SUPREME COURT. Apia. 1963. 27, 28 June; 8, August. MOLINEAUX C.J.

Will - Interpretation - Condition as to Religion - Whether severable - Uncertainty - Intention of testator.

Clause 20 of the testator's will was as follows:

"I DIRECT that, subject to the provisions enumerated in Clause 10 hereof and in other parts of this my Will referring to Tuaefu or the Tuaefu Trust, the Tuaefu Trust and all assets and other appurtenances thereunto belonging shall become the property of my grandson Olaf Frederick Nelson the eldest son born to my daughter Irene Gustava Noue on March 1st 1938 when he has reached the age of 25 or has completed his education whichever happens last PROVIDED THAT he will by then have acquired European status by the laws of Western Samoa and shall have assumed the surname of NELSON and shall have been brought up in and will continue to remain a professed adherent of a Christian denomination of the Protestant non-Conformist faith ALSO THAT he will not have caused himself by any act of his own to have become irreparably unworthy to fill the position where WHILE HOLDING Tuaefu as his own property by his own sole right he will realize that he has thus become the head of the family and appreciate as far as is conveniently possible the family home character of Tuaefu so long as any of my five daughters are alive AND IS able to maintain Tuaefu as a European home out of the funds provided for it and any additional revenue accruing to him from his own efforts AND PROVIDED THAT a sum of Five hundred pounds (£500) will be made available out of the Tuaefu Trust Funds as soon as conveniently possible without embarrassment for the benefit and on behalf of my granddaughter Leilani who is now resident in Tuaefu and One hundred pounds (£100) to each of my other grandchildren then surviving."

A notice of motion for interpretation of the will posed 2 questions -

(1) Whether the words "shall have been brought up in and will continue to remain a professed adherent of a Christian denomination of the Protestant non-Conformist faith" contained in the provisions of Clause 20 of the will relating to the gift of the Tuaefu Trust to the defendant-grandson constitute a condition or conditions or limitation or limitations which are severable and whether one or any are valid or whether one or any are void for uncertainty or for any other reason.

(2) If the said condition or conditions or limitation or limitations or any of them are wholly or partly void does the said gift to the defendant-grandson fail or does he take free from the condition.

HELD: 1. That the words constitute a single condition subsequent; that the condition does not comply with the formula for certainty required by the authorities referred to and, therefore, void for uncertainty.

Clavering v. Ellison (1859) 7 H.L. CAS. 707 applied.

Sifton v. Sifton [1938] 3 All. E.R. 435; In re Cross (1938) V.L.R. 221; In re Crane (1950) V.L.R. 192; Phipps v. Ackers (1842) 9 Cl. & Fin. 583 referred to.

2. That the defendant-grandson took the gift free from the condition subject to its being divested if he dies

without issue.

Clayton v. Ramsden /1943/ 1 All. E.R. 16; In re Allen /1953/ 2 All. E.R. 898 considered.

MOTION for interpretation of will.

Sanders (of the New Zealand Bar), for plaintiffs.
McKay (of the New Zealand Bar), for defendant.
Phillips, for grandchildren of testator other than defendant.

Cur. adv. vult.

MOLINEAUX C.J. Notice of Motion for interpretation of the Will of Olaf Frederick Nelson of Apia, merchant, deceased, who died on the 28th February 1944. The testator, after appointing his five daughters to be the executors and trustees of his will dated 20th May 1943, gave devised and bequeathed all his real and personal property to his trustees upon certain trusts of which the principal one relates to the occupancy and conduct of his residential property situated at Tuaefu near Apia in the style of a European home. The trust property comprises both real and personal estate consisting of twenty-one acres of freehold situated at Tuaefu, a substantial residence thereon, shares and some furniture. The terms of the trust provide for the occupancy of Tuaefu by one of the five daughters until a grandson of the testator, Olaf Frederick Nelson, the eldest son born to the testator's daughter, Irene Gustava Noue, attains the age of twenty-five years or completes his education, whichever happens last, when it shall become his property in the circumstances that are set out in Clause 20 of the will. There is provision for a gift over in the event of the grandson dying before the age specified or in the event of his death after that age without issue, and further provision for the disposal of the trust property in certain eventualities. The proceedings are brought by the trustees excluding the said Irene Gustava Noue as plaintiffs for the interpretation of Clause 20 relating to the circumstances under which the trust is to become the property of the grandson who is named as defendant.

