Privy Council Appeal No. 127 *of* 1929.

William Robert Patton - - - - - - *Appellant*

v.

The Toronto General Trusts Corporation and others - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH JUNE, 1930.

Present at the Hearing:

VISCOUNT DUNEDIN.
LORD BLANESBURGH.
LORD DARLING.
LORD ATKIN.
LORD MACMILLAN.

[*Delivered by* LORD BLANESBURGH.]

The issue raised by this appeal is concerned with gifts of two annuities, one immediate and the other reversionary, made to the appellant by the will of his grandfather, William Robert Patton, formerly of the City of Toronto. The Courts of Ontario have held—the Appellate Division, however, being equally divided on the question—that the appellant has lost both annuities by reason of his failure to comply with what the learned Judges have considered to be a condition precedent to the enjoyment of either—namely, that at the date of the testator's will, or, alternatively, at the date of his death, the appellant should, amongst other things, have been and should have proved himself to be, of the Lutheran religion. Hence this appeal by him.

By his will the testator appointed the Toronto General Trusts Corporation, his nephew Thomas W. Carlyle, and his niece and adopted daughter, the respondent, Annie Louise Carlyle, to be

his executors and trustees; and after certain specific bequests, including one by which he is expressed to "give, *devise* and bequeath" his gold watch and chain and pendant locket to the appellant, he directed the residue of his estate to be sold and invested. And thereupon follow the provisions with reference to the application of the income of the invested fund upon which the questions at issue immediately depend. These are as follows:—

"(*c*) 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) 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 ($500) a year, payable quarterly, it being my wish and intention that until my said grandson attains the age of 25 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 25 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 25 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.

"(*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."

The following further provisions of the will may be referred to as indicating the general nature of the document and as assisting the construction of the clauses above set forth:—

"(*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.

"(*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."

The testator then directs (*g*) that the residue of the income of his estate is to be paid to the respondent; (*h*) that on her decease, leaving issue, her surviving, the whole estate is to be paid to such persons as she may by deed or will

appoint; (*i*) that on her decease prior to the death of his son and grandson without leaving issue, her surviving, the annual income of his son and grandson is, "provided they have complied with the conditions above mentioned," to be increased by $250 a year to each of them; and (*p*) that if his said grandson, "having conformed to the conditions above mentioned," dies without leaving lawful issue him surviving, then on the decease of his son and grandson "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." And there is, finally, a comprehensive clause forfeiting the interest thereunder of any beneficiary who "enters into litigation for the purpose of voiding questioning altering or setting aside" the will or any of its provisions.

It is very manifest, even from this partial recital, that their Lordships are here confronted with a will which has to submit to construction at almost every turn if the manifest intention of the testator is not in the event to be frustrated. A "devise" of a watch merely indicates on the part of the draughtsman a forgetfulness of elementary principle, but it is a more serious reflection on his accuracy that on the words of clause (*e*) the son while to obtain and retain his annuity, he must be and *remain* a British subject, is not required to do more than prove that he is of the Lutheran religion, without, like the grandson being under the obligation to remain of that faith. Nevertheless, under clause (*f*), literally construed, his annuity ceases if, while himself remaining both British and Lutheran, his son has ceased to be either one or the other.

It will be observed, too, that unless construction can be invoked to assist the poverty of language the draughtsman has produced for the testator contrary to his plain intention, an intestacy, if, in the event stated in paragraph (*e*), the grandson makes no testamentary appointment, or, in that stated in paragraph (*h*), the respondent makes no appointment either by deed or will. Indeed, the will throughout, while presenting superficially a show of technical knowlege and skill is so inartificially drawn that it furnishes a good example of a case in which an examination of the circumstances in which the testator made it, and the facts with reference to the appellant known to him at the time, may have a decisive influence on the true construction of provisions with reference to the appellant which are themselves of uncertain or ambiguous import.

The will was made on the 22nd December, 1917—that is to say, in the middle of the war—it was made by the testator in Ontario, where he was domiciled. He died in England on the 26th February, 1919. He was a widower with one son, Robert George Patton, father of the appellant, then, as stated in the will, resident in Germany.

In his earlier life the testator had himself lived in Germany. His wife had been German. His son, a physician by profession,

had remained in Germany after the testator left for or returned to Canada. He in turn had also married a German lady, and she was a Roman Catholic, The appellant is the only child of that marriage. He was born on the 5th January, 1906. Accordingly, when the testator made his will he was barely 12 years old. At that time, presumably in obedience to an arrangement made prior to the marriage of his parents, he was being brought up a Roman Catholic—that is to say, in the religion of his mother. His father, in an affidavit put in evidence by the executors, said that all this was taking place, as he verily believed, to the knowledge of the testator, and in a letter to the executors on the 26th September, 1919, shortly after the testator's death, he stated that he had explained to his father, the reason why he had to educate his son in the Catholic faith, and the testator, he adds, agreed to it. He concludes with a reference to some letters he had addressed to the respondent, Miss Carlyle, the testator's niece and adopted daughter, and also, as above stated, an executor of the will.

