

61, 1930

In the Privy Council.

No. 127 of 1929.

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

IN THE MATTER of the Estate of WILLIAM ROBERT PATTON deceased.

BETWEEN

WILLIAM ROBERT PATTON *Appellant,*

AND

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

CASE OF THE RESPONDENT ANNIE LOUISE CARLYLE.

1. This is an Appeal from the Judgment of the Second Division of the Appellate Division of the Supreme Court of Ontario dated the 5th day of April, 1929, dismissing an Appeal by the Appellant from the Judgment of Middleton J.A., dated the 7th day of November, 1928. Record.
p. 21, l. 40.
p. 22, l. 11.
p. 15.

2. The Executors of William Robert Patton, deceased, moved by way of Originating Notice for the determination of two questions. p. 1.

THE FIRST: Is William Robert Patton (the Testator's grandson) entitled to have paid to him the sum of \$500.00 a year as directed by Clause (c) of the Will of the Testator. p. 1, l. 15.

10 THE SECOND: Is the said William Robert Patton (the grandson) entitled to have paid to him from and after the death of the said Robert George Patton (his father) the Annuity paid to the father during his lifetime under the provisions of Clause (c) of the said Will. p. 1, l. 18.

Record.
p. 26, l. 8.

3. By Clause (c) of his Will the Testator directs investment of the proceeds of his Estate and out of the Income derived therefrom payment of an Annuity to his son and to his grandson, conditionally, the provisions being :—

p. 26, l. 11.

“ 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 and during the term of his natural life, the sum of Five hundred dollars (\$500.00) a year, payable quarterly.”

p. 26, l. 33.

4. By Clause (d) of his Will the Testator directs payment to his grandson of a further Annuity, conditionally, the provision being :—

“ 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.”

5. The Testator was a British subject domiciled and residing in the Province of Ontario.

p. 24, l. 40.
p. 24, l. 13.
p. 4, l. 18.

6. The Testator's Will is dated the 22nd day of December, 1917, he died the 26th day of February, 1919, and the said Robert George Patton, his son, upon the 4th day of July, 1928.

p. 30, l. 38.
p. 5, l. 18.
p. 5, l. 32.

7. The said William Robert Patton (the Grandson) was not at the date of the Will nor at the Testator's death, nor at the date he became of age, namely the 5th of January, 1927, of the Lutheran Religion—but on those dates he was a member of the Roman Catholic Religion. It appears from the affidavit of Carl Wendland that the said William Robert Patton adopted the Lutheran Religion on the 30th January, 1927, but it has not been found that he is of the Lutheran Religion.

p. 7, l. 30.
p. 13, l. 33.

8. It is submitted that Middleton J.A. was right in finding the Testator makes it a condition precedent that neither the son nor grandson shall take unless at the date of the Will or death of the Testator he is of the Lutheran Religion, and in holding that it makes no difference whether the date of the Will or the date of the Testator's death is adopted.

p. 14, l. 5.

The learned Judge further finds the gift to the grandson as set out in Clause (D) of the Will is unambiguous, that the words "that he is and proves himself to be of the Lutheran Religion" are dominated and controlled by the expression accompanying them "on the condition as above mentioned" and make the condition referable to the death of the Testator and not to the death of his son. The learned Judge expressed a doubt whether the grandson had made a real change of his religion and held that he was not entitled to take either the \$500.00 legacy or the \$1,500.00 legacy.

Record.
p. 13, l. 27.

p. 14, l. 30.

p. 13, l. 33.
p. 14, l. 41.

9. The Appellant appealed to the Appellate Court. The Second Division of the Court delivered Judgment upon the 5th day of April, 1929, and the Court being equally divided the Appeal was dismissed. Latchford C.J. and Orde J.A. affirmed the Judgment of Middleton J.A. for the reasons set forth in their respective Judgments. Fisher J.A. dissented. Riddell J.A. concurred in the reasoning and result of the Judgment of Fisher J.A.

p. 21, l. 32.

p. 16, l. 29.
p. 17, l. 8.

p. 19, l. 20.
p. 21, l. 29.

10. It is submitted that the intention of the Testator is clearly and unambiguously expressed by his Will. It is fair inference gathered from the Will that the Testator feared he was being misled as to the religion of his son and grandson and was determined if they were not of the Lutheran Faith they should not take of his goods.