Clause 20 reads:

"I DIRECT that, subject to the provisions enumerated in Clause 10 hereof and in other parts of this my Will referring to Tuaefu or the Tuaefu Trust, the Tuaefu Trust and all assets and other appurtenances thereunto belonging shall become the property of my grandson Olaf Frederick Nelson the eldest son born to my daughter Irene Gustava Noue on March 1st 1938 when he has reached the age of 25 or has completed his education whichever happens last PROVIDED THAT he will by then have acquired European status by the laws of Western Samoa and shall have assumed the surname of NELSON and shall have been brought up in and will continue to remain a professed adherent of a Christian denomination of the Protestant non-Conformist faith ALSO THAT he will not have caused himself by any act of his own to have become irreparably unworthy to fill the position where WHILE HOLDING Tuaefu as his own property by his own sole right he will realize that he has thus become the head of the family and appreciate as far as is conveniently possible the family home character of Tuaefu so long as any of my five daughters are alive AND IS able to maintain Tuaefu as a European home out of the funds provided for it and any additional revenue accruing to him from his own efforts AND PROVIDED THAT a sum of Five hundred pounds (£500) will be made available out of the Tuaefu Trust funds as soon as conveniently possible without

embarrassment for the benefit and on behalf of my granddaughter Leilani who is now resident in Tuaefu and One hundred pounds (£100) to each of my other grandchildren then surviving."

The Notice of Motion, as amended, seeks an Order determining the following two questions arising from the interpretation of the Will:-

(1) Whether the words "shall have been brought up in and will continue to remain a professed adherent of a Christian denomination of the Protestant non-Conformist faith" contained in the provisions of Clause 20 of the will relating to the gift of the Tuaefu Trust to the defendant constitute a condition or conditions or limitation or limitations which are severable and whether one or any are valid or whether one or any are void for uncertainty or for any other reason.

(2) If the said condition or conditions or limitation or limitations or any of them are wholly or partly void does the said gift to the defendant fail or does the defendant take the said gift free from the condition.

The defendant attained the age of twenty-five years on the 1st March 1963. It appears from the affidavits filed that the testator throughout his life was a staunch member of the Methodist Church and had strong anti-Catholic views. It is not disputed that the defendant had been brought up in the Roman Catholic religion and that he was at the time of the hearing still practising that religion. The plaintiffs have accepted that the defendant has fulfilled the conditions set out in Clause 20 with the exception of the condition forming the subject matter of Question (1) to be answered by the Court. It was announced by Counsel prior to the commencement of the hearing that no answer was required from the Court to Question 3 set out in the Notice of Motion.

The preliminary question for determination is whether the words referred to in the Motion constitute a condition or conditions or limitation or limitations that are severable. It is presumed that what is meant by severable is that the words are capable in some way of being rearranged into separate conditions or limitations which will enable them to be considered independently of each other as separate entities. The question does not postulate how many separate conditions or limitations are to be extracted by this process but from the argument as developed by Counsel it would appear that two are contemplated. I shall therefore approach the matter on that basis. The question of course is purely one of construction. It seems appropriate, having regard to the nature of the context, that the words should be treated as a condition as they do more than merely define the circumstances surrounding the gift but go on to prescribe terms upon which the gift itself is to be retained. The contingencies that surround the gift are set out in a series of provisos. The religious condition, if I may term it that, is preceded by two other contingencies affecting status and surname and is followed in turn by two more dealing with conduct and certain payments. In context the religious condition reads as a single separate condition in which professed adherence of a Christian denomination of the Protestant non-Conformist faith is to obtain during two phases of the life of the defendant, the first of which covers the period of his upbringing and the second extending throughout the remainder of his life after that. The religious qualification applies to both. It is true that different terms are used in the description of each phase but then during the former the matter of his religious instruction would normally be expected to be in the hands of those responsible for his general upbringing, whereas during the latter his religious beliefs are a matter for his own conscience. If I understood him correctly this was advanced by Mr Sanders as an argument in favour of severance upon the grounds that the matter was required to be approached differently as during minority the responsibility for satis-

