APP TOWN 1423
FOLL. 1950 S.R. 145

[HIGH COURT OF AUSTRALIA.]

IN RE CUMING.

NICHOLLS . . . . . APPELLANT;
APPLICANT,

AND

PUBLIC TRUSTEE (SOUTH AUSTRALIA) AND ANOTHER . . . . . } RESPONDENTS.
RESPONDENTS,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1945.

ADELAIDE, *Sept.* 19, 20.

SYDNEY, *Nov.* 19.

Latham C.J., Starke and Dixon JJ.

Will—Conditional gift—Condition precedent—Renunciation of Roman Catholic faith—Uncertainty—Validity of condition—Public policy—Interference with parental duty—Infant legatee—Infant legatee married—Law of Property Act, 1936 (*S.A.*) (*No.* 2328 *of* 1936), *s.* 23.

A testatrix, subject to a life interest, left half of her residuary estate upon trust for her grand-daughter "provided she shall have renounced the Roman Catholic religion within three calendar months of my decease." The grand-daughter, who had married during the life of the testatrix, professed and had not renounced the Roman Catholic faith. She did not attain the age of twenty-one years until three calendar months and one day after the death of the testatrix.

Held: (1) The condition was a condition precedent and was valid: (2) It was not void for uncertainty, because the condition requiring renunciation was capable of performance by an unequivocal and sincere declaration: (3) It was not void for impossibility, because the beneficiary, though under twenty-one years of age, was competent to renounce her religion; dictum of *Luxmoore* J. in *In re May* ((1932) 1 Ch. 99, at p. 106) applied: (4) As the beneficiary was a married woman, it was not void as contrary to public policy as an interference with the parental right to bring up a child in a particular faith.

Decision of the Supreme Court of South Australia (*Napier* C.J.): *In re Cuming* (1943) S.A.S.R. 336, affirmed.

APPEAL from the Supreme Court of South Australia.

By her last will and testament, Phebe Smith Cuming appointed the Public Trustee of Adelaide sole executor and trustee of her will. She left the residue of her estate to her trustee upon trust for investment and for payment of the income therefrom (so far as material) as to one-half share to her daughter Joyce Torrens Backshall for life. She then directed her trustee as follows: "Upon the decease of the said Joyce Torrens Backshall as to one half of the capital sum representing my residuary estate upon trust for my grandchild Bridget Irene Backshall provided she shall have renounced the Roman Catholic religion within three calendar months of my decease and failing such renunciation as aforesaid then as to such one half of the capital sum as aforesaid upon trust for the Protestant Children's Home at Magill in the said State for the general funds of such Home." The testatrix died on 27th December 1941 and was survived by the daughter and the grand-daughter named in the will. The Public Trustee duly proved the will. At the date of the death of the testatrix, the grand-daughter Bridget Irene Backshall had married one Nicholls. She did not attain her majority until 28th March 1942, one day after the lapse of three calendar months from the death of the testatrix. It was common ground that she professed the Roman Catholic faith, and she had not renounced that religion.

On an originating summons in the Supreme Court of South Australia, *Napier* C.J. held that the condition attached to the gift to Bridget Irene Nicholls (formerly Backshall) was valid and that she took no share in the residuary estate: *In re Cuming* (1).

From this decision, Bridget Irene Nicholls appealed to the High Court.

K. L. Ward (with him *Culshaw*), for the appellant. The condition is a condition subsequent. There is no fixed test as to whether a condition is precedent or subsequent, but the law favours an early vesting (*Jarman* on *Wills*, 7th ed. (1930), p. 1450; *Halsbury's Laws of England*, 2nd ed. (1940), vol. 34, p. 370). The word "failing" indicates that the gift over is to take effect on defeasance of the condition (*Gulliver d. Corrie* v. *Ashby* (2)). The modern tendency is to favour a condition subsequent (*In re Greenwood*; *Goodhart* v. *Woodhead* (3); *Sifton* v. *Sifton* (4); *In re Cross*; *Law* v. *Cross* (5)). The modern tendency of the English Courts is to prevent a testator

(1) (1943) S.A.S.R. 336
(2) (1766) 4 Burr. 1929 [98 E.R. 4].
(3) (1903) 1 Ch. 749.
(4) (1938) A.C. 656, at p. 676.
(5) (1938) V.L.R. 221.

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from controlling the lives of his children from the grave (*Clayton* v. *Ramsden* (1); *In re Blaiberg*; *Blaiberg* v. *De Andia Yrarrazaval* (2); *In re Evans*; *Hewitt* v. *Edwards* (3)). The condition is void for uncertainty, for impossibility and because it is contrary to public policy. It is void for uncertainty, because there is no test which can be applied to decide whether or not a person has renounced the Roman Catholic religion (*In re Borwick*; *Borwick v. Borwick* (4); *Re Tegg* (5); *In re Moss's Trusts*; *Moss* v. *Allen* (6)).

