spouse without the consent of the other is entitled to determine that the infant (child) be brought up in a religion other than that both spouses had at the time they

entered into marriage or in any other religion, or that the infant (child) be withdrawn from the theology classes in school."

By me the German Civil Code provides in Paragraph 2:

"A person attains majority upon reaching the age of (21) twenty-one years."

SWORN before me at the City of Cologne, in the Republic of Germany, the 16th day of February, 1928.

10 "A. G. FALLOWFIELD,"
British Vice-Consul.

HEINZ SCHRAMMEN, Justizrat.

Seal British Consulate General,
Cologne.

RECORD

In the
Supreme
Court of
Ontario

No. 6
Affidavit
of Heinz
Schram-
men,
16th
February,
1928
—Continued

No. 7
Affidavit
of Georg
Peiser,
27th
Septem-
ber, 1928

AFFIDAVIT OF GEORG PEISER.

Filed by Annie Louise Carlyle on Originating Motion.

GERMANY.

I, GEORG PEISER, of 31, Markgrafenstrasse, Berlin, in the Republic of Germany, make oath and say as follows:

1. I have practised as a German Attorney for the last 33 years and as a Public Notary for the last seven years and am acquainted with the laws prevailing in Germany.

20 2. In Germany the "Burgerliche Gesetzbuch" (B.G.B.) applies to the civil law and for the whole of the territory of the German Republic and therefore to Cologne.

3. Paragraphs 1616 of BGB deal with the legal position of children born in wedlock.

Paragraph 1616 decrees:

A child is under the control of the parents as long as it is under age.

Paragraph 1631 decrees:

The care of the child itself comprises the right and duty to educate the child, to supervise and to determine its residence.

30

With regard to the religious upbringing the laws of the single German States through article 134 of the Introductory Act of BGB apply. In so far as the laws of the single States do not provide otherwise such parent entrusted with the education, as a rule this being the father, has

RECORD
 In the
 Supreme
 Court of
 Ontario

No. 7
 Affidavit
 of Georg
 Peiser,
 27th
 September,
 1928
 —Continued

the right to determine the religion of the child. The observance of the provisions in regard to the religious upbringing of the child may be enforced by the Court of Chancery.

4. The following should however be taken note of:

According to paragraph 19 of the Introductory Act of B. G. B. the legal family connections between parents and their legitimate offspring are regulated according to the law of the nationality of the father. Therefore English law applied to the legal relations between father and child.

I would however mention, that the German Court of Chancery is competent also in case of foreign law being applied, to make arrangements to safeguard the child against spiritual or bodily harm.

Therefore in consideration of the above I answer the questions put to me as follows:

(1) Which parent has the right to determine in what religion the child shall be brought up?

(2) Is the father entitled to this right or the mother or both of them?

(3) If they both of them have the right, who is entitled to intervene and who decides in case of a difference of opinion on the part of the parents in regard to what religion the child should be brought up in? 20

In regard to (1) and (2)

In the first line the father has the right.

In case of a failing of the power of the father, the mother.

In regard to (3)

In case of a difference of opinion, the Court of Chancery decides.

Berlin, den 27. September, 1928,
 (Georg Peiser)

Beschworen von dem Rechtsanwalt
 und Notar Justizrat Georg Peiser,
 Berlin, W. 8. Markgrafenstrasse 31
 vor mir, dem unterzeichneten Notar.

Number 66 des Notariatsregisters 1928

Berlin, den 27. September 1928.

(Arthur Landsberger)

Notar

in Bezirk des Preussischen Kammergerichts.

(SEAL)

REASONS FOR JUDGMENT OF HON. MR. JUSTICE MIDDLETON.

S.C.O.
IN THE MATTER OF THE
ESTATE OF WILLIAM
ROBERT PATTON.

Copy of Judgment of Middleton, J.A.,
delivered 7th November, 1928.

SEDGEWICK, for the executors.

CHARLES KAPPELE, for William

Patton.

DONALD MACDONALD, for Annie

Louise Carlisle and Mary J.

Macdonald.

November 5th, 1928.

RECORD

In the
Supreme
Court of
Ontario

No. 8

Reasons for
judgment
of Hon.
Mr. Justice
Middleton,
7th
November,
1928

10 Motion by the executors for the determination of the questions:
Firstly, Whether William Robert Patton is entitled to have paid to him
the annuity of \$500.00 a year referred to in the will of the testator; and
secondly: Whether the said William Robert Patton upon the death of
his father Robert George Patton became entitled to be paid the further
annuity of \$1,500 referred to in the will of the testator.

William Robert Patton, at the time of his death having a fixed place
of abode in the City of Toronto, but being then in England, departed
this life on the 26th day of February, 1919, having first made and pub-
lished his last will and testament dated the 22nd of December, 1917.
20 This will was duly admitted to probate on the 9th day of June, 1919.

By this will, after making certain specific gifts, it is provided that
the executors shall invest the proceeds of the estate and from the income
derived therefrom;

“Provided my son Robert George Patton now residing at Cologne,
Germany, is and remains up to the date of his death a British Subject,
and is and proves himself to be of the Lutheran Religion, to pay to my
said son Robert George Patton annually for and during the term of his
natural life the sum of one thousand five hundred dollars, in quarterly
payments and provided and so long as my grandson William Robert Patton
30son 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 a year, payable quarterly.”

This is followed by provisions authorizing the expenditure of an
annuity for the benefit of the grandson until he attains his twenty-fifth
year. These are not material to the questions now discussed.

The will contains the further clause:

40 “On the decease of my said son Robert George Patton the above men-
tioned 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 the
condition as above mentioned that he is and remains a British Subject
and is and proves himself to be of the Lutheran Religion.”

RECORD

In the
Supreme
Court of
Ontario

No. 8
Reasons for
judgment
of Hon.
Mr. Justice
Middleton,
7th
November,
1928

—Continued

The will further provides that upon the decease of the grandson, "he having remained a British Subject up to the time of his death and having proved himself to be and remaining of the Lutheran Religion up to the time of his death," the money set apart to provide the annuity for his father and himself shall be distributed among the lawful issue of the grandson as he may by his will appoint, but in the event of the son or grandson "not having remained until the date of their death British Subjects and of the Lutheran Religion" the testator provides that the bequests herein made for their benefit shall absolutely cease and be of no effect, and the money set apart for their use and benefit shall become¹⁰ part of the residuary estate and be paid over accordingly. The remaining provisions of the will are not material.

Robert George Patton the son was always a British Subject and remained so until his death. He was also of the Lutheran faith, and remained so until the time of his death, and the annuity given to him was paid to him so long as he lived. He died on the 4th of July, 1928, after having sworn to one of the affidavits upon which this motion is based.