fying that part of the condition rested with others. Responsibility for one's parentage is a matter that may reasonably be regarded as resting with others but that fact apparently did not weigh sufficiently with the House of Lords to effect a severance of the condition in the case of Clayton v. Ramsden, /1943/ 1 All E.R. 16, where one limb of the condition related to marriage with a person of Jewish parentage, the responsibility for which of course did not rest with the prospective husband although compliance with the second limb relating to his religion did. Personal incapacity to satisfy one part of a condition, it seems, is not sufficient in itself to effect severance even though the validity of the part affected by the incapacity may be attacked on other grounds. It was contended that Clayton's case was distinguishable insofar as both limbs of the condition there were required to be satisfied at the one time, namely at marriage, whereas in the present case satisfaction could only be effected at different times. But with respect that argument does not seem to me to be quite tenable either for the reason that satisfaction of the condition in regard to parentage in Clayton's case must inevitably have taken place at the time of the birth of the prospective husband and not at the time of his impending marriage. The condition here seems less severable to me than the condition in Clayton's case which was held to be a single condition in which the two component parts consisted of the two separate qualifications of parentage and religious faith for the reason that in the present case there is only the one qualification of religious faith which is applied to two phases or periods of the defendant's life. I think it is true to say that before one can continue in a certain state of religious belief or adherence, one must previously have acquired that state of belief or adherence. The condition here predicates that professed adherence of a Christian denomination of the Protestant non-Conformist faith shall obtain during both the phases of the defendant's life mentioned. There is an implication in the stipulation of continuing to remain a professed adherent that that degree of belief had been acquired prior to the time from which he is required, by the terms of the will, to continue in it or, put in another way, that he became a professed adherent during the period of his upbringing. There is a merger back into the first phase that does not seem consistent with the concept of severability as the period of qualification is continuous. Gramatically, of course, the condition is not severable as it stands. There would have to be some form of alteration or rearrangement of the context in order to spell out or compose two separate sentences before one could go on to consider whether the condition in its redrafted form was capable of being treated as being severable into two separate conditions. Insofar as a measure of selection would inevitably be involved in that process I doubt whether the Court would be justified in attempting such a task in view of the consequent risks of interference with the intention of the testator. If the words were in a form that would lend itself to severance without the necessity for alteration or rearrangement of the context the position might perhaps be otherwise. An example of such a case is to be found in the New Zealand decision of In re Lockie /1945/ N.Z.L.R. 230, where not only were the conditions capable of severance without alteration but they were separated in time by a gap measured by the difference between the end of the devisee's bringing up and education in the Protestant faith and the time of his attaining the age of twenty-five years. The question of their severability was really answered by their own construction and the Court was prepared to deal with them on the basis that they were severable. There the terms of forfeiture were: "In the event of his not being brought up and educated in the Protestant faith AND not adhering to the Protestant faith at the time of his attaining the age of 25 years." But in an Australian case of In re Cross, Law v. Cross (1938) V.L.R. 221, where the words of the condition were "Provided they are brought up and shall remain in the Protestant faith" the question of severance was not raised, doubtless because it was not in issue, but nevertheless the judgment proceeded to deal with the words as a single condition without comment upon the two phases or periods of time that appear to be inherent

in that condition also. The existence of the two phases predicated to the Protestant faith in no way seems to have suggested to the Court that each one should have been treated separately as a single condition. The conclusion that I am led to in the present case is that the words constitute but one condition containing two parts or phases that are better regarded as being definitive of the period during which the religious qualification is to obtain rather than as comprising two separate entities. The condition is at most a single compound or composite condition.