[STARKE J. referred to *Clavering* v. *Ellison* (7).]

It is void for impossibility, because it was legally impossible for the beneficiary to renounce her religion during her minority (*Halsbury's Laws of England*, 2nd ed., vol. 17, p. 669; *In re May*; *Eggar* v. *May* (8); *Lough* v. *Ward* (9); *In re May*; *Eggar* v. *May* (10); *Patton* v. *Toronto General Trusts Corporation* (11); *In re Agar-Ellis*; *Agar-Ellis* v. *Lascelles* (12); *Partridge* v. *Partridge* (13)).

[DIXON J. referred to *Public Trustee* v. *Gower*; *Gower* v. *Public Trustee* (14).]

It is void as contrary to public policy, because it interferes with parental control and because it impels an infant, possibly against her conscience, to renounce her religion while she is under age (*In re May*; *Eggar* v. *May* (8); *Patton* v. *Toronto General Trusts Corporation* (15); *In re Borwick*; *Borwick* v. *Borwick* (16); *Re Tegg* (17); *Perpetual Trustee Co.* v. *Hogg* (18)). Even if the condition be a condition precedent, the gift is good and the bad condition may be ignored (*Law of Property Act* 1936 (S.A.), s. 23, which was passed to overcome the decision in *In re McGillivray* (19)). The word "illegal" in the section means only "unlawful" or "void"—something which the law will not recognize (*Acts Interpretation Act* 1915-1936 (S.A.), s. 22). Even apart from this section, the gift is good and the condition rejected, because in cases of *malum prohibitum* (as this is) a condition precedent is treated on the same basis as a condition subsequent (*Jarman* on *Wills*, 7th ed. (1930), p. 1443; *In re Moore*; *Trafford* v. *Maconochie* (20); *Reynish* v. *Martin* (21);

(1) (1943) A.C. 320.
(2) (1940) Ch. 385.
(3) (1940) Ch. 629.
(4) (1933) 1 Ch. 657, at p. 668.
(5) (1936) 2 All E.R. 878.
(6) (1944) 61 T.L.R. 147.
(7) (1859) 7 H.L.C. 707 [11 E.R. 282].
(8) (1917) 2 Ch 126.
(9) (1945) 2 All E.R. 338.
(10) (1932) 1 Ch. 99, at p. 106.
(11) (1930) A.C. 629, at p. 636.
(12) (1883) 24 Ch. D. 317.
(13) (1894) 1 Ch. 351.
(14) (1924) N.Z.L.R. 1233.
(15) (1930) A.C. 629.
(16) (1933) 1 Ch. 657.
(17) (1936) 2 All E.R. 878.
(18) (1936) 36 S.R. (N.S.W.) 61; 53 W.N. 67.
(19) (1908) S.A.L.R. 77, at pp. 82, 83, 84.
(20) (1888) 39 Ch. D. 116.
(21) (1746) 3 Atk. 330 [26 E.R. 991].

In re Ellis ; *Perpetual Trustee Co. Ltd.* v. *Ellis* (1) ; *In re Thomas's Will Trusts* ; *Powell* v. *Thomas* (2)).

Phillips, for the respondent Morialta Protestant Children's Home Incorporated. Section 23 of the *Law of Property Act* (S.A.) is aimed at cases where, apart from the section, the gift would be void. "Illegal" means the type of condition which is *contra mores* or illegal in the strict sense of the term (*In re Dickson's Trust* (3)). If the court finds that this is a condition precedent, it can upset the judgment appealed from only if the condition is bad on grounds of public policy. The first thing to seek is the intention of the testatrix. In so far as the civil law applies, it merely furnishes a rule of construction and must yield to the context (*In re Coward* ; *Coward* v. *Larkman* (4)). Clearly the present testatrix did not intend the appellant to enjoy her bounty unless and until the condition was fulfilled. The condition is not uncertain. What is contemplated is an overt act indicating that the appellant no longer belongs to the Roman Catholic religion (*In re Evans* ; *Hewitt* v. *Edwards* (5)). While it may be difficult to show that a person belongs to a particular faith, it may be easy to demonstrate that he has renounced it. Hence little assistance is derived from such cases as *Clayton* v. *Ramsden* (6) ; *In re Blaiberg* ; *Blaiberg* v. *De Andia Yrarrazaval* (7). Nor is the condition contrary to public policy. In every case where that doctrine has been invoked, there has been a direct interference with parental control. Instances are *In re Borwick* ; *Borwick* v. *Borwick* (8) ; *In re Sandbrook* ; *Noel* v. *Sandbrook* (9) ; *In re Cross* ; *Law* v. *Cross* (10) ; *Perpetual Trustee Co.* v. *Hogg* (11) ; *In re Jones* ; *Jones* v. *Baxter* (12) ; *Gower* v. *Public Trustee* (13). In any case the appellant had reached the age of discretion and was able to exercise her own judgment as to matters of religion (*Hodgson* v. *Halford* (14) ; *Gower* v. *Public Trustee* (15)). The condition is not void for impossibility (*In re Agar-Ellis* ; *Agar-Ellis* v. *Lascelles* (16) ; *In re May* ; *Eggar* v. *May* (17) ; *Public Trustee* v. *Gower* ; *Gower* v. *Public Trustee* (18)). [On the question of costs he referred to *Dunne* v. *Byrne* (19).]