William Robert Patton, the grandson, was, at the time of his grandfather's death, an infant it is said of the age of thirteen. He became of age on the 5th of January, 1927. His mother, I am told, though this does²⁰ not appear upon the material, was a member of the Roman Catholic Church and for this reason her son was brought up as a member of that Church, and remained a member of it until after he had attained his majority. He then, to quote from his own affidavit, "formally adopted the Lutheran Religion" and has ever since remained and still is solely "a member of the said Lutheran religion." In this he is confirmed by his father's affidavit, and also by the affidavit of a clergyman of the Protestant Lutheran Church at Cologne. He fixes the date upon which he "formally adopted the Lutheran religion" as the 30th of January, 1927.

The reason for the delay in the change of faith is thus described by³⁰ the son, who, after stating his knowledge of the condition in the will and his willingness and anxiety to comply therewith, adds "but being a minor and still under the age of twenty-one years at the time of my said grandfather's death, I was not able or qualified by reason of the laws in force at the City of Cologne, the place of my domicile, to adopt the Lutheran religion and so comply with my grandfather's said will as literally construed, which, however, I verily believe is not the way my grandfather intended his said will to be interpreted."

This statement is confirmed by the father, who states that his son "although perfectly willing to change his religion from that of the Roman⁴⁰ Catholic to Lutheran religion, was unable to do so by reason of his minority." This statement is in conflict with communications received by the Trust Company from the father.

On the 26th September, 1919, he wrote:

“As to my son I add that he is of Roman Catholic faith. The reason that I had to educate my son in that faith I had in time explained to my father who has agreed to it I say that I shall give the boy after he has left high school the religion required by his grandfather.”

On the 8th March, 1922, he wrote:

“I beg to inform you that William Robert Patton, grandson of W. B. Patton, is about to leave school and will therefore no longer be any hindrance to his complying with the conditions stipulated in the last will of his grandfather and becoming Lutheran I trust the certificate of the British Consulate confirming his change of religion and adoption of the Lutheran faith will suffice for your purposes.”

There is no difficulty in the son's way by reason of the requirement of the will, that he should be of British citizenship. His father was a British subject and this fact governs. Affidavits have been filed with reference to the German law which are in some respects in conflict, but on the view that I take of the case this conflict is not material. A child is under the control of the parents so long as it is under age, and the care of the child includes, so far as the father is concerned, the right to determine the child's religion, and it is quite evident that here the father thought it expedient that the child should be brought up as a Catholic. This was probably with the concurrence of the child's mother, and because of her natural desire that her child should be brought up in her own religion. It is as appears from the affidavits possible that in the event of the difference of opinion between the father and mother, a German Court might have interfered.

It is, however, clear to me that this child, being a British subject, son of a British subject, his father had the right to determine the religion in which the child should be brought up, this being the English law. I do not know when the child could have emancipated himself from this parental control, had he chosen to assert himself, but apparently all acquiesced in the child being and continuing a Roman Catholic until after he attained his majority. I do not know whether any real change then took place owing to the repeated use of the word “formally” in connection with the supposed change.

In my view this question does not really arise, because I think according to the true interpretation of the will, the question must be determined once and for all at the death of the testator.

I have searched for authorities and have read many, but can find none which throw any real light upon the problem submitted, and I think the will must, in the end, be interpreted by the expressions used, due regard being had to the surrounding circumstances.

The testator was evidently dominated by two main ideas. He was a British subject, and he did not desire any of his money to go to anyone other than a British subject. He feared that his son, resident in Germany

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No. 8

Reasons for
judgment
of Hon.
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Middleton,
7th
November,
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RECORD

In the
Supreme
Court of
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No. 8
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judgment
of Hon.
Mr. Justice
Middleton,
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1928
—Continued

and apparently married to a German woman, may have abjured his British allegiance; he was also opposed to the Roman Catholic religion and desired that nothing should go to his son unless his son adhered to the Lutheran faith. He had a like feeling with regard to his grandson, and so with regard to each he makes it a condition precedent that neither shall take unless he is a British Subject at the date of the will or at the date of the death, it makes no difference here which date is adopted, and he likewise stipulates that neither the son nor the grandson is to take unless he is and remains of the Lutheran faith. In this way he makes it a condition precedent to anything being taken by the son or grandson that he is a British Subject and of the Lutheran faith at the date of his death, and he makes it a condition subsequent governing the various payments of the annuity provided for that each shall continue, remain and prove himself to be a member of the Lutheran religion. Failing this he will take nothing further.

The condition is made a *sine qua non*, failing which no benefit is given. The testator has not placed himself in the position of offering a price to his son or to his grandson to abjure the faith held at the date of his death. He had been, no doubt, most anxious concerning this matter, and has in the end determined that the son and grandson shall have the benefit contemplated or shall take nothing, this to be determined by the facts as they are at the date the will becomes operative.

I cannot see my way to read the will as meaning this is given to my son if he elects to become a member of the Lutheran Church. He is only to have the benefit if he is of that Church at the time the will speaks—the death of the testator.

It was argued, and was forcibly argued, that a different consideration might be applied to the gift to the grandson of the son's legacy upon his death, but on the best consideration I can give the matter the words "that he is and proves himself to be of the Lutheran religion" are dominated and controlled by the expression accompanying them "as above mentioned" which I think removes all ambiguity and makes the condition referable to the death of the testator, and not to the death of his son.

It appears that on December 24th, 1917, the testator wrote a letter addressed to his son to be delivered to him upon his decease, and it is sought to use this letter to aid in the interpretation and to control the meaning of the words of the will. Plainly this cannot be done. If the letter is looked at it is found to be of no assistance. It was intended to be an explanation by a father to the son of the grievance underlying the making of the will.

There will be, therefore, a declaration that the grandson is not entitled to take either the \$500 legacy or the \$1,500 legacy.

Not without some hesitation I direct costs of all parties to be paid out of the estate, those of the executors to be taxed as between solicitor and client.

FORMAL JUDGMENT OF HON. MR. JUSTICE MIDDLETON.

IN THE SUPREME COURT OF ONTARIO.

THE HONOURABLE
MR. JUSTICE MIDDLETON

Wednesday the Seventh day
of November, A.D. 1928

IN THE MATTER OF the Estate of William Robert Patton, Deceased.