Before dealing with the second part of the first question as to whether the condition is void for uncertainty or for any other reason, it is necessary to consider whether the words used constitute a condition precedent or a condition subsequent. There is authority for the proposition that a condition that may be void for uncertainty when construed as a condition subsequent may not necessarily be so when viewed as a condition precedent. The doctrine of uncertainty applicable to conditions subsequent laid down by the House of Lords in the leading case of Clavering v. Ellison (1859) 7 H.L. CAS. 707, is still good law. In giving rise to the doctrine which has so often been quoted in cases of this kind, Lord Cranworth at p. 725 of the judgment in that case stated his classic formula:

> "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."

It is well known that this doctrine has no application in cases where the condition is precedent as was clearly illustrated by the more recent decision of In re Allen /1953/ 2 All E.R. 898, where the ratio turned on the point that the principles involved in the construction of words when viewed as a condition precedent were quite different from those that would have been applicable had the condition been subsequent. "The principles applicable to a condition precedent differ materially from those applicable to a condition subsequent," said Sir Raymond Evershed, as he then was, at p. 904 in a judgment that met with the approval of the House of Lords and in which he later observed that had the language of the condition in the case he was considering, which was a case of a condition subsequent, formed part of a qualification or condition precedent it was probable, at least, that the decision of the House would have been in a sense opposite to that in the case which was decided. It seems necessary, therefore, to deal first with the preliminary issue.

There is no convenient yardstick, unfortunately, that is available to a Court of construction which, when applied to a condition will determine whether it be precedent or subsequent unless it is the actual intention of the testator himself as expressed in the terms of the will. The question in each case seems to be a matter of construction. Little help, if any, is to be gained from a perusal, however careful, of decided cases in the hope of gleaning from them the emergence of some general principle as each case falls to be determined upon the construction of its own context and circumstances. Williams on Wills, 2nd edition, at p. 259, explains the difference in this way: "if upon the proper construction of the will there is no gift intended until the condition has been fulfilled the condition is a condition precedent. If a condition be subsequent the gift must already have vested and the condition is intended to put an end to the gift." Jarman, 8th edition Vol. II, p. 1458, states: "Conditions are either precedent or subsequent: in other words the performance of them is made to precede the vesting of an estate or the non-performance to determine an estate antecedently vested."

Leaving aside for the moment the question of whether there are applicable to the present case any rules of construction that would assist in the determination of the date of vesting, there are some preliminary matters consequent upon a straightforward reading of the will, not great in themselves perhaps, but which nevertheless when taken together make it difficult for the condition to be construed as precedent. The gift to the defendant is in the form of a direction to the trustees that the property referred to as comprising the Tuaefu Trust shall become the property of the defendant when he has reached the age of twenty-five or has completed his education, whichever happens last. The Court is not concerned with the latter alternative as the attainment of the age of twenty-five by the defendant was agreed upon by Counsel as having happened last. There then follow the provisos as to status, surname, religion and conduct which are set out in their context in the following manner:

> "PROVIDED THAT he will by then have acquired European status by the laws of Western Samoa and shall have assumed the surname of Nelson and shall have been brought up in and will continue to remain a professed adherent of a Christian denomination of the Protestant non-Conformist faith ALSO THAT he will not have caused himself by any act of his own to have become irreparably unworthy to fill the position where WHILE HOLDING Tuaefu as his own property by his own sole right he will realize that he has thus become the head of the family and appreciate as far as conveniently possible the family home character of Tuaefu as long as any of my five daughters are alive AND IS able to maintain Tuaefu as a European home out of the funds provided for it and any additional revenue accruing to him from his own efforts..."