(1) (1929) 29 S.R. (N.S.W.) 470 ; 46 W.N. 146.
(2) (1930) 2 Ch. 67.
(3) (1850) 1 Sim. (N.S.) 37 [61 E.R 14].
(4) (1887) 57 L.T. 285.
(5) (1940) Ch. 629.
(6) (1943) A.C. 320.
(7) (1940) Ch. 385.
(8) (1933) 1 Ch. 657.
(9) (1912) 2 Ch. 471.
(10) (1938) V.L.R. 221.
(11) (1936) 36 S.R. (N.S.W.) 61 ; 53 W.N. 67.
(12) (1929) 30 S.R. (N.S.W) 26 ; 46 W.N. 190.
(13) (1924) N.Z.L.R. 1233.
(14) (1879) 11 Ch. D. 959.
(15) (1924) N.Z.L.R. 1233, at p. 1250.
(16) (1883) 24 Ch. D. 317, at p. 336.
(17) (1932) 1 Ch. 99, at p. 111.
(18) (1924) N.Z.L.R. 1233, at p. 1253.
(19) (1912) A.C. 407, at p. 412.

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Lewis, for the respondent Public Trustee, submitted to the order of the Court and referred, as to the trustees' costs, to *Gleeson* v. *Fitzpatrick* (1).

Ward, in reply.

Cur. adv. vult.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from an order of the Supreme Court of South Australia (*Napier* C.J.) declaring that a condition attached to a gift of residue made by the will of the late Phebe Smith Cuming is valid. The gift is contained in the following clause of the will :— " Upon the decease of the said Joyce Torrens Backshall as to one half of the capital sum representing my residuary estate upon trust for my grandchild Bridget Irene Backshall provided she shall have renounced the Roman Catholic religion within three calendar months of my decease and failing such renunciation as aforesaid then as to such one half of the capital sum as aforesaid upon trust for the Protestant Children's Home at Magill in the said State for the general funds of such Home."

Joyce Torrens Backshall is the daughter of the testatrix, who died on 22nd December 1941, having made her will on 2nd September 1941. Bridget Irene Backshall is the daughter of Joyce Torrens Backshall, and she and her mother both survived the testatrix. Bridget Irene Backshall married prior to the death of the testatrix and is now Mrs. Nicholls. The affidavit of the Public Trustee states :—Mrs. Nicholls " did not attain her majority until the 28th March 1942 namely until one day after the lapse of three calendar months from the death of the testatrix and she has not renounced her religion." The affidavit does not state that Mrs. Nicholls was brought up in the Roman Catholic religion, and that she still professes that religion, but the case was argued upon the basis that those were the facts. The learned Chief Justice held that the condition of the gift that she should " renounce the Roman Catholic religion " within three calendar months of the death of the testatrix was a condition precedent, was valid, and had not been performed, so that the gift to Mrs. Nicholls failed.

The gift was a gift of the proceeds of sale and conversion of real and personal estate, and it is not disputed that it is to be treated as a gift of personalty (*In re Ellis* ; *Perpetual Trustee Co. Ltd.* v. *Ellis* (2)). It was argued for the appellant that the condition was a

(1) (1920) 29 C.L.R. 29.

(2) (1929) 29 S.R. (N.S.W.) 470, at pp. 474, 475 ; 46 W.N. 146, at pp. 147, 148.

condition subsequent, and was void, so that the gift became absolute, free from the condition. Alternatively, it was argued that if it were a condition precedent it was void on three grounds; first, as being uncertain; secondly, as being impossible, and thirdly, as being contrary to public policy. If the condition was void upon any one of these grounds it could not take effect, and it was contended that, as the gift must be treated as a gift of personalty, a rule of the civil law applied and the gift became absolute.