RECORD
In the
Supreme
Court of
Ontario

No. 9
Formal
Judgment
of Hon.
Mr. Justice
Middletton,
7th
November,
1928

UPON Motion made unto this Court on Monday the fifth day of November, 1928, by counsel on behalf of the executors of the last Will and Testament of the above-named William Robert Patton, deceased, in the presence of counsel for William Robert Patton of Cologne in Ger-
10 many and for Annie Louise Carlyle and Mary Josephine Macdonald to determine the following questions arising in the administration of the said estate respecting the rights of William Robert Patton of Cologne in Germany, a grandson of the said deceased, namely:—

(1) Is William Robert Patton entitled to have paid to him the sum of five hundred dollars a year during his lifetime as directed in clause (c) of the last Will and Testament of the said deceased?

(2) Is the said William Robert Patton entitled to have paid to him from and after the death of Robert George Patton and thereafter during the lifetime of the said William Robert Patton the annuity of one thou-
20 sand five hundred dollars per year paid to the said Robert George Patton during his lifetime?

Upon reading the affidavits of James Lang and Georg Peiser filed and the exhibits in the said affidavit of James Lang referred to and upon hearing Counsel aforesaid and the Court being of the opinion that all persons interested in the said estate are sufficiently represented and that no further notice of this motion need be given to any other person no one appearing for Joseph Churchill Patton, George C. Patton, Robert George Patton or Mrs. W. Graham Brown although notified as appears by affidavits of Peter Devlin and Harry Edward Grundy filed.

30 1. This Court doth answer both of said questions in the negative and doth declare that the said William Robert Patton of Cologne in Germany, grandson of the said deceased, is not entitled to any benefit whatsoever under the will of the said William Robert Patton, deceased, and this Court doth order and adjudge the same accordingly.

2. And this Court doth further order that the costs of all parties hereto be paid out of the estate of the said deceased those of the said executors as between solicitor and client.

Judgment signed this
17th day of November, 1928.

“D’ARCY HINDS,”

Asst. R.

RECORD*In the
Supreme
Court of
Ontario*No. 10
Notice of
appeal
to the
Appellate
Division,
10th
November,
1928**NOTICE OF APPEAL TO THE APPELLATE DIVISION.****IN THE SUPREME COURT OF ONTARIO.****IN THE ESTATE OF William Robert Patton, late of the City of Toronto,
Esquire, Deceased.****TAKE NOTICE** that William Robert Patton appeals to a Divisional Court from the Judgment pronounced by Mr. Justice Middleton on the Seventh day of November, 1928, on the following grounds:—

1. The Judgment is not in accordance with the evidence and precedents.

2. The evidence shows that the Testator knew that the said W. R. Patton was being brought up a Roman Catholic, and in making his Will as he did, the necessary presumption is, that he wished to win him over from the Roman Catholic to the Lutheran Religion.

3. The evidence shows that the said grandson, W. R. Patton, was an infant thirteen years old at the Testator's death, and not in a position to comply with the conditions in said Will until twenty-one years of age, when he did so comply.

4. The above facts bring the case within the following precedents: Partridge vs. Patridge (1894), 1 Ch. 351; re-Edwards (1910), 1 Ch. 541, and in re-Quintin vs. Dick (1926), 1 Ch. 992.

20

DATED at Toronto this Tenth day of November, 1928.

KAPPELE & KAPPELE,
Solicitors for the said W. R. Patton.To Messrs. Macdonald & Macdonald,
Solicitors for A. L. Carlyle,
And To Messrs. Malone, Malone, Sedgewick & Montgomery,
Solicitors for the Executors.**REASONS FOR JUDGMENT OF APPELLATE DIVISION.**

April 5. LATCHFORD, C.J.:—Appeal by William Robert Patton from the judgment pronounced by Mr. Justice Middleton on the 7th November, 1928, on an originating motion for the determination of certain questions arising in the administration of the estate of William Robert Patton, deceased.

The questions were whether, under the will of the deceased, his grandson, the present appellant, was entitled to two annuities, one of \$500 and the other of \$1,500.

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Latchford,
C.J.

They were carefully considered by my learned brother Middleton, who decided that to neither annuity had the grandson any right.

I concur so completely in the reasons stated for reaching that determination that I find myself unable usefully to qualify them by substituting or adding a single word.

Accordingly I think the appeal should be dismissed with costs, those of the executors on a solicitor and client basis.

ORDE, J.A.:—The facts and the provisions of the will in question are so fully set forth in the judgment of my brother Middleton that they need not be repeated.

The argument in support of the appeal developed into two branches. The first was based upon the fact that William Robert Patton, the testator's grandson, was an infant when the will was made and at the date of the testator's death. The other applied only to the legacy of the \$1,500 annuity to the grandson, which was to take effect upon the death of the latter's father, Robert George Patton, and involved the question whether the condition applied as of the death of the testator or as of the date when the annuity would first become payable to the grandson.

Upon the first branch several arguments were presented. It was urged that, the grandson being an infant, his religion must be deemed to be that of his father, who was a Lutheran, and not that in which he was in fact being brought up at the testator's death, namely, that of the Roman Catholic Church, which was the religion of his mother. It was further argued that by reason of his infancy at the testator's death the appellant had a right to elect as to his religion at his majority, and that pending that election the condition as to his religion was suspended, and it was urged in support of this contention that, as the testator must have known that the appellant was being brought up as a Roman Catholic (there is no evidence that he did know), he must have intended that the grandson would have an opportunity, when of age, of deciding for himself what his religion should be. And it was further contended that an infant has no religion, and that therefore the question as to his religion must be left for determination until he is of age.

To all these arguments there is, I think, but one answer. The conditions as to nationality and religion are clearly conditions precedent, and so far as they govern the grandson's right to the annuity of \$500, which takes effect immediately upon the testator's death, they are imperative. Unless the grandson came within their terms, the legacy failed completely. The father's letters, which are quoted in the judgment below, and the father's affidavit made while this motion was pending, to say nothing of the grandson's admissions, establish beyond question that the appellant was not a Lutheran at the testator's death and did not become one until after his own majority about 5 years later. When he attained his majority he was admittedly a Roman Catholic.

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C. J.
—Continued
Orde, J. A.

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1929

Orde, J. A.

—Continued

None of the authorities cited by counsel for the appellant lend any colour to the argument that an infant, by making some declaration at his majority as to what his religion should thereafter be, could alter the fact as to what it was, or was not, at some earlier period. In the absence of evidence to the contrary, there might perhaps have been a presumption that his religion as an infant was that of his father. But here the fact that the appellant was not a Lutheran when the testator died is beyond question.

The argument that an infant could have no religion really defeated itself, because if that theory were sound, then the gift must fail because the condition that he must be a Lutheran would not have been fulfilled.