A further proviso dealing with certain payments follows that need not be set out in detail. The words introducing the second phase of the religious condition "and will continue to remain" do not by virtue of the change of tense in which they are cast relate to the period referred to by the words "by then" with which the provisos themselves are introduced. The second phase of the condition is thus excluded from the period of time referred to by the word "then" which is "when" the defendant has reached the age of twenty-five years. If this is correct the continuing nature of the second part or phase of the religious condition brought about by the testator himself in changing the tense to the future places the time for its performance beyond the time appointed for entry into possession, namely, when the defendant becomes twenty-five. On that construction the condition is not precedent. It was submitted by Counsel for the plaintiff that vesting need not necessarily be fixed in point of time at twenty-five, for example, but only when the conditions in the provisos, and the religious condition in particular, had been met. The reference in Clause 24 to the defendant being deprived in the circumstances outlined in that clause of the Tuaefu Trust for himself alone when he reaches twenty-five, however, points to an intention on the part of the testator that the defendant should enter into enjoyment of the property at that age. There are other indicia to which I shall refer presently that suggest that he had an even earlier date in mind. A second difficulty consequent upon the use of the future tense is that it throws the time for the performance of the condition forward into the indefinite future. A man may change his religion at any time even, for example, when on the point of death; in fact such an event is by no means uncommon. For the condition here to be literally construed as precedent the vesting must necessarily be deferred until it is no longer physically possible for the defendant to change his religion for only then will he have "continued to remain" in the religious faith required by the testator. Such a construction is clearly contrary to the general intention expressed by the testator in Clause 20 in his direction to the trusteesthat Tuaefu shall become the property of the defendant at twenty-five and as again mentioned in Clause 24 where the reference is to the circumstances which

would deprive the defendant of the "Trust for himself alone when he reached twenty-five". In such circumstances the Court is justified if not required to resist a construction so clearly in conflict with the intention of the testator.

> "Where the construction of a devise to be contingent in accordance with the letter of the will would have the effect of rendering nugatory a purpose clearly expressed by the testator the Court will struggle to avoid such a construction." - Jarman, 8th edition, Vol. II, p. 1375.

The language of the lapse clause is perhaps significant, the relevant part of which reads as follows: Clause 21 - "I direct that in the event of my grandson Olaf Frederick Nelson not being alive on March 1st 1963 or dies after that date without issue then the whole of the Tuaefu Trust shall revert to my five daughters who shall decide as to the disposal of same in any manner most advantageous to them subject, etc." The legal estate having been vested in the trustees by the devise contained in Clause 3, the position in regard to the equitable estate seems to me to be that either it still reposes in the trustees in the event of the gift being contingent or it vested in the defendant immediately upon the death of the testator. One's attention, however, is drawn to the words "shall revert" as possibly excluding the former alternative in view of the fact that provision is made for the Trust to revert even before the time set by Clause 20 for the defendant to take, before, in fact, the time for compliance with the conditions set out in the provisos had expired. Although I am not unmindful of the fact that here is a will that appears on the face of it to have been drawn by the testator himself, the use of the word "revert" if given its ordinary meaning in relation to property of going back to and lodging in the former owner after the expiration of some previous estate, when used in this context presupposes that some estate or interest had vested at a time that was prior to the reversion and before the defendant had reached the age of twenty-five. Put in another way, it is difficult to attach meaning to the word "revert" if any estate or interest had not vested as there would be nothing to revert. Were the gift to the defendant contingent as it would be if the condition is precedent, both the equitable and the legal estates would still be with the trustees and would not vest until the contingency had been met. The word "revert" in its present context can hence only be read intelligibly as being consistent with a vesting that preceded the attainment of the age qualification notwithstanding that time had not run for compliance with the conditions in the provisos. Perhaps these are minutiae too slight in themselves to be of consequence as emanating from too refined a scrutiny of words but on balance the Court is bound to go by the will and I think it fair to say that they follow from a straightforward reading of the context giving to the words their natural and ordinary meaning and are to be considered along with others of contrary import before proceeding finally to determine whether the testator intended the religious condition to be complied with before the defendant should take or whether it should operate merely to divest an estate that had already vested. If correctly drawn they tend to support the latter view and indeed seem not to be consistent with the former, and consequently to move the Court away from that position of doubt when it would invoke the presumption of early vesting referred to by the Privy Council in the Canadian case of Sifton v. Sifton /1938/ 3 All E.R. 435, where it was held that in such a situation the condition was, by virtue of the presumption to be regarded as subsequent.

