Re BALENSI, deceased.

Supreme Court
Bacon, C.J.
25 February 1947

Will — forfeiture clause — prohibition of marriage with a person "not of the Jewish Faith" — uncertainty.

By his will, Solomon Levy Balensi made provisions for his children and grandchildren, with a stipulation that if any daughter of his should marry a person who was not of the Jewish faith, she should forfeit all benefit under the will.

Held: The forfeiture clause was void for uncertainty.

Note. The line of English cases cited is not yet ended. The latest is *In re Tuck's Settlement Trusts*, [1978] 1 Ch. 49.

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1 (1915) 3 Lloyd Pr. Cas. 418.

Cases referred to in the judgment.

Clavering v Ellison, (1859) 7 H. L. Cas. 707.
Sifton v Sifton, [1938] A.C. 656.
Hodgson v Halford, (1879) 11 Ch. D. 959.
Wainwright v Miller, [1897] 2 Ch. 255.
In re Morrison's Will Trusts, Walsingham v Blathwayt, [1940] Ch. 102.
In re Blaiberg's Will Trusts, unreported, see [1942] Ch. 1, at p. 28.
In re Blaiberg, [1940] Ch. 385.
In re Samuel (deceased), Jacobs v Ramsden, [1942] Ch. 1.
In re Evans, Hewitt v Edwards, [1940] Ch. 629.
Clayton v Ramsden, [1943] A.C. 320.
In re Donn, Donn v Moses, [1944] Ch. 8.
In re Moss, Moss v Allen, (1944) 172 L.T. 196.
Re Masson, Morton v Masson, (1917) 117 L.T. 548.
Forster v Baker, [1910] 2 K.B. 636.

Originating Summons

This was an originating summons to determine the validity of a forfeiture clause contained in a will, excluding from any benefit any daughter of the testator who should marry anyone not of the Jewish faith.

S. Benady for the plaintiff.
A.B.M. Serfaty for L.L. Balensi.
J.A. Hassan for D. Porral

25 February 1947: The following judgment was read—

In these proceedings, commenced by originating summons, the court is asked to determine questions regarding a forfeiture clause contained in the will of Solomon Levy Balensi, deceased. After hearing counsel in chambers, I directed that the proceedings be removed into court for judgment since the point in issue is of considerable importance to the public.

After making provision for his children and grand-children, the testator added this: "If any daughter of mine shall marry anyone who is not of the Jewish Faith such daughter shall forfeit all benefit under this my will and shall be deemed as from the date of such marriage to have died in my lifetime unmarried."

He thus purported to provide for the exclusion of any daughter of his, and for that of any children she might have, from all interest in his estate in the event of the specified contingency subsequently happening.

Two questions are asked: (1) Is that clause void for uncertainty? (2) If not, does the word "daughter" include the testator's grand-daughters?

Question (1) is put as the result of a number of decisions ranging over nearly a century, not all of which are in accord with one another.

The basic principle is clear; it is its application to specific cases which has caused the difficulty. That principle may perhaps best be stated by two citations from opinions of the highest authority. In *Clavering v. Ellison* [1] Lord Cranworth said: "I consider that, from the earliest times, one of the cardinal rules on the subject has been this: that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine". And in *Sifton v. Sifton*[2], in delivering the judgment of the Privy Council on an appeal from Canada, Lord Romer quoted with approval the following elaboration of the rule: "the condition must be clear and certain. That .... includes, not only certainty of expression in the creation of the limitation, but also certainty in its operation. It must be such a limitation that, at any given moment of time, it is ascertainable whether the limitation has or has not taken effect".

To that brief selection from a large body of judicial utterances on this topic may be added this further point, which has been expressed in one way or another on various occasions: the criterion is not the ability of an individual beneficiary to know clearly whether in a given case he or she is contemplating or has done the prohibited act; it is the ability of a court of law to define with precision from the outset what the limitation involves, however difficult that task might be. If, and only if, the standard prescribed by the testator is incapable of exact ascertainment, his provision for defeasance is void for uncertainty.