As to the other branch of the appeal, which affects the annuity of \$1,500, the case is not so clear. The language of this gift is as follows:—

“(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 terms of his natural life, on the condition as above mentioned, that he is and remains a British subject, and is and proves himself to be of the Lutheran religion.”

This gift, being an annuity taking effect only upon the death of the donee's father, and lasting only during the donee's lifetime, must by its very nature be contingent upon the donee's surviving his father. There could be no vesting prior to that date, because until the father died there was nothing to vest. Apart from any effect which may be given by the phrase “as above mentioned,” by which the language of the condition is extended so as to comprehend that in which it was already expressed in para. (c), the condition, standing alone, would, I think, be construed as of the date when the gift would take effect, so that if, at his father's death, the grandson was a British subject and a Lutheran, as in fact he was at that time, the gift would take effect. The exact meaning of the phrase “as above mentioned” is not quite clear. It may be intended merely to import into the condition those words in para. (c) which are omitted in para. (d), namely, “until the date of his death.” But the words seem to indicate something more and to be intended to connect the conditions governing the one gift with those governing the other, so as to make them uniform, and so that the two gifts would stand or fall together.

That this was the testator's intention is made clearer when para. (e) is considered. By that paragraph it is provided that upon the death of the grandson, “he having remained a British subject up to the time of his death and having proved himself to be and remaining of the Lutheran religion up to the time of his death,” the money set apart for the payment of the \$1,500 annuity to the appellant's father and himself is to be distributed among such of the appellant's “lawful issue (child or children)” as he shall by his will appoint. This power of appointment was,

I think, exercisable during the lifetime of the father of the appellant. There is nothing to indicate that the power was to be dependent upon the grandson's surviving his father. It is a power of appointment over the capital of the fund set apart to produce the annuities, and I think clearly enabled the appellant by his will to appoint the fund in favour of such of his own children as he wished, whether he died before or after his father. That being so, it is quite clear that the power of appointment was subject to the same condition as to nationality and religion as the annuities, and that that condition operated from the moment of the 10testator's death. In these circumstances the testator could not have intended that, while the appellant might have failed to establish a right to the immediate annuity of \$500 and also any right to exercise the power of appointment given by para. (e), he might nevertheless qualify himself for the postponed annuity of \$1,500 by changing his religion before it became effective. I agree with my brother Middleton that the testator intended the conditions upon which the gifts to the grandson were to be dependent to be applied uniformly and to be effective at his death as to all the benefits conferred upon the grandson.

For these reasons, I would dismiss the appeal with costs.

20 FISHER, J.A.:—I am, with respect, of the opinion that the construction placed upon the will of the deceased by Middleton, J.A., in his very full and careful judgment, does not accord with the intention of the testator.

All the facts are fully set out in the judgment appealed from. Middleton, J.A., construed the will as meaning that the \$500 annuity given to the grandson failed because he was not, at the death of the testator, either a British subject or a Lutheran, thinking that the words "is a British subject" and "is a Lutheran" related and must be confined to the time of the testator's death. If the construction of my brother Middleton is 30the right one, it is evident that the testator's emphatic and repeated intentions will be defeated; and, for the reasons I am about to give, I adopt the construction which will carry them out. The duty of the Court is to give effect to the testator's will, and the task is to discover his intentions, his real will. To do this the intentions and purposes of the will and the circumstances surrounding the testator at the time the will was made must be considered. The testator was a British subject, residing in Toronto, Canada; his only descendants were his son and his grandson, and he naturally desired to provide for them. There were difficulties in his way, as his son was married to a woman who was a 40Roman Catholic and evidently a German, and all three were residing in Germany; the grandson was about 13 years of age, and at the time the will was made was being brought up by his mother, apparently under some arrangement or at all events without objection by the husband, as a Roman Catholic; and at that time the Great War was going on, and because of the many repetitions in the will it is manifest that the testa-

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Fisher,
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 of
 Appellate
 Division,
 5th April,
 1929
 Fisher,
 J. A.
 —Continued

tor entertained a strong animosity towards Germany and the Germans, and determined upon excluding his only flesh and blood from getting as much as a dollar from him unless they were British subjects and Lutherans, as opposed to the Roman Catholic religion.

According to the uncontradicted evidence, the testator knew the circumstances under which the grandson was, under his mother's direction, being brought up in the religion of the Roman Catholic Church. Notwithstanding all this, the testator had the natural desire to provide for his own flesh and blood, but there must be loyalty to the testator's country and to the Lutheran Church. In these circumstances he had his will prepared, and provided in it that, if they remained or became, and as long as they remained, British and Lutheran, they should have the benefits of his will, and failing these qualifications they would receive nothing. A reasonable inference, I think, is that the testator believed his son and grandson would comply with his desires, as there was apparently nothing to prevent but the nationality and religion of the mother, and he believed that these would be overcome when the grandson was free to act for himself. Is that not exactly what happened? The grandson, after attaining his majority and before his father's death, became a Lutheran—as he and the Lutheran Minister have without contradiction testified — and was and still is a British subject; and so he then became and now is qualified to receive the bounty of his grandfather. The gifts are to William Robert Patton, a British subject and a Lutheran—the appellant is that person, and if he were not a British subject and a Lutheran he would not be the beneficiary named in the will. The provision for payment of the annuity to the mother until the son attained the age of 25 years is quite in keeping with all this, and in making the annuity payable to her, I believe he thought that might induce her for her son's sake and her own to forgo her Church affiliations.

I cannot find anything in the will opposed to this view: the controlling words in the gift to the grandson of the \$500 annuity are, not the word "is" twice used, but are "so long as my grandson is," which literally and in every other way means whilst he "is" and that he is to continue so until his death.

The disposition of the \$1,500 annuity, which comes under clause 3 of the will, remains to be considered. The father died, and, as stated, no question arises that the grandson had not become a British subject and a Lutheran. The words used by the testator in this paragraph are "on the condition, as above mentioned, *that he is and remains a British subject and is and proves himself to be of the Lutheran religion.*" It seems to me that these words are entirely in accord with the views expressed as to the testator's general intention, and I cannot see what excuse there is for not giving effect to the specific qualification "that he is and remains a British subject and proves himself to be of the Lutheran religion," nor can I understand why any particular date should be selected

when the beneficiary must be qualified or lose all. It is not as if there was one gift only—the gifts are annual gifts. Why should the grandson forfeit all even if he had not qualified for the first ?