20 11. The Annuity of \$500.00 is given subject to the said condition precedent, and the bequest is expressed in clear and unequivocal language. The Testator could not have used clearer words to express an intention to exclude the grandson from the benefit of the gift if he did not come within the terms of the conditions attached thereto.

12. The Annuity of \$1,500.00 is given upon the same condition precedent as the Annuity of \$500.00, and speaks from the date of the Will. The same words are used in creating the condition,—“and is and proves himself to be of the Lutheran Religion.” It is submitted that these words standing alone require the grandson to be of the Lutheran Religion at the date of the Will. If there is any ambiguity, the same is removed by the words that precede the condition, which are “on the condition as above mentioned,” etc. These words must have their effect, they cannot be disregarded, they were introduced for a purpose. It cannot be assumed that these words were used without any purpose at all. They refer to the conditions set out in Clause (c) of the Will. The intention of the Testator was to refer back to the conditions on which the \$500.00 Annuity was given. The same words of reference are used in Clause (i) of the Will where the Testator directs that the annual income of his son and grandson shall provided they have complied with the “conditions above mentioned” be increased, etc. There is a similar reference in Clause (p) of the Will where the Testator refers to his grandson having conformed to the “conditions above mentioned,” etc.

p. 26, l. 33.
p. 26, l. 38.

p. 26, l. 37.

p. 26.

p. 27, l. 21.

p. 28, l. 41.

The like intention of the Testator is further shown in Clauses (E), (F) (i) and (p) of his Will.

p. 26, l. 41.
p. 27, l. 3.

p. 27, l. 20.
p. 28, l. 41.

Record. **13.** It is submitted that Fisher J.A. erred when he said in his Reasons for Judgment that according to the uncontradicted evidence the Testator knew that the grandson under his mother's direction was being brought up in the "Roman Catholic Church." There is no evidence and there is nothing in the Will to found this conclusion upon. The learned Judge appears to have relied upon Clause 5 of the Affidavit of Robert George Patton which may be read as expressing the belief of the deponent that the Testator possessed such knowledge. It is a proper inference from the use in his Will of the present tense "is of the Lutheran Religion," that the Testator had been told and believed that his grandson was of that religion **10** and that he only desired his grandson to benefit upon the footing that this belief was well founded.

p. 20, l. 5.

p. 5, l. 12.

14. It is submitted that Fisher J.A. has founded his conclusions upon conjecture, not upon the proper principles of construction. The only legitimate evidence of the Testator's intentions is the Will itself, his expressed intention must be his actual intention and intention cannot be implied from what the Testator has not expressed in his Will. There is no presumption in favour of a relative having a claim on the Testator. An infant is bound by a condition precedent equally with an adult.

15. It is submitted that the Judgment appealed from is right and ought **20** to be affirmed for the following amongst other

REASONS.

1. Because the Will is to be construed according to the law of the Province of Ontario.
2. Because each of the gifts in question is conditional upon the grandson being of the Lutheran Religion at the date of the Testator's Will, or alternatively at the date of his death.
3. Because admittedly the grandson was not at the date of the Will, nor yet at the Testator's death, of the Lutheran **30** Religion.
4. Because it has not been shown that he is even yet of the Lutheran Religion.
5. Because of the reasons given in the Judgments of Middleton J.A. and Orde J.A.

DONALD MACDONALD
JOHN W. F. BEAUMONT.

In the Privy Council.

No. 127 of 1929.

*On Appeal from the Appellate Division of the
Supreme Court of Ontario.*

IN THE MATTER of the Estate of WILLIAM
ROBERT PATTON deceased.

BETWEEN

WILLIAM ROBERT PATTON .. *Appellant,*

AND

THE TORONTO GENERAL TRUSTS COR-
PORATION, THOMAS W. CARLYLE
AND ANNIE LOUISE CARLYLE (as
Executors), ANNIE LOUISE CARLYLE
AND MARY JOSEPHINE MAC-
DONALD *Respondents.*

CASE OF THE RESPONDENT
ANNIE LOUISE CARLYLE.

BLAKE & REDDEN,
17, Victoria Street, S.W.1.