1944 *Present:* **Howard C.J. and de Kretser J.**

DE SILVA, *et al.*, Appellants, *and* DE SILVA, *et al.*, Respondents.

90—D. C. Colombo, 2,187.

Last Will—Condition against marriage —Prohibition to marry outside the Buddhist Goigama community of the Sinhalese race—Condition void for uncertainty.

Where a last will contained the following clause:—It is my will and desire that none of my aforesaid children shall contract a marriage with 'those not belonging to the Goigama community of the Sinhalese race' or not professing Buddhism. Such a marriage should further be sanctioned by all or a majority from and out of the following five persons . . . . In case any of my children contract a marriage contrary to these instructions such child or children shall forfeit whatever rights they may have acquired under this will and the property left and bequeathed by me to such child or children shall enure to the benefit of the remaining children . . . .

Held, that the condition imposed by the will was void for uncertainty.

Held, further, that where one limb of a composite condition is void it would be sufficient to defeat the forfeiture.

APPEAL from an order of the District Judge of Colombo. The facts appear from the headnote.

N. Nadarajah, K.C. (with him *E. G. Wikremanayake*), for the fourth to seventh, ninth and tenth defendants, appellants.—Although conditions in general restraint of marriage are void as being against public policy conditions in partial restraint of marriage are valid—*Vol. 34 Laws of England (Hailsham), pp. 107-8; Theobald on Wills (8th ed.), p. 705,* Steyn's *Law of Wills in S. Africa (1935 ed.), pp. 69-70.* Clause 12 of the will in this case imposes conditions only in partial restraint of marriage. It was not intended that the devisees should remain unmarried. What was prohibited was marriage with any person other than a Sinhalese Goigama Buddhist. Such a prohibition is valid and failure to observe it would result in forfeiture. *Hodgson v. Halford*[1]; *Jenner v. Turner*[2]; and *In re Bathe*[3] are in point, although *Sifton v. Sifton*[4] and *In re Blaiberg*[5] express a conflicting view.

The conditions in clause 12 have, as the trial Judge holds, to be considered *seriatim*. Even if the terms "Goigama community" and "those not professing Buddhism" are vague and uncertain there can be no doubt with regard to what was meant by "of the Sinhalese race". This last condition has clearly not been complied with, as the plaintiff, having married a Burgher lady, admits. The plaintiff cannot, therefore, claim any share under the will.

H. V. Perera, K.C. (with him *M. T. de S. Amerasekere, K.C.*, and *H. W. Jayawardene*), for the plaintiff, respondent.—Clause 12 of the will speaks of one composite condition and not of a series of conditions. It is void

[1] *L. R. (1879) 11 Ch. D. 959.*
[2] *L. R. (1880-1) 16 Ch. D. 188.*
[3] *L. R. (1925) Ch. 377.*
[4] *L. R. (1938) A. C. 656.*
[5] *L. R. (1940) Ch. 385.*

for uncertainty, and almost amounts to a general restraint of marriage. *Clayton v. Ramsden* [1] is directly in point. One's faith is a matter of one's conscience and cannot be ascertained by a definite test. A condition subsequent, to be valid, must be clear and certain and must be such a limitation that at any given moment of time it is ascertainable whether the limitation has or has not taken effect—*Sifton v. Sifton* [2]. The expression " Goigama community of the Sinhalese race " too is vague. As regards the condition that each devisee should, before marriage, obtain the consent of the five persons mentioned in the will there is no provision as to what should happen if some or any of them die or refuse to act.

N. E. Weerasooria, K.C. (with him *S. E. J. Fernando*), for the first defendant, respondent.

E. B. Wikremanayake (with him *G. T. Samarawickreme*), for the second and third defendants, respondents.

N. Nadarajah, K.C., in reply.—A condition requiring the consent, before marriage, of certain named persons is valid—*In re Whiting's Settlement* [3].

Cur. adv. vult.

October 19, 1944. HOWARD C.J.—

In this appeal the question for consideration is whether the decision of the Additional District Judge of Colombo, made in a partition action, with regard to the failure of certain conditions imposed by the will of one Mudaliyar Richard de Silva is correct. This will is dated March 25, 1915, and clause 12 is worded as follows:—