Middleton, J.A., has said that these beneficiaries must be qualified at the death of the testator instead of at the time when they are to receive the money, because the will speaks from death. Wills do not speak from death unless the testator shews by his will that they are so to speak, but even the Legislature (Wills Act, R.S.O. 1927, ch. 149, sec. 26(1)), in giving that effect to them as to the real and personal property comprised in them, makes them still speak from the time of the making of them, but provides that they shall speak and take effect as if made immediately before the testator's death. I do not see how it is possible to construe the will as meaning that the qualification of nationality and religion was to exist when the will was made, because the testator knew that it did not and was not likely to exist until the grandson should be free to act for himself, and for like reasons, under the known circumstances, to fix the time as that of the testator's death. In other words, the testator knew that a literal compliance would be impossible without any fault of the grandson.

20 In my opinion, the grandson did all that which he was required to do as soon as it was possible for him to do it, and that is a sufficient compliance with the testator's wishes.

The results of my conclusions are that the appellant is entitled to all payments of the \$500 annuity that have come due since he qualified, and as to the \$1,500 annuity he is entitled to all payments that have come due since his father's death and to all the benefits of the will as long as he remains a British subject and a Lutheran.

The appeal should be allowed with costs.

30 RIDDELL, J.A.:—I concur in the reasoning and result of my brother Fisher's judgment.

The Court being divided, appeal dismissed without costs.

FORMAL JUDGMENT OF APPELLATE DIVISION.
IN THE SUPREME COURT OF ONTARIO.

THE HONOURABLE THE CHIEF JUSTICE
OF THE SECOND DIVISIONAL COURT
THE HONOURABLE MR. JUSTICE RIDDELL
THE HONOURABLE MR. JUSTICE ORDE
THE HONOURABLE MR. JUSTICE FISHER

Friday the 5th day of
April, 1929

IN THE MATTER OF the Estate of William Robert Patton, Deceased.

40 UPON Motion made unto this Court on Thursday the tenth day of January, 1929, by counsel on behalf of William Robert Patton by way

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of
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5th April,
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Fisher,
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—Continued

Riddell,
J. A.

No. 12
Formal
Judgment
of
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5th April,
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*In the
Supreme
Court of
Ontario*

No. 12
Formal
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—Continued

of appeal from and to set aside the Judgment of the Honourable Mr. Justice Middleton herein bearing date the seventh day of November, 1928, in the presence of counsel for Annie Louise Carlyle, Mary Josephine Macdonald and for The Toronto General Trusts Corporation and Annie Louise Carlyle, executors of the last Will and Testament of the above named William Robert Patton, deceased, upon reading the said Judgment and the reasons therefor and material filed upon the motion made before the Honourable Mr. Justice Middleton; upon hearing Counsel aforesaid and the Court having taken time to consider the said matter and the said matter having come on this day for judgment; 10

1. THIS COURT DOTH ORDER that the said appeal be and the same is hereby dismissed without costs.

(SEAL)
(Supreme Court of Ontario)

E. HARLEY,
Senior Registrar, S.C.O.

No. 13
Order
Admitting
Appeal of
William
Robert
Patton
to His
Majesty
in His
Privy
Council,
1st
June,
1929

ORDER ADMITTING APPEAL OF WILLIAM ROBERT PATTON
TO HIS MAJESTY IN HIS PRIVY COUNCIL.

THE APPELLATE DIVISION OF THE SUPREME COURT
OF ONTARIO.

THE HONOURABLE

MR. JUSTICE HODGINS
IN CHAMBERS

Saturday the First day of 20
June, 1929.

IN THE MATTER OF the Estate of William Robert Patton, Deceased.

UPON the application of William Robert Patton for an Order approving of the security given by him upon and allowing his Appeal from the Judgment of the Second Divisional Court of the Appellate Division of the Supreme Court of Ontario herein dated the Fifth day of April, 1929, to His Majesty in His Privy Council, upon hearing read the Notice of the said Application and the Certificate of the Accountant of the Supreme Court of Ontario, that the said Appellant has paid into Court to the credit of the above matter the sum of Two Thousand Dollars³⁰ (\$2000.00) as security that he will effectually prosecute the said Appeal and pay such costs and damages as may be adjudged, in case the Judgment appealed from is confirmed, and upon hearing Counsel for the applicant and for The Toronto General Trusts Corporation and Annie Louise Carlyle, Executors of the Estate of the said William Robert Patton, deceased, and for Annie Louise Carlyle, no one appearing for Mary Josephine Macdonald, although duly served with Notice of this Application.

1. IT IS ORDERED that the said sum of Two Thousand Dollars paid into Court, as aforesaid, by the applicant be approved as good and sufficient security that the applicant will effectually prosecute his said Appeal and pay such costs and damages as may be adjudged in case the judgment appealed from is confirmed and that the said Appeal from the said Judgment to His Majesty in His Privy Council be and the same is hereby admitted.

2. IT IS FURTHER ORDERED that the costs of this application be costs in the Appeal.

10

E. HARLEY,
Senior Registrar, S.C.O.

RECORD

In the
Supreme
Court of
Ontario

No. 13
Order
Admitting
Appeal of
William
Robert
Patton
to His
Majesty
in His
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Council,
1st
June,
1929

—Continued

RECORD

In the
Supreme
Court of
Ontario

Exhibits:
A
to affidavit
of James
Lang

Letters
Probate
Will of
William
Robert
Patton,
9th June,
1919

PART 2.

EXHIBITS AND DOCUMENTS.

Letters Probate of Will of William Robert Patton, Deceased, Exhibit A
to Affidavit of James Lang Filed by The Toronto General Trusts
Corporation et al Executors.

CANADA;

PROVINCE OF ONTARIO.

IN HIS MAJESTY'S SURROGATE COURT OF THE
COUNTY OF YORK.

#38307

BE IT KNOWN that on the Ninth day of June in the year of our¹⁰
Lord one thousand nine hundred and nineteen the Last Will and Testa-
ment of William Robert Patton, late of the City of Toronto, in the
County of York, Esquire, Deceased, who died on or about the Twenty-
sixth day of February, in the year of our Lord one thousand nine hun-
dred and nineteen at the City of London, England, and who at the time
of his death had a fixed place of abode at the City of Toronto in the said
County of York, was proved and registered in the said Surrogate Court
a true copy of which said Last Will and Testament is hereunder written
and that the administration of All and Singular the property of the said
deceased and in any way concerning his Will was granted by the afore-²⁰
said Court to The Toronto General Trusts Corporation of the City of Tor-
onto, in the County of York, and Thomas W. Carlyle, of the Town of
Cobalt, in the District of Temiskaming, Bank Manager, and Annie
Louise Carlyle, of the said City of Toronto, Spinster, the Executors named
in the said Will, they having been first sworn well and faithfully to
administer the same by paying the just debts of the deceased and the
legacies contained in his Will as far as they are thereunto bound by
Law and by distributing the residue (if any) of the property according
to Law and to exhibit under oath a true and perfect Inventory of All and
Singular the said property and to render a just and true account of their³⁰
Executorship whenever thereunto lawfully required.