The application of this doctrine to cases more or less analogous to the present one has passed through various phases.

First, for many years somewhat similar provisions in wills were generally regarded as not void for uncertainty. A typical instance was the case of *Hodgson v. Halford* [3], where the words were: "shall marry a person who does not profess the Jewish religion". Another was *Wainwright v. Miller* [4], where the clause contained the phrase: "if not at my death a member of the Roman Catholic Church or of any sisterhood". In neither of those cases was the question of uncertainty raised at all.

This apparent acceptance of the position persisted even as late as the year 1939. In the case of *In re Morrison's Will Trusts, Walsingham v. Blathwayt* [5] there was an elaborate forfeiture clause which included the phrase "or shall

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1 (1859) 7 H.L. 707, at p. 725.
2 [1938] A.C. 656, at p. 671.
3 (1879) 11 Ch. D. 959.
4 [1897] 2 Ch. 255.
5 [1940] Ch. 102.

marry a Roman Catholic". Both Bench and Bar left unmentioned the question of uncertainty. Bennett, J., heard the case and there was no appeal.

Meanwhile, however, the next phase had already opened, though at that time it was unknown to the public or even to the legal profession in general. On 14 December 1938 Farwell J. had given an unreported decision in *In re Blaiberg's Will Trusts* [1] holding that the words "should cease or fail to profess, or intermarry with any person who should not profess, the Jewish faith" were void for uncertainty. Moreover — and here at last we find exact analogy for the first time — in further proceedings arising out of the same will, heard on 28 February 1940, Morton J. held, after full argument, that the words "should any child or grandchild of mine ..... marry any person not of the Jewish faith" were also void for the same reason. And there was no appeal from either decision. See *In re Blaiberg* [2].

Then yet another phase very shortly supervened. In *In re Samuel (deceased), Jacobs v. Ramsden* [3] the very form of words in the present case were considered by the Court of Appeal. The testator's full expression of the contingency was: "if my said daughter Edna Samuel shall at any time after my death contract a marriage with a person who is not of Jewish parentage and of the Jewish faith". Bennett, J., had held that each limb of that condition was void for uncertainty, but the Court of Appeal reversed his decision, held the whole clause valid, expressly overruled Morton, J.,'s decision in *In re Blaiberg*, and indicated that anything said per Farwell, J., in *In re Blaiberg's Will Trusts* or in *In re Evans, Hewitt v. Edwards*[4] which was inconsistent with that view should also be disregarded. (I have not referred to the last-mentioned case in detail because there the testator's language was quite different from that in the present proceedings.)

But the matter did not rest there; *In re Samuel* was taken to the House of Lords, where it is reported sub nom. *Clayton v. Ramsden* [5], and the decision of the Court of Appeal was in its turn reversed.

Even there, however, as a matter of strict technicality, no binding decision on the particular words with which I have to deal was pronounced. For their Lordships based themselves on the composite nature of the forfeiture clause, with its two limbs each of which must achieve the necessary degree of certainty; and, having decided that the first limb — the expression "not of Jewish parentage" — did not come up to the standard required by law, it became unnecessary for them to express an opinion on the second for the purpose of disposing of the appeal.

Nevertheless each of their Lordships expressly dealt with that second limb, the very words used in the present case, i.e. "of the Jewish faith". And by a majority of four to one they made it clear beyond doubt that in

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1 See *In re Samuel* [1942] Ch. 1, at p. 28.
2 [1940] Ch. 385.
3 [1942] Ch. 1.
4 [1940] Ch. 629.
5 [1943] A.C. 320.

their view this expression also suffered from the same defect of uncertainty. Morton J.'s decision in *In re Blaiberg*, it was said [1], may well stand on that ground.