The law upon which the appellant relied is contained in the following passage in *Jarman* on *Wills*, 7th ed. (1930), pp. 1443-1444:— "Where land is devised upon a void condition, and the condition is precedent, the devise is itself void; if the condition is subsequent, the devise is absolute. Where personal estate is bequeathed on a void condition, if the condition is subsequent, the same rule applies as in the case of a devise of land, that is to say, the bequest is absolute. But the civil law, which in this respect has been adopted by Courts of Equity, differs in some respects from the common law in its treatment of conditions precedent; the rule of the civil law being that where a condition precedent is originally impossible, or is illegal as involving *malum prohibitum*, the bequest is absolute, just as if the condition had been subsequent. But where the performance of the condition is the sole motive of the bequest, or its impossibility was unknown to the testator, or the condition which was possible in its creation has since become impossible by the act of God, or where it is illegal as involving *malum in se*, in these cases the civil agrees with the common law in holding both gift and condition void." The law as thus stated was approved in the case of *In re Moore*; *Trafford* v. *Maconochie* (1).

The first question which arises is whether the condition is a condition precedent or a condition subsequent. I agree with the decision of the learned Chief Justice that it is a condition precedent. In order to ascertain whether a condition is precedent, so that it must be performed before a beneficiary takes any interest, or a condition subsequent, so that it operates only in defeasance of an interest given to the beneficiary, it is necessary to look at the precise words of the provision creating the condition. It is a question of the intention of the testator, to be ascertained from the words which he has used (*Acherley* v. *Vernon* (2), quoted in *Jarman* on *Wills*, 7th ed. (1930), p. 1445). In the present case, the beneficiary professed the Roman Catholic religion at the time of the death of the testatrix, and it is in my opinion clear upon the words of the will that the

(1) (1888) 39 Ch. D. 116, at pp. 122, 128.

(2) (1739) Willes 153 [125 E.R. 1106].

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testatrix did not intend her to enjoy any interest under the will unless she fulfilled the condition of renouncing the Roman Catholic religion within the time stated—a single definite act to be performed within a limited period. This is not a case of a gift being made to a beneficiary which is liable to be defeated if a condition is not performed. The condition is a condition precedent.

The appellant contended that the condition was void upon the principle stated in *Clavering* v. *Ellison* (1), namely, 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." But this rule applies only to conditions which operate in defeasance of estates previously vested, i.e., to conditions subsequent: See *Sifton* v. *Sifton* (2) and *Clayton* v. *Ramsden* (3). If, however, the condition is valid, it is immaterial whether it is a condition precedent or a condition subsequent, if it has not been performed.

But it is contended on behalf of the appellant that, apart from the particular rule mentioned, the words " provided she shall have renounced the Roman Catholic religion," are such that no certain meaning can be attached to them. Reference was made to cases in which courts had, upon the ground of uncertainty, held to be void conditions of defeasance upon, for example, marrying a person not of the Jewish faith (*In re Blaiberg* ; *Blaiberg* v. *De Andia Yrarrazaval* (4) ; *Clayton* v. *Ramsden* (5) ; *In re Moss's Trusts* ; *Moss* v. *Allen* (6)).

There may be difficulty in some circumstances in determining whether or not a person is of a particular religious faith though, until recently, as in the cases last cited, the courts appear to have found no inherent difficulty in solving the problem (*Hodgson* v. *Halford* (7)). It was mentioned by my brother *Starke* during argument that it had not hitherto been thought that there was any difficulty in interpreting the provisions of the *Act of Settlement* (Imp.), which determined the succession to the throne by (*inter alia*) excluding persons who should profess the Roman Catholic faith.

But in this case the condition refers to *renunciation* of a particular faith. The long history of religion provides many instances of such renunciation. The provision is capable of quite certain performance by an unequivocal and sincere declaration repudiating the particular

(1) (1859) 7 H.L.C. 707, at p. 725 [11 E.R. 282, at p. 289].
(2) (1938) A.C. 656, at p. 670.
(3) (1943) A.C. 320, at p. 326.
(4) (1940) Ch. 385.
(5) (1943) A.C. 320.
(6) (1944) 61 T.L.R. 147.
(7) (1879) 11 Ch. D. 959, at p. 967.

faith. Of course a difficulty may arise in determining whether or not such a declaration is sincere and real, but a decision as to the veracity and credibility of a person is an every-day task for the courts. In the present case, it is plain that Mrs. Nicholls has not renounced the Roman Catholic faith. The argument that the condition is uncertain should, in my opinion, be rejected.