> " It is my will and desire that none of my aforesaid children shall contract a marriage with those not belonging to the Goigama community of the Sinhalese race or not professing Buddhism. Such a marriage should further be sanctioned by all or a majority from and out of the following five persons to wit, my wife the said Lydia Catherine de Cabraal Wijetunge, my brother Edward de Silva, Mohandiram, Charles Batuwantudawe, Don Baron Jayatillake and (torn off) de Silva Abeyeratna, all of Colombo. In case any of my children contract a marriage contrary to these instructions herein set forth such child or children shall forfeit whatsoever rights they may have acquired under this will and the property left bequeathed and devised by me to such child or children by this will shall enure to the benefit of the remaining children of mine in equal shares subject to the terms of the specific legacies already enumerated, provided such children shall not contract any marriages contrary to the directions herein set forth. No legatee among my aforesaid children shall be at liberty to lease for a period exceeding five years, mortgage, encumber, sell or in any other way alienate or dispose of the bequests made under this will until and unless such legatees shall have contracted a marriage in accordance with the directions specified in this clause and any property so leased for a period of over five years, mortgaged, encumbered, sold

[1] *(1943) 1 A. E. R. 17.* [2] *L. R. (1938) A. C. 656 a 671.*
[3] *L. R. (1905) 1 Ch. 96.*

or (torn) other way alienated or disposed of shall vest in my remaining children who may be surviving at the time of such (torn off) legatee that does not contract a marriage shall have on (torn off) interest of his or her share. "

The learned Judge has held that the conditions imposed by clause 12 of the will fail and cannot be given effect to for want of certainty. In coming to this conclusion he has held that—

(1) The will gave each devisee an absolute interest in the property devised subject to forfeiture in the event of such devisee contracting a marriage forbidden by the testator;

(2) The restrictions must be taken *seriatim* and not *en bloc;*

(3) Although there would be no difficulty with regard to the term " Sinhalese race ", it was impossible to say what the testator meant when he said " those not belonging to the Goigama community ". Nor would a Court know what criterion to apply in order to distinguish a person " who professed Buddhism " from one who did not.

(4) With regard to the further condition imposing on the devisee the duty of submitting his choice of a spouse for the approval of five named persons, the learned Judge was doubtful whether a testator had the right to impose such a condition and even if such a right existed a Court could not interpret it in the absence of terms providing for every possible and conceivable eventuality.

Mr. Nadarajah on behalf of the appellants has contended that the clause imposed a partial restraint on marriage which was valid. In this connection he referred to Theobald on Wills and the Roman-Dutch law on Wills as set out in Steyn at pages 69-70. The passage is as follows:—

" A condition that a beneficiary ' shall not marry ' and that if he does the benefit must go to another is void on the grounds of public policy as it operates in general restraint of marriage, but not where the condition merely forbids the beneficiary from marrying a particular person, or a person belonging to a particular family or of a particular faith. "

This principle is conceded although Mr. Perera has contended that the forfeiture clause in this case taken as a whole almost amounts to a complete restraint on marriage.

Dealing *seriatim* with the findings of the learned Judge, I am of opinion that (1) is unassailable. With regard to (2), I think the learned Judge was wrong. Clause 12 of the will is composite, but contains several limbs. I think it would be sufficient to defeat the forfeiture that any of the limbs should be uncertain. In this connection I would refer to the judgment of Lord Atkin in *Clayton v. Ramsden*[1]. In his judgment in the same case, when marriage with a person not of Jewish parentage and not of the Jewish faith was prohibited, Lord Romer also held that this was a composite qualification. If one of the two qualifications required in a permissible husband is expressed in so uncertain terms that it is impossible to say of any particular individual whether he does or does not possess it, the whole condition is void. If the clause is considered as a whole the

[1] *(1943) 1 A. E. R. 17.*

case put forward on behalf of the respondents is all the stronger. In fact the clause so considered practically deprives the children of the testator of all freedom of choice in the matter of marriage.

I agree with the learned Judge's findings as summarized in (3) and (4). The use of the words " not professing Buddhism " would impose on a Court the difficulty of discovering what degree of adherence to the Buddhist religion the testator required. These words were, therefore, uncertain. In *Clayton v. Ramsden* (*supra*) the House of Lords cited and followed the rule formulated by Lord Cranworth in *Clovering v. Ellison*[1]. This rule was as follows:—

> " 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."

Lord Romer in *Clayton v. Ramsden* (*supra*), at page 23 of the report of *Clayton v. Ramsden*, applied this rule in the following passage:—

> " Even if the clause could be read as though it merely provided for a forfeiture in the event of the daughter being married to a man not of the Jewish faith, I am of opinion that it would still be void for uncertainty. For how is it to be ascertained whether a man is of the Jewish faith? It will have been observed from what I have already said that in the Court of Appeal they answered this question by saying that whether a man was or was not of the Jewish faith was a mere question of fact to be determined on evidence and that the assertion by the man that he was of that faith was well nigh conclusive. I should agree entirely with the Court of Appeal as to this if only I knew what was the meaning of the words " of the Jewish faith ". Until I know that, I do not know to what the evidence is to be directed. There are, of course, an enormous number of people who accept every tenet of and observe every rule of practice and conduct prescribed by the Jewish religion. As to them there can be no doubt that they are of the Jewish faith. But there must obviously be others who do not accept all those tenets and are lax in the observance of some of those rules of practice and of conduct, and the extent to which the tenets are accepted and the rules are observed will vary in different individuals. Now, I do not doubt that each of these last-mentioned individuals, if questioned, would say, and say in all honesty, that he was of the Jewish faith. On the other hand I do not doubt that one who accepted all the tenets and observed all the rules would assert that some of the individuals I have mentioned were certainly not of the Jewish faith. It would surely depend on the extent to which the particular individual accepted the tenets and observed the rules.
>
> My Lords, I cannot avoid the conclusion that the question whether a man is of the Jewish faith is a question of degree. The testator has, however, failed to give any indication what degree of faith in the daughter's husband will avoid and what degree will bring about a