Similar factors were considered by the Judges in two Australian cases to which I refer. In In re Cross (1938) V.L.R. 221, the testator left real and personal estate in remainder after his son's death to his son's children "provided that they are brought up and shall remain in the Protestant faith", failing which the property was to go to other persons. Martin, J. in holding the condition to be subsequent said at p. 230: "It

seems reasonably clear that the testator intended that breach of the condition should put an end to a gift already vested and that it was not his intention to withhold the gift unless and until the condition was fulfilled." It is noted that the words with which the second part of the religious condition in that case were introduced, "and shall remain", are almost identical in tense and effect with the corresponding words used in the present case, "and will continue to remain". The condition was held to be subsequent. In the second case, that of In re Crane (1950) V.L.R. 192, the testator divided his estate into parts and as to one of such parts provided that his child or children be "brought up according to the rites of the Church of England" then his trustee was to hold such part in trust for his widow during her life with an alternative provision in the event of non-compliance with the condition. Dean, J. experienced difficulty owing to the continuing nature of the condition in determining a point of time for its completion and came to the conclusion for that reason that it could be more easily read as a condition subsequent. He approached the matter as follows:

> "The initial problem is to determine whether the words of the condition create a condition precedent or a condition subsequent. In the case of Acherley v. Vernon, (1739) Will. 153, at pp. 156-7, Willes L.C.J. said:
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> 'I know of no words that either in a will or deed necessarily make a condition precedent, but the same words will either make a condition precedent, or subsequent according to the nature of the thing and the intent of the parties.'
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> This statement from the Court of Common Pleas is a sound principle today. I ask myself, therefore, what this testator really intended to provide. The words 'be brought up', read literally, refer to a completed act. It could not be finally ascertained until the process of bringing up a child was completed, whether he had been brought up in one faith or in another. I do not know when it could be said that the process was completed. Upon this view, the widow would not be entitled to receive anything until she had satisfied the condition by bringing up the child according to the rites of the Church of England."

He went on to say that in the case of a continuing condition it is easier to treat it as subsequent. Jarman, mentioning the two cases earlier referred to of Clavering v. Ellison and Sifton v. Sifton, at p. 1465 states that strictly speaking continuing conditions are merely a variety of conditions subsequent. Indeed, the general stream of decided authority is to that effect. In the former case the devise was made to grandchildren upon the express condition that the children of testator's son be educated in England and in the Protestant religion according to the rites of the Church of England -- "apt words with which conditions subsequent may be introduced," said Lord Campbell at p. 720, and in the latter case where the condition was also held to be subsequent certain payments were to be made to the testator's daughter "only so long as she shall continue to reside in Canada." It is, of course, the continuing nature of the present condition that renders it so insusceptible to construction as a condition precedent. While it is not permissible for a Court of construction to indulge in speculation as to what may or may not have been the intention of the testator, if one lays aside for a moment the finer points of a purely grammatical construction and looks at this condition in relation to the will as a while one is left with a clear impression that what the testator really intended here was that the religious condition should continue to enure after the defendant had reached the age of twenty-five as a deterrent against his adopting any religion other than that specified in the will and that the condition should operate as a pivot upon which retention of the property was to depend rather than that it

should act merely as a prerequisite of its acquisition. Both Counsel made reference to the reasons that may have led to the absence from the gift over clause of any provisions for failure of the conditions in the provisos as pointing to intention but indulgence in this kind of reasoning more often than not leads one only to those distant fields of conjecture and surmise where all is uncertain and nothing sure. The intention of the testator, if it is to be ascertained at all, is to be ascertained from what he has said in the will and not from what he has not said. It is unlikely, therefore, that any legitimate conclusions regarding the intended date of vesting can be drawn from speculation of this kind. The condition is a continuing one and looked at in this light is, I think, clearly subsequent.