There was some difference of judicial opinion in the Appellate Division upon the question whether the testator when he made his will did or did not know that the appellant was being brought up as a Roman Catholic. This issue of fact bulked very largely in the arguments before the Board. Mr. Justice Middleton in the Court of first instance apparently attached no importance to the matter, and makes no reference to it. In the Appellate Division the learned Chief Justice is in complete agreement with Middleton J. Orde J., however, while agreeing in the result with the Chief Justice, observes in passing that there is no evidence that the testator did know the appellant's then situation in this respect. Fisher J.A. on the other hand, and with him Riddell J.A. agrees, states that according to the uncontradicted evidence the testator when he was making his will knew the circumstances under which the appellant was, under his mother's direction, being brought up in the religion of the Roman Catholic Church.

Now, in this matter, their Lordships can have no doubt that this fact must in these proceedings be taken to be as stated by Fisher J.A. All the evidence before the Court was put in by the applicants, the executors. Uncontradicted or unqualified, that evidence led only to one conclusion on this point. The respondent, Miss Carlyle, residing with the testator, to whom Robert George Patton addressed his letters, herself one of the applicant executors, and, as so expressed. a respondent to the application as well, must presumably have been in a position to contradict or at least to qualify that evidence had contradiction or qualification been truthfully possible. She remained silent. Robert George Patton being dead, no further evidence from him was by the date of the hearing obtainable, and no further evidence was called for by the respondent. Their Lordships accordingly can have no doubt that in this matter the basis of fact upon which

the case was presented to the Court both by the applicants and respondent separately was that stated by Fisher J.A. and no other, and it is on this footing that the Board proceeds to an examination of the provisions of the will.

Before entering upon that task it is necessary only further to state that Robert George Patton, died on the 28th January, 1928, having been in receipt of his annuity up to the date of his death; that the appellant who, from his birth, has been a British subject, attained his majority on the 5th January, 1927; and that within a few days of that event—namely on the 30th January, 1927—he became and has since remained, a member of the Lutheran religion or faith. It is also in evidence that according to German law to which presumably both the appellant and his parents, domiciled in Germany, were in this matter subject, the appellant, before he attained majority was not without the consent of both his parents in a position effectively to change the religion in which he was, during minority, being brought up at their instance. It is in these circumstances that the question has now to be determined whether the appellant is entitled to both of his annuities or to one of them only, or whether, as has been so far held, he is entitled to neither the one nor the other.

The claim of the appellant to his immediate annuity will be first dealt with. It has in the judgment of the Board been made out.

Imputing to the testator, as their Lordships do, knowledge that at the date of his will the appellant, a boy of eleven, was being educated by his mother, as a Roman Catholic, the construction placed upon clause (C) of the will in the judgments appealed from, involves that its elaborate provisions so far as the appellant was concerned were to the knowledge of the testator struck with sterility so soon as they were written. They were completely ineffective. It is impossible that having such a result they express the testator's real intention. And learned counsel for the respondent was himself impressed with this difficulty. He did not conceal from the Board his view that if knowledge of the appellant's religious position was to be imputed to the testator when framing his will, the construction placed upon the clause by the Courts in Canada was beset with difficulties. And, indeed, these difficulties are so formidable that it becomes obligatory upon a Court of construction to ascertain whether, construed in association with the surrounding circumstances known to the testator, the words used are not capable of a more rational interpretation.

Now, speaking of his only grandson, not yet twelve years of age, and known to him to be then under Roman Catholic discipline, the testator in terms requires the boy then to be, and to prove himself to be, until the date of his death, of the Lutheran religion. If its strict literal construction is its true construction, the testator here imposes upon the appellant a