[1] *(1859) 7 H. L. Cases 707.*

forfeiture of her interest in his estate. In these circumstances the condition requiring that a husband shall be of the Jewish faith would, even if standing alone, be void for uncertainty."

The question as to whether a person professes Buddhism would depend on the extent to which the particular individual accepted the tenets of the Buddhist religion and observed the rules. In his judgment Lord Romer cited with approval the judgment of Morton J. *In re Blaiberg*[1] where it was held that a condition of forfeiture in the event of marriage to a person not of the Jewish faith was void for uncertainty. Lord Russell of Killowen would also appear to have taken the same view of the words " of the Jewish faith " although he did not consider it necessary to decide the point. At page 19 he states:—

" In these circumstances it is unnecessary to express an opinion upon the certainty of the words " of the Jewish faith "; but had it been necessary I should have felt a difficulty in holding that their meaning was clear or certain. It seems to me that (apart from the difficulty which arises from the existence of the three varieties of Judaism referred to by Lord Greene M.R.) the testator has given no indication of the degree of attachment or adherence to the faith which he requires on the part of his daughter's husband. The requirement that a person shall be of the Jewish faith seems to me too vague to enable it to be said with certainty that a particular individual complies with the requirement. The decision of Morton J. *In re Blaiberg* though seemingly based on the difficulty of ascertaining the state of a man's mind, may well stand on the ground of the uncertainty of the words there in question."

Lord Thankerton agreed with Lord Romer and Lord Atkin seems to have shared the same views. The only member of the Court who was doubtful as to whether the words " of the Jewish faith " were of insufficient clearness and distinctness was Lord Wright. His Lordship, however, held that the uncertainty of the words " Jewish parentage " rendered it unnecessary for him to make a decision on the words " Jewish faith ". The only case put forward by Counsel for the appellant in support of his proposition that the condition imposing forfeiture in the event of marriage with a person " not professing the Jewish religion " was valid, is *Hodgson v. Halford*[2]. The will in this case imposed a forfeiture if " any son or daughter of mine shall marry a person who does not profess the Jewish religion, or shall marry a person not born a Jew or Jewess although converted to Judaism and professing the Jewish religion, or shall forsake the Jewish religion and adopt the Christian or any other religion ". It was held by Hall V.C. that the clause was single and not void as being against public policy. The question as to its being void for uncertainty was not raised and hence I do not think it can be regarded as an authority so far as the present case is concerned. With regard to its authority on a matter of public policy, it must be remembered that it was decided in 1879. Lord Atkin's judgment in *Clayton v. Ramsden* (*supra*) would seem to suggest that a different view would be taken now.

[1] *(1940) 1 Ch. 385.*

[2] *11 Ch. D. 959.*

As one limb of the composite condition is void, it follows that so is the whole condition. I think, however, that I should also consider the two other conditions.

Again applying the principles laid down by the House of Lords in *Clayton v. Ramsden* (*supra*), I am of opinion that the prohibition of marriage " with those not belonging to the Goigama community of the Sinhalese race " is void for uncertainty. It may be conceded that the expression " Sinhalese race " is well defined and would present no difficulty to a Court called upon to interpret it. On the other hand the words " Goigama community " introduce uncertainty. Does it mean a person who always or generally associates with other Goigamas or lives in the same locality with other Goigamas ? Does it mean a person who associates himself with the aims of this particular community if it has any aims ? If it means merely of Goigama descent, what degree of caste purity, if community is a synonymous term for caste, is required ? The language is, in my opinion, ambiguous. To use the words of Lord Wright in *Clayton v. Ramsden* (*supra*) the Court would have to amplify and add to it before it could be held to denote any definite set of facts.

Judged by the same test, the further condition in the will requiring the devisees to obtain the consent of the majority of five persons prior to marriage is also, in my opinion, void. There is no provision providing for the position that would arise if one or other of the referees is dead or refuses to act.

For the reasons I have given the appeal must be dismissed with costs.

DE KRETSER J.—I agree.

Appeal dismissed.