WITNESS HIS HONOUR JOHN WINCHESTER, Judge of the
said Surrogate Court at the City of Toronto in the County of York the
day and year first above written.

By the Court

(ARTHUR F. WALLIS)
Registrar.

(SEAL)

THIS IS THE LAST WILL AND TESTAMENT of me, WILLIAM
ROBERT PATTON, of the City of Toronto, in the County of York, and
Province of Ontario, Esquire, made this 22nd day of December, in the⁴⁰
year of our Lord, One thousand nine hundred and seventeen.

I HEREBY REVOKE all Wills and other Testamentary Dispositions by me at any time heretofore made and declare this to be my last Will and Testament.

I DIRECT my Executors hereinafter named, to pay all my just debts, funeral and testamentary expenses as soon after my decease as may be convenient.

I HEREBY APPOINT THE TORONTO GENERAL TRUSTS CORPORATION, my Nephew, THOMAS W. CARLYLE, and my Niece and Adopted Daughter, ANNIE LOUISE CARLYLE, to be the Executors and Trustees of this my Will.

I GIVE, DEVISE AND BEQUEATH unto my Niece and Adopted Daughter, ANNIE LOUISE CARLYLE, all my household goods, chattels, furniture, plate, linen, china, glass, oil paintings, pictures, water-colors, diplomas, guns, trophies, and all my jewelry (excepting my gold watch and chain and pendant locket) and all other personal belongings, goods and chattels of every nature and description, for her own absolute use.

I GIVE DEVISE AND BEQUEATH unto my said Niece and Adopted Daughter, ANNIE LOUISE CARLYLE, my leasehold property known as "Moose Lodge" Number 268 Lake Shore Road, Centre Island, Toronto, subject to the payment of the rent and the performance of the covenants contained in the Lease of said property, and in connection with this devise and bequest, I give, devise and bequeath unto my said Niece and Adopted Daughter the boat house at Centre Island, and all the contents thereof, such as boats, canoes, etc. as well as the cruising motor boat named "Roamer", for her own absolute use.

I GIVE, DEVISE AND BEQUEATH to my Grandson, WILLIAM ROBERT PATTON, my gold watch and chain and pendant locket.

All the rest, residue and remainder of my Estate, of whatsoever nature and kind and wheresoever situated, I give, devise and bequeath unto my Trustees above named, upon the following trusts, namely:—

(a) To retain as an investment for my estate, such of my investments as my said Trustees may consider to be fit and proper investments for my estate, notwithstanding that same may not be such investments as authorized by the Laws of the Province of Ontario for Trustees to invest in, I hereby relieving my said Trustees from all responsibility which may attach to them by reason of any loss being made through their having

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retained any of my said investments as investments for my estate after my decease. All the rest, residue and remainder of my estate not consisting of ready money, I direct my said Trustees to sell and convert into cash.

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(b) From and out of the proceeds of my said estate, I direct my said Trustees to pay to my niece and adopted daughter, Annie Louise Carlyle, the sum of Five Hundred Dollars (\$500.00).

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(c) To invest and keep invested the proceeds of my estate in such securities as trustees are by the Laws of the Province of Ontario allowed to invest trust funds, and from and out of said income so derivable10 from my estate, provided my son, Robert George Patton, now residing at Cologne, Germany, is and remains up to the date of his death, a British Subject, and is and proves himself to be of the Lutheran Religion, to pay to my said son, Robert George Patton, annually for and during the term of his natural life, the sum of One Thousand Five Hundred Dollars (\$1,500.00) in quarterly payments, 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 and20 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. In case of the decease of the mother of the said William Robert Patton, before the said William Robert Patton attains the age of twenty-five years, I direct that said payments so to be made for the benefit of my said Grandson, shall be paid by my30 Trustees above mentioned for his maintenance, education, care and advancement in life;

(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 the condition as above mentioned that he is and remains a British Subject, and is and proves himself to be of the Lutheran Religion.

(e) On the decease of my said Grandson, William Robert Patton, he having remained a British Subject up to the time of his death and hav-40 ing proved himself to be and remaining of the Lutheran Religion up to the time of his death, I direct that the money so set apart for the payment of said annuity to his Father and himself, shall be paid and distributed by my Trustees among such of the lawful issue (child or children)

of my said Grandson as he shall by his last Will and Testament appoint or direct;

(f) In the event of either my said Son or Grandson not having remained until the date of their death, British Subjects, and of the Lutheran Religion, I direct that the bequests herein made for their benefit, shall absolutely cease and be of no effect, and that the said money above mentioned so set apart for their use and benefit, shall revert and become part of the residue of my estate.

(g) To pay over to my Niece and Adopted Daughter, Annie Louise Carlyle, all the rest, residue and remainder of the income derivable from my said estate, in equal quarterly payments, for her own absolute use;

(h) On the decease of my said Niece and adopted Daughter, Annie Louise Carlyle, married and leaving lawful issue (child or children) her surviving, I direct my said Trustees to pay over the whole of the residue of my estate to such persons and in such manner as she may by deed or will direct or appoint;

(i) On the decease of my said Niece and adopted Daughter, Annie Louise Carlyle, prior to the death of my said Son and my said Grandson, without leaving lawful issue (child or children) her surviving, I direct that the annual income of my said Son and Grandson, shall, provided they have complied with the conditions above mentioned, be increased by Two Hundred and Fifty Dollars (\$250.00) a year to each of them;

(j) In the event of my Brother, George C. Patton, or his children, taking any benefit under this my Will, I direct that my said Trustees shall first deduct from any portion of my estate which either my said brother, George C. Patton, or his children, shall benefit from, the amount which my said brother, George C. Patton, has borrowed from my Sister, Wilhelmina Deborah Carlyle, at various time and has not repaid to her, and which amount I have settled at the sum of \$10,000.00.

(k) In the event of my said Niece and adopted Daughter Annie Louise Carlyle, dying without leaving lawful issue (child or children) her surviving, then I direct that my said estate shall be divided into three equal parts and that the annual income derivable from one of said parts shall be paid to my brother, Joseph Churchill Patton, for and during the term of his natural life; That there shall be deducted from one other of such parts, an amount of money which my said Brother, George C. Patton, has borrowed from my sister, Wilhelmina Deborah Carlyle, and has not repaid to her, and the annual income derivable from said part, less the amount so deducted as aforesaid, shall be paid to my Brother, George C. Patton, for and during the term of his natural life, and that the annual income derivable from the other of such parts, together with the annual income derivable from the amount so deducted from the share so set aside for the benefit of my said Brother, George C. Patton,

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shall be payable to my sister, Wilhelmina Deborah Carlyle, for and during the term of her natural life.