In the next place, it is argued that the condition is void by reason of impossibility. This argument is based on the contention that no person under twenty-one years of age can either adopt or renounce a religion. The bald statement of this proposition seems to me to be sufficient to discredit it as opposed to ordinary human experience. It is supported, however, by a reference to *In re May* ; *Eggar* v. *May* (1), where *Neville* J. said :—" The result to my mind is that during the time until he reaches the age of twenty-one he cannot in the sense meant in the will be said to be either a Roman Catholic or not a Roman Catholic. In the eyes of this Court he cannot determine what his religion shall be until he has reached years of discretion." The learned judge, however, was interpreting particular provisions in a will. He construed the will as intended to provide that the legatee should exercise the religious option to which the will referred after, and not before, he had attained the age of twenty-one. After the legatee had attained the age of twenty-one the Court of Appeal considered the provisions of the same will (*In re May* ; *Eggar* v. *May* (2)). There the Court of Appeal accepted, as a matter decided between the parties in the previous proceedings, that the beneficiary was not to be regarded as a Roman Catholic within the meaning of the will while he was a minor. Since attaining the age of twenty-one he had maintained his previous adherence to the Roman Catholic Church. He stated in an affidavit : " I am and have been all my life a Roman Catholic." This statement was accepted as decisive of the question. (I see no reason why a similarly clear statement as to renunciation of a faith cannot equally be accepted.) The decision of *Luxmoore* J. was that the beneficiary had become a Roman Catholic, and, accordingly, had forfeited his legacy. Neither *Luxmoore* J. (3) nor *Romer* L.J. in the Court of Appeal (4) gave any support to the view that it was impossible for an infant to determine what his religion was until he had attained his majority. I agree with *Luxmoore* J., who said :—" For my own part, I should have thought that a person under the age of twenty-one could properly determine his adherence to a particular religion before attaining that age " (3). On this point see also *Public Trustee* v. *Gower* ; *Gower* v.

(1) (1917) 2 Ch. 126, at p. 130.
(2) (1932) 1 Ch. 99.
(3) (1932) 1 Ch., at p. 106.
(4) (1932) 1 Ch., at p. 113.

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Public Trustee (1) per *Salmond* J. If a minor has reached years of sufficient discretion and intelligence to understand what he is doing he is capable of renunciation of a particular religion. The condition is not, in my opinion, impossible.

In the third place, it was argued that the condition was void as being contrary to public policy. This contention was based upon the proposition that a parent has not only a duty to attend to the religious education of his child, but also has the right to bring up a child in a particular faith, and that any gift to which a condition is attached which interferes with that duty and that right is opposed to the policy of the law. The offer of a benefit upon condition of adopting or deserting a particular religion provides, it is said, a pecuniary inducement which interferes with such parental rights and duties. Reference was made to *In re Sandbrook* ; *Noel* v. *Sandbrook* (2), where the court held to be invalid a condition of a gift which contained a declaration that if children should live with their father or be in any way directly under his control, their benefits under the will should cease and determine. It was held that the condition was void as contrary to public policy, because it was inserted with the object of preventing the father from performing his parental duties. Reference was also made to *In re Borwick* ; *Borwick* v. *Borwick* (3), where the court considered a will which provided that an interest given to a child should be forfeited if the child " shall at any time before attaining a vested interest . . . be or become a Roman Catholic or not be openly or avowedly Protestant." A vested interest would have been obtained under the will when the child attained the age of twenty-one years. It was held that this condition operated to interfere with the parent in the exercise of his parental duty in regard to the religious instruction of his children and was accordingly void as contrary to public policy. See also *In re Ellis* ; *Perpetual Trustee Co. Ltd.* v. *Ellis* (4) ; *Perpetual Trustee Co.* v. *Hogg* (5) ; *Re Tegg* (6) ; *In re Cross* ; *Law* v. *Cross* (7).

But the legatee in this case was a married woman at the time of the death of the testatrix and during the period of three months after her death mentioned in the will. There is no authority which says that a parent is either bound or entitled to control a daughter in respect of her religion after her marriage. In *In re Agar-Ellis* ; *Agar-Ellis* v. *Lascelles* (8), *Brett* M.R., referring to the jurisdiction exercised by the courts in relation to the custody of children upon applica-

(1) (1924) N.Z.L.R. 1233, at p. 1253.
(2) (1912) 2 Ch. 471.
(3) (1933) 1 Ch. 657.
(4) (1929) 29 S.R. (N.S.W.) 470 ; 46 W.N. 146.
(5) (1936) 36 S.R. (N.S.W.) 61 ; 53 W.N. 67.
(6) (1936) 2 All E. R. 878.
(7) (1938) V.L.R. 221.
(8) (1883) 24 Ch. D. 317, at p. 326

tion for writs of habeas corpus, said that above the age of fourteen in the case of a boy and above the age of sixteen in the case of a girl the court will inquire into the wishes of the child. In *Simpson* on *Infants*, 4th ed. (1926), p. 153, it is said that there is a doubt whether guardianship of a female infant is determined by her marriage, though Lord *Hardwicke* had expressed a contrary opinion. But, whatever may be the position as to guardianship, it would, in my opinion, require very clear authority to show that a parent has any right or duty to control the religious education or opinions of a married daughter of the age of twenty years. I agree with the opinion of *Napier* C.J. that " in the circumstances of this case it would be against reason to say that the condition would operate to interfere with the exercise of any parental duty." See also *Lough* v. *Ward* (1), where *Cassels* J. held that a father's control over the religious bringing up of children continued until they reached twenty-one or married under that age.