The matter may be approached from a different angle but with the same result for the condition falls, I believe, within the second class of cases mentioned by Tindall, C.J. in the case of Phipps v. Ackers, 9 Cl. & F. 583. In that case there was a devise upon trust to convey to the testator's godson when and so soon as he should attain the age of twenty-one with a gift over on death without issue under that age in which case the property was to sink into residue when it would go to another. It was held by the House of Lords that the devisee took an immediately vested equitable interest on the death of the testator subject only to its being divested on failure of the condition of the devisee dying without issue before reaching the age of twenty-one. The rule is based on the principle "that the subsequent gift over shows the meaning of the testator to have been that the first devisee should take whatever interest the party claiming under the devise over is not entitled to which gives him the immediate interest subject to its being divested on a future contingency - the rule applies to personal as well as to real estate." See 39 Halsbury's Laws of England, 3rd edition, 1127. The rule was considered and applied in two decisions of the New Zealand Court of Appeal which are of interest insofar as both cases also contained contingencies in addition to the age qualification. In one there was a gift over in the event of failure of the condition and also a gift over on failure of attainment of the age qualification, whilst in the other there was a gift over in the latter event only, but in both the rule was held to apply notwithstanding the presence of other contingencies. They would appear to indicate that the rule in Phipps v. Ackers is not necessarily excluded by the existence of other contingencies additional to the age qualification. The first is that of In re Belcher, Bollard v. Belcher, (1913) 32 N.Z.L.R. 1336, where the testator gave the residue of his estate on trust for his wife for life and after her death "and as and when my children being sons respectively attain the age of thirty-one years having lawful issue of their bodies capable of inheriting real property under the law of England I direct my trustees to transfer and convey to my said children being sons and having lawful issue as aforesaid the respective properties following.....subject to certain rent charges." And there followed a gift over "Should any of my children other than my son Thomas die before attaining the age of thirty-one years without leaving lawful issue or being a daughter at any age without leaving issue I direct....."It is to be noted that there is no reference in the gift over clause as to what would happen in the event of the son's not having lawful issue capable of inheriting real property under the law of England just as there is no reference to the failure of the conditions in the provisos set out in the lapse clause of the case. The gift was held to be vested subject to being divested on failure of the condition subsequent of not having lawful issue that qualified. The additional condition did not affect the application of the rule even though the effect of failure would have meant that the estate would have passed as on an intestacy. Sim, J. in delivering the judgment of the Court of Appeal considered that the gift over in the event of dying before attaining the age of thirty-one years without lawful issue brought that case within the second class of cases referred to in Phipps v. Ackers. He went on to say, at p. 1343:

"It is clear, therefore, that each of the two sons in question took an immediately vested interest in the remainder subject to its being divested in certain contingencies. If the only contingency provided for had been that mentioned in the gift over then the case would have come exactly within the decision of the House of Lords in Phipps v. Ackers and as both sons have attained the age of thirty-one years the estates would now both be absolutely vested. The gift over deals only with the contingency of a son dying under the age of thirty-one without leaving lawful issue. That contingency did not arise and the gift over cannot take effect now. Before, however, the estate can be completely and absolutely vested another condition must be complied with. That is the condition contained in the trust to convey. It is that each son shall have lawful issue of his body capable of inheriting real property under the law of England. Failure to comply with that condition will divest the estate now vested."