(l) On the decease of my said brother Joseph Churchill Patton, I direct that the annual income from the share of my said estate so set apart for his benefit, shall be divided equally between my sister, Wilhelmina Deborah Carlyle, and my brother, George C. Patton, and if either of them be deceased at that time I direct that the children of said one so deceased shall be entitled to the parent's share of said income until the period of distribution hereinafter mentioned;

(m) In case of the decease of my brother, George C. Patton,¹⁰ prior to the decease of either my brother, Joseph Churchill Patton, and my sister, Wilhelmina Deborah Carlyle, I direct that the annual income so set apart for the benefit of my said brother, George C. Patton, shall be payable to his lawful issue (child or children) until the period of distribution hereinafter mentioned.

(n) On the decease of my sister, Wilhelmina Deborah Carlyle, I direct that the income from the share of my said estate so set apart for her benefit, shall be divided equally between her lawful issue (child or children) share and share alike, until the period of distribution hereinafter mentioned.

20

(o) On the decease of the survivor of my said two brothers and sister, then I direct that there shall be taken from the corpus of my said estate, the amount so borrowed as aforesaid from my said sister, Wilhelmina Deborah Carlyle, by my brother, George C. Patton, and that the balance of my said estate shall be divided into five equal parts, and one of such parts shall be payable to the lawful issue (child or children) of my said brother, George C. Patton, in equal shares, and the other four of such parts, together with the amount so borrowed by my said brother, George C. Patton, from my said sister, Wilhelmina Deborah Carlyle, and so deducted from my said brother's share, shall be divided by my said³⁰ Trustees between the children of my said sister, Wilhelmina Deborah Carlyle, in equal shares, with the exception that from the portion coming to my Niece, Edna Browne, the eldest daughter of my said sister, Wilhelmina Deborah Carlyle, there shall be deducted the sum of Nine Thousand Seven Hundred and Fifty-six Dollars (\$9,756.00) being the amount owing by the husband of the said Edna Brown to me; it being my intention that the share of the said Edna Brown shall be Nine Thousand Seven Hundred and Fifty-six Dollars (\$9,756.00) less than the share of any of the other children of my said sister, Wilhelmina Deborah Carlyle.

40

(p) If my said Grandson, having conformed to the conditions above mentioned, dies without leaving lawful issue (child or children) him surviving, then I direct that on the decease of my said son and on the decease of my said Grandson above mentioned, that that portion of my

estate from which the annual income payable to my son and grandson is derived, shall revert to and become part of the residue of my estate.

(q) I further direct that in the event of my said sister, Wilhelmina Deborah Carlyle, not providing by her last Will and Testament or by some other document, for an equal division of her personal estate among her children (including the said Annie Louise Carlyle, my niece and adopted daughter,) so that my said niece and adopted daughter, Annie Louise Carlyle, shall share equally in my said sister's estate with the remainder of my said sister's children, I direct that there shall be deducted out of any moneys that shall become payable under this my Will to the children (other than the said Annie Louise Carlyle) of the said Wilhelmina Deborah Carlyle a sum equivalent to the amount by which the share of the said Annie Louise Carlyle, under her Mother's Will, shall be less than the share she would receive from her Mother's estate if an equal division of the said personal estate were made by her mother amongst all her children, and the amount so deducted shall be paid to the said Annie Louise Carlyle, and the remainder only of the said moneys so becoming payable to the other child or children of the said Wilhelmina Deborah Carlyle from and out of my estate, shall be paid to them.

20 I direct that my body shall be buried beside those of my parents in the Cemetery at the City of Montreal.

I direct my Executors and trustees above named to pay from and out of my estate, as soon after my decease as may be convenient, Succession Duty (if any) which may be assessable or chargeable against any benefit, devise, bequest or legacy herein contained, as it is my intention that all such shall be paid free from Succession Duty.

I hereby will and declare that notwithstanding any of the devises and bequests hereinbefore made or contained, if any legatee, devisee, annuitant or beneficiary under this my Will enter into litigation for the purpose of voiding, questioning, altering or setting aside this my Will or any provision or term thereof, or refuses to confirm same or to do such acts and things as may be demanded for giving full effect to all or any of such disposition, then and in every such case such legatee, devisee, annuitant or beneficiary shall thereupon forfeit all benefit hereunder, as any such step or conduct shall of itself make void any and every beneficial provision for such person or beneficiary herein contained, and as to the estate or benefit so forfeited, I hereby declare that same shall form part of my residuary estate and be subject to the provisions and directions governing the disposition of said residuary estate, excepting always therefrom the said legatee, devisee, annuitant or beneficiary so offending as aforesaid, if he or she would otherwise under the terms of this my Will, be entitled to share in or be benefited from such residuary estate, such persons so offending to be treated as having predeceased me and not entitled to share in any part of my estate under any of the provisions or devises herein contained.

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IN WITNESS WHEREOF I have hereunto set my hand the day and year first above written.

SIGNED, PUBLISHED AND DECLARED by the Testator, William Robert Patton, as and for his last Will and Testament, in the presence of us both present at the same time, who, at his request, in his presence and in the presence of each other have hereunto subscribed our names as witnesses.

W. R. PATTON"

10

A. L. MALONE

B. SIMMONS

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to affidavit
of James
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Letter
Robert
George
Patton
to A. D.
Langmuir,
26th
September,
1919

Letter Robert George Patton to A. D. Langmuir part of Exhibit C to affidavit of James Lang filed by The Toronto General Trusts Corporation et al Executors.

Mr. A. D. Langmuir,
General Manager,
Toronto.

Cologne, 26 Sept. 1919.

Dear Sir:

20

In receipt of your letter of 12 August I send you enclosed the papers required. I hope the same will be sufficient.

As to my person I remark that I was brought to prison in 1914 as British subject and only through exertions of my lawyer, according the convention of Geneve as physician, under guarantee of a highly respected citizen of Cologne, was liberated and placed under Police supervision and had to appear twice daily at the police office. I was not allowed to leave the limits of the town, so much about my supposed immunity.