Nor is that the end of the story. For two further cases, each exactly in point, have since then come before the Chancery Division of the High Court in England.

The first was *In re Donn, Donn v. Moses* [2] in which the testator's words were identical with those now under consideration. Uthwatt J., having reviewed the whole position created by the *Blaiberg* and *Samuel* cases, felt "bound to pay all respect" to the dicta in the latter and declared the clause to be void.

The second recent case (the last case reported, as it appears) was *In re Moss, Moss v. Allen* [3], decided by Vaisey J. in December of that year. There the testator had provided for forfeiture on the part of any child or grandchild who "shall inter-marry with any person not a member of the Jewish faith" — again identical phraseology except for the word "member". In holding the clause to be void Vaisey J. said: "It seems to me that 'the Jewish faith', whatever be the sense in which the words are used, is an expression of complete uncertainty"; he then observed that the addition of the word "member" made uncertainty doubly apparent. "I think I am bound", he said (at p. 198), "and I certainly intend, to pay the same regard to the dicta of the House of Lords in *Clayton v. Ramsden* with regard to the words "of the Jewish faith" as was paid to them by Uthwatt J. in *In re Donn*"

As regards my decision in the present case, it was argued by Mr. Serfaty that I am not bound by the decision of another judge of co-ordinate jurisdiction, especially when it comes to the construction of a will. In my view that contention is correct: see per Warrington, L.J., in *Re Masson, Morton v Masson* [4], and per Bray, J., in *Forster v Baker* [5]. Indeed, as was then pointed out, I am under a duty to express my own opinion. But what I am entitled — and indeed, I conceive, also bound — to do is to give weight to the decisions of the High Court in England in identical cases, and also to dicta uttered in the House of Lords, by way of guidance in the matter which I have to decide in the absence of any binding authority. Such is the recognized practice of judges of first instance.

In the present case the chain of recent decisions to which I have referred affords strong guidance in favour of holding the forfeiture clause void for uncertainty. Three Chancery Judges on three separate occasions (excluding Farwell J., who dealt with the somewhat different expression "profess the Jewish faith") and four members of the House of Lords (as against one) have expressly taken that view. And since the reversal of the Court of Appeal in *In re Samuel*, there is no modern decision to the contrary.

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1 Per Lord Russell of Killowen at p. 329.
2 [1944] Ch. 8.
3 (1944) 172 L.T. 196.
4 (1917) 117 L.T. 548, at p. 551.
5 [1910] 2 K.B. 636, at p. 638.

On the other hand there have been a number of cases, up to and including *In re Morrison's Will Trusts* decided in 1939, in which analogous or similar language referring to the Protestant, Roman Catholic, Jewish or Lutheran denomination has been tacitly accepted as sufficiently precise for validity. Over and over again the point as to uncertainty was not raised.

So much for guidance. As to my own view of the forfeiture clause in the will now before me, I hold, in the light of that guidance to which due weight must be given, and as a matter of construction by way of applying the basic principle as enunciated in *Clavering v Ellison* and in *Sifton v Sifton,* that the clause is void for uncertainty. It has to be remembered that the clause must apply as regards the world at large if it is to be enforced at all: It contains no territorial limitation. That being so, a particular "faith" or "religion" is to my mind a question of degree. No doubt there is a multitude of individuals in whose cases the question of adherence to one or another combination of religious tenets is crystal clear; but there must also be very many in this world whose position in such matters is not definable at any given time with that degree of precision which the law requires in order to give effect to a forfeiture on a condition subsequent, especially in so delicate a matter as a posthumous dominion over the lives of children and the vicarious penalization of grandchildren yet unborn.

The answers, therefore, to the questions put to the court are these:

(1) The clause is void for uncertainty.

(2) This question does not arise.

In all the circumstances I think that the usual order as to costs in such cases is the proper order here. Accordingly the costs of all parties, as betwen solicitor and client, will come out of the estate.