Accordingly, in my opinion, all the objections to the condition fail and the learned Chief Justice was right in holding it to be valid.

This conclusion renders it unnecessary to consider the provisions of the *Law of Property Act* 1936 (S.A.), s. 23. This section provides that " no gift . . . by testamentary disposition . . . shall be held to be void solely on the ground that the testator . . . has attached an illegal stipulation to such gift ". The section has no application where a condition is not illegal.

It was argued that, if the gift to Mrs. Nicholls failed because the condition upon which it was given was a condition precedent and was void, it followed that the alternative gift to the Children's Home was also void because it would then be dependent upon the failure of a condition of a kind to which the court could give no effect. But if the condition is good (as in my opinion it is) and has not been performed, no such question arises.

As to costs, the appellant should abide her own costs and the respondents should be allowed their costs out of the estate ; costs of Public Trustee fixed at £10 10s.

STARKE J. Phebe Smith Cuming, who died on 27th December 1941, made a will in September 1941 whereby she bequeathed the residue of her estate upon trust upon the decease of her daughter Joyce Torrens Backshall as to one-half of the capital sum representing her residuary estate for her grandchild Bridget Irene Backshall " provided she shall have renounced the Roman Catholic religion within three calendar months of " her (the testatrix's) " death and

(1) (1945) 200 Law Times Journal 7.

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failing such renunciation as aforesaid then as to such one-half of the capital sum as aforesaid upon trust for the Protestant Children's Home at Magill . . . for the general funds of such home."

Joyce Torrens Backshall survived the testatrix and is, I understand, still alive.

Bridget Irene Backshall married one Nicholls before the death of the testatrix but did not attain the age of twenty-one years until 28th March 1942, one day after the lapse of three calendar months from the death of the testatrix. Bridget Irene Backshall or Nicholls was brought up in the Roman Catholic faith and has not renounced her religion.

The Supreme Court of South Australia declared that the condition attached to the trust for the grandchild Bridget Irene Nicholls is valid and binding, and from this declaration an appeal has been brought to this Court.

The cases establish that a testator may by his will make provision in favour of his children or other persons on condition that they shall not embrace a particular faith or become a member of a particular religious order (*Hodgson* v. *Halford* (1); *Wainwright* v. *Miller* (2)). Conditions of this character, whether precedent or subsequent, are not favoured by the courts. According to the books, if personal property or a mixed fund of the proceeds of real and personal estate (*Bellairs* v. *Bellairs* (3)) is bequeathed subject to a condition precedent which is void because it involves *malum prohibitum* or is impossible *ab initio*, the bequest is absolute—the bequest stands "pure and simple." But where the condition involves *malum in se* or the condition has become impossible by act of God the bequest is void (*Wren* v. *Bradley* (4); *In re Moore*; *Trafford* v. *Maconochie* (5); *Dawson* v. *Oliver-Massey* (6)). *Mala prohibita*, I gather, were acts prohibited by statute, whereas *mala in se* were acts contrary to the law of God or of nature. But, as Sir *William Holdsworth* points out, the Reformation "caused a considerable divergence of opinion as to what was and what was not commanded by the law of God or nature," and he also points out that the State is "assuming power to determine the contents of these laws": See *Holdsworth, History of English Law*, 2nd ed. (1937), vol. 6, pp. 218-223. Acts contrary to public policy would, I should think, be regarded as *mala prohibita* within the rule.*

Here the condition is precedent because the performance of the condition is to precede the vesting of the gift.

(1) (1879) 11 Ch. D. 959.
(2) (1897) 2 Ch. 255.
(3) (1874) L.R. 18 Eq. 510.
(4) (1848) 2 DeG. & Sm. 49 [64 E.R. 23].
(5) (1888) 39 Ch. D. 116.
(6) (1876) 2 Ch. D. 753, at p. 755.

* Editor's Note.—See also *Re Piper*; *Dodd & Anor.* v. *Piper & Ors.*, (1946) W.N. 187.

It is said to be contrary to the policy of the law because it operates to interfere with the legatee's parents in the exercise of their parental duty as regards her religion (*In re Sandbrook*; *Noel* v. *Sandbrook* (1); *In re Borwick*; *Borwick* v. *Borwick* (2)), and consequently that the gift is absolute and "stands pure and simple." But those cases strike me as a rather fanciful application of the rule that conditions against public policy are void. And to apply the rule to the case of an infant who is a married woman is unjustifiable, for the infant is no longer under parental control.