condition impossible of performance. But the testator has definitely given him the opportunity of proving that he is of the Lutheran religion, and that opportunity if it is to be his at all must be operative at some date later than that which is in literal terms prescribed. Moreover, if the proof to be adduced is to be such as can be accepted, it must, the appellant being an infant, be given when he is not only able to prove that he is of the Lutheran religion, but that, his years of disability being over, he can no longer, by parental authority or otherwise, be constrained to submit to the discipline of any other Church. In other words, as their Lordships think, the testator meant that the appellant was to have a real choice in the matter, and just as, in the eye of the Court, the appellant was not in a position truly to determine what his religion was until he had attained his majority—*In re May* [1917] 2 Ch. 126—so the testator here has not imposed upon him any earlier limit of time. That such was the meaning of his requirement is at the least consistent in their Lordships' view, with his direction that in the first instance the annuity is to be administered for the benefit of the appellant by his Roman Catholic mother and not by his Lutheran father, a provision which, while naturally making compliance with the condition conscientiously more difficult to the appellant when the time came for decision, would seem to indicate a readiness on the part of the testator to leave him in his mother's religion until his youth had passed away. The testator, it is true, ends the appellant's disability at 25, and it may be that that age was in his mind. But the appellant was, of course, entitled, on well-established principles of construction, to demand payment of the annuity to himself direct on attaining the age of 21, and the result is in their Lordships' view that the appellant on attaining that age was bound to supply the proof required as he has done. The will properly construed called for no more at his hand. Until that date arrived his enjoyment of the annuity was free of condition and in the result he is now entitled to receive all arrears of it as from the death of the testator, and to have it, subject to condition, paid to him for the future.

In this view of the will sub-clause (*e*) confirms the position of the appellant, instead of weakening it, as was supposed by Orde J.A. For the will of the appellant therein referred to, exercising his power of appointment, would only be valid if executed after he had attained 21. By that time, whether the will was made in the life-time of his father or not, he was in a position to comply with all conditions imposed upon him by the testator.

Next as to the claim of the appellant to his reversionary annuity. Here, the learned Judges unfavourable to him all admit that, *prima facie*, the test required with reference to that annuity need first be applied only when the right to it opened to the appellant, *i.e.*, by the death of Robert George Patton,

his father, by which date the appellant had in fact fulfilled the conditions both as to British citizenship and the Lutheran religion.

But they argue that this *prima facie* view is displaced by the words "as above mentioned" which, according to them, drive back the condition to the date at which the appellant had to fulfil it so as to become entitled to his immediate annuity, and that date, in their view, was, at the latest, the day of the testator's death.

The answer to this is two-fold. First, their Lordships differing here from the learned Judges, are of opinion, for the reasons already given that the condition as to the appellant's immediate annuity did not fall to be fulfilled once for all at the testator's death; and, secondly, they think that the words of the present condition which follow the words "as above mentioned" are, and are intended to be, exegetical of them, so that it is the succeeding words bearing the construction, which, as is on all hands agreed, is naturally to be attached to them that alone define the condition which the appellant is here required to fulfil.

His claim to this reversionary annuity is accordingly also established.

In the result, and for these reasons, their Lordships are of opinion that this appeal should be allowed: that the judgment of the Appellate Division of the Supreme Court of Ontario, dated the 6th April, 1929, and the judgment of Mr. Justice Middleton, dated the 7th November, 1928, should both be discharged, and that it should be declared that the appellant as from the death of the testator is entitled to the annuity of $500 given him by his will: and that he is, as from the 28th January, 1928, entitled to the annuity of $1,500, thereby also given to him on the death of his father: and that he is entitled to each of these annuities for his life or for so long as he remains a British subject and is and proves himself to be of the Lutheran religion.

And their Lordships will humbly advise His Majesty accordingly.

As to costs their Lordships note that it was only with some hesitation that Mr. Justice Middleton directed the costs of all parties to be paid out of the estate. Their Lordships note also that if there had been a majority of the Judges of the Appellate Division against the appellant, he would have been ordered not only to pay the costs of the appeal but would have had to pay the executors costs as between solicitor and client.

As to the costs in the Court of first instance, it appears to their Lordships that this was preeminently a case in which the difficulty being caused by the testator himself, and the question being raised by the executors in the most inexpensive form, an order for the costs of all parties to be paid out of the estate, and even as between solicitor and client, was, in any event, almost a matter of course. As for an order directing the appellant to pay any costs of the executors as between solicitor and client, their

Lordships know of no principle upon which such an order could have been supported. As against an opposite party executors are no more entitled to solicitor and client costs than is an individual litigant.

Now, however, that this appeal has succeeded costs stand upon a different footing, the appellant being, of course, entitled to his costs throughout, it being right that in the Court of first instance these should be taxed as between solicitor and client. In relief of the respondent who is interested in the residue only for her life, all the costs should come out of the corpus of the estate and not out of her interest only, and as her action has been in defence of the entire fund her costs to be borne thereout should be taxed as between solicitor and client. The proper order as to costs will, therefore, be, that the costs of all parties in the Courts below and of this appeal be paid by the executors out of the estate : the costs of all parties in the Court of first instance, and the costs of the executors and of the respondent throughout, being taxed as between solicitor and client.

In the Privy Council.

WILLIAM ROBERT PATTON

v.

THE TORONTO GENERAL TRUSTS CORPORATION AND OTHERS.

DELIVERED BY LORD BLANESBURGH.

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