I have lost my little what I possessed as I could not make a living as Englishman. I have been confidential physician for 2 life insurance³⁰ societies. The half of the fortune of my mother in law had also to be spent to have a living, and I am now greatly in debt. The sum which my father has decided for me would have been at the present value of the Dollar, if I had it in hand now, a great help. I am sorry to say you have overlooked to send me with the will your conditions and so I had to pawn my little home from which I very likely have to move on December 1st. Every man will recognize how absolutely impossible it is to earn a living here as British subject. As to my son I add that he is of Roman Catholic faith. The reason why I had to educate my son in that faith I have in time explained to my father who has agreed to it. ⁴⁰

You will therefore understand if I will consider the recognizing of the will of my father and his signature as the conditions therein are

not to be understood by me. I say that I shall give the boy after he has left the Highschool the religion required by his grandfather. He is British Subject being my son. Enclosed I send you MK 60 for death advertisement of my father in the Kolnische Zeitung. Considering my condition I wish to cancel that item from the fonds of the Will.

Being without an answer to some letters to Miss A. L. Carlyle I ask the executors of the will to let me have the small oil painting by Miss Mosse and the photos of me, my dear mother and of my boy. Please note that the valuta of exchange of the dollar is of great importance
10to me. I am

Respectfully yours,

Cologne,
3 Friesenplatz

“ROBERT GEORGE PATTON.”

P.S.—I ask after taking note of the different documents to return the certification by the English Town Commandant, and the head of police of the town of Cologne, as I require the same urgently.

For the purpose of proving his claim for an inheritance, we hereby confirm that Robert George Patton (at present residing at) Friesenplatz 3 Cologne, has furnished sufficient proofs that he is a British subject.

20 E. de Geige, Lieutenant Staff Officer to Commandant Cologne.

Letter R. G. Patton to The Toronto General Trusts Corporation part of Exhibit C to affidavit of James Lang filed by the Toronto General Trusts Corporation et al Executors.

Cologne 8. III. 22.

The Toronto General Trusts Corporation,
Re Dr. W. R. Patton Co-Excrp.
Toronto.

Dear Sir:—

30 Herewith I beg to inform you that William Robert Patton, grand-son of W. R. Patton, is about to leave school, and there will therefore no longer be any hindrance to his complying with the conditions stipulated in the last will of his grandfather and becoming Lutheran.

I believe I have furnished sufficient proof of my British nationality and naturally my son has the same nationality as his father; according to German law he could not change his nationality (even if he wished to do so) until he has attained the age of 21 years.

I trust that a certificate issued by the British Consulat, confirming his change of religion and adoption of the Lutheran faith will suffice for your purposes, otherwise it means double expenses for me, which, in view
40of the rate of exchange are extremely heavy.

Awaiting the favour of your reply, I remain,

Yours truly,

“R. G. PATTON.”

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Letter
Robert
George
Patton
to Toronto
General
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tion, 8th
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Trusts Corporation et al Executors.

Cologne 12. 7. 22

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The Toronto General Trusts Corporation,
Dr. W. R. Patton Executorship,
Toronto.

Dear Sir:

Enclosed please find receipt for the month of June.

As my son William has meanwhile complied with the conditions¹⁰
stipulated in the will and in particular to those contained in the last letter
my father wrote me (in which his intentions are clearly stated), I shall
be glad to receive further news from you as soon as possible.

I remain, Yours truly,

R. G. PATTON.

The Toronto General Trusts Corporation,
Toronto.

Herewith I acknowledge the receipt from 125 Dollars being the
monthly payment on account of annuity for the month of June.

“R. G. PATTON.”

20

3 Friesenplatz.

Cologne, July 12th, 1922.

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Letter R. G. Patton to The Toronto General Trusts Corporation part of
Exhibit C to affidavit of James Lang filed by The Toronto General
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Cologne 14 Sept. 22.

Letter
R. G.
Patton
to Toronto
General
Trusts
Corpora-
tion,
14th
September,
1922

The Toronto General Trusts Corporation,
Ex-ship Dr. W. R. Patton,
Toronto.

30

Dear Sir:—

Today, Okt. 12th, I duly received your cheque on S. Oppenheim to
the value of 147000 and 60 Marks, which is supposed to be the equiva-
lent of 125 Dollars. I beg to state that on Sept. 27th, the date on which
the cheque was made out, the Dollar exchange at New York was 1640.
As there is practically no difference between the American and the
Canadian Dollar, the equivalent should have been 205,000 Marks. I
assume that an error has been committed in this case by one of your
employees and request you to send me the balance of the amount. At the
same time I beg you to forward the cheque on the, 25th of each month
which is the date of my father's death and furthermore I would be glad
if you would send me the cheque in Dollars.

Also I beg not to send the letter "registered" because every such letter will be opened in this country. Twice allready I wasted my time at S. Oppenheim and not even at this moment there is an advice from this Hamilton Bank. I am very astonished that Mssrs. Cook are not able any more to exchange a draft.

You interprete the matter concerning my son's inheritance in a manner which is contrary to the wishes of his grandfather, which I am able to prove by means of the letter written to me by my father, "To be delivered to R. G. Patton, of Cologne, Germany, on my decease." I reserve the right of taking further action in this question.

Yours faithfully,

"DR. R. G. PATTON."

3 Friesenplatz
Germany Cologne

Letter William Robert Patton to Robert George Patton Exhibit D to affidavit of James Lang furnished by Appellant to, and filed on originating motion by, The Toronto General Trusts Corporation et al Executors.

To be delivered to Robert George Patton, Cologne, Germany, on my decease.

20

Robert George Patton
Dear Robert:—

Dec. 24, 1917.
Cologne on the Rhine, Germany.

When you receive these lines—they will come from the grave. You might well be of the opinion that I wronged you again and left you insufficiently out of my estate. I shall explain this. When I left Germany I had an estate worth approximately marks 300,000.00 yielding annually about marks 15,000.00 (including what I received from I. Hauser, Gereon & Rodenkirchen). Out of this I bequeath to you and your son annually marks 8,000.00 (marks 6,000 and marks 2,000.00 respectively) together with marks 1000.00 for each of you, in case certain conditions are complied with—so that William Robert will receive an income of marks 10,000.00 eventually and in my opinion I have divided it (estate) more than fairly. You will receive a copy of my last Will and Testament. Now, what else shall I say: I do not know. During my lifetime you have never appreciated me and where there is no appreciation there can be no love. On the contrary! I knew you only as far as the German part of your extraction is concerned which always plainly appeared. The world war and barbarism evidences that vulgarity and brutality are, and remain, Germany, Germany over everything! You may now understand the provisos of my will and act accordingly. I cannot but wish that you have a better experience with your son than I had. You and your son have a clean name, British through and through.

Your father,
PATTON.

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Letter
William
Robert
Patton,
to Robert
George
Patton,
24th
December,
1917