Next it was said that the condition was impossible of performance *ab initio* because of the infancy of Bridget Irene Nicholls, or at all events that, upon the proper construction of the will, the testatrix could not have meant that the condition should be performed during the infancy of Bridget Irene Nicholls because it involved the exercise of choice by her: See *In re May*; *Eggar* v. *May* (3); *Partridge* v. *Partridge* (4); *In re Edwards*; *Lloyd* v. *Boyes* (5). An infant, however, is not without capacity. Contracts may be made by him binding upon the other contracting party until avoided, the privilege of avoidance being that of the infant only. An infant may become possessed of real or personal property to which obligations are incident and become liable to those obligations so long as he continues in possession of the property. And infancy is no defence to actions for wrongs independent of contract (*Leake* on *Contracts*, 6th ed. (1911), pp. 389-390, 393). So there is no convincing reason that disentitles an infant, who has reached years of discretion, from renouncing a religion or becoming a convert to another religion. And the intention of the testatrix can only be gathered from the terms of her will, and it is explicit that renunciation by the legatee must take place within three months of the death of the testatrix. And I suppose a court of equity might assist an infant—a ward of court—who had not reached years of discretion: Cf. *Seton* on *Forms of Decrees, Judgments and Orders*, 7th ed. (1912), pp. 999 et seq.

In the present case, Bridget Irene Nicholls was competent enough, had she so desired, to renounce her religion, but she in fact has never renounced it: Cf. *In re May*; *Eggar* v. *May* (6); *Patton* v. *Toronto General Trusts Corporation* (7).

Lastly it was contended that the condition was so uncertain that it was impossible of performance *ab initio*.

The cases show that the condition must be such that the courts can see precisely and distinctly upon what event the gift is to vest or

(1) (1912) 2 Ch. 471.
(2) (1933) 1 Ch. 657.
(3) (1917) 2 Ch. 126.
(4) (1894) 1 Ch. 351.
(5) (1910) 1 Ch. 541.
(6) (1917) 2 Ch. 126; (1932) 1 Ch. 99.
(7) (1930) A.C. 629.

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to determine : See *Clavering* v. *Ellison* (1) ; *Clayton* v. *Ramsden* (2). But there is no good reason for holding in this case that the condition is uncertain. It was said that the legatee is left in doubt as to the nature of the act which was required for the fulfilment of the condition. Some definite act or conduct from which it may be concluded that Bridget Irene Nicholls renounced her religion must doubtless be established (*In re Evans* ; *Hewitt* v. *Edwards* (3)). But there is no more difficulty in proving that a person has renounced a religion than there is in proving the renunciation of a contract or other benefit.

The provisions of s. 23 of the *Law of Property Act* 1936 (S.A.) have, in the view I have taken, no bearing upon this case.

In my judgment, the decision of *Napier* C.J. was right and this appeal should be dismissed.

DIXON J. I agree that this appeal should be dismissed. That the proviso to clause 10 of the will of Phebe Smith Cuming is framed as a condition precedent to the gift to Bridget Irene of the interest expectant upon the death of Joyce Torrens Backshall appears to me scarcely to admit of doubt. The reasons, highly artificial reasons, for placing a construction upon it which would result in its being a proviso by way of defeasance, seem to me to have little or no application to a future interest and, in any event, to be insufficient to overcome the form in which the proviso is expressed.

In strictness, it does not matter in the circumstances whether the condition, being once positively construed as distinctly precedent to the gift and intended as indispensable to its operation, is uncertain, notwithstanding that the gift is of personalty. But, in spite of the steady flow of case law in which, for one reason or another, conditions for the shifting of interests or the defeat of gifts on grounds relating to religious faith have been invalidated, I think that this testatrix has succeeded in setting a criterion which is not so vague as to entitle the Court to reject it. Renunciation involves an overt act expressive of a refusal to accept or adhere to the faith denied. It is asked by counsel how much of the faith in question, which, and how many, of its doctrines and tenets must be renounced in this sense ? The answer lies in the evident fact that the difference in religious faith to which this testatrix directed the condition attached to the gift is that between Roman Catholicism and Protestantism.