This decision was applied by the same Court in the case of In re Gower v. the Public Trustee /1924/ N.Z.L.R. 1233, where the testator left his residuary estate after conversion and investment in trust for his said son at his attaining the age of twenty-one years and not being a Roman Catholic and in the event of his said son dying before the age of twenty-one years or being disqualified from succeeding to such residuary personal estate by reason of his being a Roman Catholic then over. Salmond, J. thought that the rule was applicable in that case and that the gift of residue conveyed an immediately vested interest to the son of the testator subject to the condition subsequent of surviving until he was twenty-one and if the condition was valid of not being a Roman Catholic when he became twenty-one, and at p. 1260, he said:

"It is true that the terms of the gift of residue include expressions which in themselves suggest that the condition is precedent. The will refers to the event of the son being disqualified from succeeding to such residuary personal estate by reason of his being a Roman Catholic. It is, however, the essence of the rule in Phipps v. Ackers that words which would otherwise create a condition precedent are to be construed by reason of the gift over as creating merely a condition subsequent."

It seems, therefore, that the rule is not necessarily excluded by the existence of other contingencies collateral to the age qualification. Indeed, one is reminded of the forceful declaration of Lord Campbell in Clavering v. Ellison at p. 720 that there was no authority for the doctrine, that if there be a limitation in a will which by itself will give a vested estate and a condition is afterwards added for a breach of which the estate is directed to go over, the limitation and condition shall be construed into a contingent devise. In my view the rule is applicable to the present case and it follows that the defendant took an immediately vested equitable interest in the Tuaefu Trust property on the date of death of the testator, subject now as he has survived the age of twenty-five years only to its being divested in the event of his failure to comply with the religious condition if it is valid, contained in the proviso, or in the event of his death without issue. As before, the religious condition is subsequent.

Having arrived at this point the answer to Question 2 in the Notice of Motion has really resolved itself. Mr Sanders properly and very fairly conceded that if the condition was subsequent the words were void for uncertainty and it followed that the defendant took the gift free from the condition. I think he is right and for that reason it does not seem necessary to develop the matter fully. It has long been recognized as a principle of will construction that conditions subsequent are to be

construed strictly and since the decision of Clayton v. Ramsden the determination of the religious faith of a person when considered as one of the ingredients in a condition subsequent has had the effect of rendering that condition void for uncertainty Lord Romer, in referring to the testator in that case said, at p. 20:

> "He was one of those testators of whom I venture to think there have been far too many who by means of a forfeiture clause have sought to compel a person to whom benefits are given by the will to act or refrain from acting in matters concerned with religion not in accordance with the dictates of his own conscience but in accordance with the religious convictions of the testator himself. That a testator may do this should he so desire is beyond question; but in such a case it behoves him to define with the greatest precision and in the clearest language any event under which the forfeiture of the interest given to the beneficiary is to take place. The rule as to clauses forfeiting by condition subsequent interests given by a will has long been settled by a decision of your Lordships' House. It is Clavering v. Ellison where the rule is stated by Lord Cranworth in these words at p. 725: '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 divided 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.'"

The same test was referred to with approval in the more recent decision of the House of Lords of In re Allen (supra). In the present circumstances it is not possible, I think, for the Court to say in advance precisely and distinctly upon the happening of what event the condition here would operate to deprive the defendant of the Trust property. The requirements of having been brought up in and continuing to remain do not specify an event which would enable the Court to say with certainty when, how, and in what circumstances a forfeiture would occur. The condition does not comply with the formula for certainty required in a condition subsequent established by the authorities referred to, and it is void for uncertainty. That being the case it becomes unnecessary for the Court to consider whether the condition is void as being contrary to public policy or upon any other grounds. As the condition is subsequent the defendant takes the gift free from the condition.

The questions in the Motion are answered as follows:

(1) The words constitute a single condition subsequent that is void for uncertainty.

(2) The defendant takes the gift free from the condition subject to its being divested if he dies without issue.

Counsel for both the plaintiffs and the defendant have travelled from New Zealand for the hearing of this case which has necessitated the absence from their own practices of approximately ten days and I take this into consideration in fixing costs which I allow at 350 guineas each plus disbursements including reasonable travelling expenses to be fixed by the Registrar. Mr Phillips is allowed costs at 10 guineas. All costs are to be payable out of the trust.