Under the law of South Australia it is at least probable that the invalidity of a condition precedent on the ground of public policy may result in the gift remaining effective and becoming absolute,

(1) (1859) 7 H.L. Cas. 707 [11 E.R. 282.]
(2) (1943) A.C. 320.
(3) (1940) Ch. 629, at p. 634.

in the same way as it would if the condition were subsequent. For s. 23 of the *Law of Property Act* 1936 (S.A.), enacted in consequence of the remarks of *Gordon* J. in *In re McGillivray* (1), provides in substance that a testamentary gift shall not be held void because the testator " has attached an illegal stipulation " to " the gift." I am not prepared to say that a condition bad because contrary to the policy of the law is not included in the words " illegal stipulation " and, indeed, I did not understand it to be contended that illegality did not cover the contravention of public policy. But it is another matter to hold that the proviso attached to the gift in question is, in truth, contrary to public policy. The basis of the contention that it is bad on that ground is the fact that, throughout the period of three months allowed for her to renounce her religion, Bridget Irene, although a married woman, was an infant. She reached full age the day after the three months expired. For a testator to place adherence to religious beliefs and the adherent's pecuniary interest in opposition is not considered contrary to good morals or to any principle of public policy which the law vindicates by the avoidance of counter stipulations or conditions. The sensibilities of the law appear to be not so refined concerning that moral question considered as affecting the mind of the donee. What is seized hold of in the decided cases on the subject where an infant is involved, is the legal duty of the parent or guardian to decide upon and care for his or her religious instruction. The parent or guardian is not to be perplexed in the discharge of this duty by conditions attached to gifts to his child or his ward involving the loss to the latter of property if in exercising his authority he pursues the course his judgment and his conscience dictate. See *In re Sandbrook* ; *Noel* v. *Sandbrook* (2) ; *In re May* ; *Eggar* v. *May* (3) ; *In re Borwick* ; *Borwick* v. *Borwick* (4) ; *Re Tegg* (5) ; *Lough* v. *Ward* (6).

We are dealing here only with a period of three months, the last three months of the minority of the donee, and she was a woman whose religious faith had been fixed and throughout the period the donee was a married woman living with her husband. We are not dealing with an abstract question. To decide the validity as affected by public policy of any provision, you look at the state of facts existing when the instrument becomes operative and to which it applies. Looking at the circumstances as at the death of the testatrix, it would, I think, be entirely unreal to hold that the parental duty continued in reference to Bridget Irene or could be

(1) (1908) S.A.L.R. 77, at pp. 82, 83.
(2) (1912) 2 Ch. 471.
(3) (1917) 2 Ch. 126 ; (1932) 1 Ch. 99.
(4) (1933) 1 Ch. 657.
(5) (1936) 2 All E.R. 878.
(6) (1945) 2 All E.R. 338, at p. 348.

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prejudiced by the proviso. There is no binding authority nor any principle requiring us so to hold. On the contrary, what little guidance there is tends, on the whole, to show that in the case of a woman marriage to an adult before full age ends the guardianship of the person (see *Eversley's Law of Domestic Relations*, 5th ed. (1937), Part III., ch. IV., s. 2 (*a*), p. 556, and *Halsbury's Laws of England*, 2nd ed. (1935), vol. 17, p. 693 and note (*a*) *Jenks' Digest*, par. 1989) and, even if that were not so, it would be hard to believe that the parental responsibility for upbringing could go on: Cf. *Lough* v. *Ward* (1), per *Cassels* J., who says :—" The law of England is that the father is the head of the family and has control over his children, their persons, their education and their conduct until they are twenty-one years of age or marry under that age."

Some of the foregoing considerations are material to the question whether the proviso or condition is void for impossibility on the ground that, until twenty-one, the donee could not lawfully decide whether or not to renounce her religion. In *May's Case* (2) *Neville* J. said :—" In the eyes of this Court he cannot determine what his religion shall be until he has reached years of discretion." But fourteen years afterwards, when the matter came before *Luxmoore*, J. (3) he said :—" With all respect to the learned judge, I doubt whether he is really correct in saying that in the eyes of the court a person cannot determine what his religion shall be until he has reached the age of twenty-one. For my own part, I should have thought that a person under the age of twenty-one could properly determine his adherence to a particular religion before attaining that age."

I think that we should act on the view of *Luxmoore* J., interpreting the will as meaning that a renunciation *per verba de praesenti* by the donee, whether of full age or not, would satisfy the condition.

For these reasons, I think that the appeal should be dismissed and with costs.

Appeal dismissed. Appellant to abide her own costs. Costs of respondents out of estate, those of respondent Public Trustee fixed at ten guineas.

Solicitors for the appellant, *Gunson & Culshaw.*

Solicitors for the respondent Morialta Protestant Children's Home Inc., *Finlayson, Phillips, Astley & Hayward.*

Solicitors for the respondent Public Trustee, *Davies & Giles.*

C. C. B.

(1) (1945) 2 All E.R., at p. 348.
(2) (1917) 2 Ch., at p. 130.
(3) (1932) 1 Ch., at p. 106.