CONDITIONS AS TO RELIGION ATTACHED TO GIFTS

TRUSTEES OF CHURCH PROPERTY OF NEWCASTLE v. *EBBECK*

Settlors and testators have often made their gifts subject to the satisfaction of religious qualifications, with the purpose of advancing (or hindering) the cause of certain religions, or of ensuring that the people to benefit are (or are not) members of certain religious groups. Such requirements have been attacked in court on two main grounds, that of uncertainty and that of public policy. The recent decision of the High Court of Australia in *Ebbeck's Case*[1] concerned both grounds, and raised important problems in regard to each of them.

I. *The Facts and Holding*

Claude William Ebbeck died in 1957. He was survived by a widow and three adult sons. In his will, made in 1954, he devised and bequeathed his real and residual personal estate to his trustees upon trust for his wife for life, and after her death, upon trust for his three sons, naming them, in equal shares as tenants in common, subject to the following proviso:

> . . . provided however and I hereby declare that the devise and bequest to each of my said sons shall be upon the condition that he and his wife shall at the date of death of my said wife or at my death should my said wife predecease me profess the protestant faith and accordingly I declare that if at the date aforesaid my trustees shall not be satisfied that any son of mine and his wife profess the protestant faith then and in every such case such son shall absolutely forfeit and lose all share and participation in the principal and income of my estate to which otherwise such son would become and be entitled.

Every interest so forfeited was declared to devolve equally between four charitable institutions, and the testator then declared "that the question whether any son of mine and his wife profess the protestant faith shall be determined by my trustees and their decision shall be final". The testator and his family were apparently protestants, but at the time the will was executed two of the sons were married to wives of the Roman Catholic faith, and the third was about to marry a lady of that faith, and subsequently did so.

The widow, one of the trustees of the will, sought a determination of the validity of the proviso. Else-Mitchell, J., in the Supreme Court of New South Wales, held that the proviso was a condition subsequent void for uncertainty, and declared that the interest in remainder of each of the sons was "indefeasibly vested notwithstanding the purported attachment thereto by the will of the testator of certain conditions".[2] Two of the charitable institutions appealed to the High Court of Australia.

The High Court affirmed the decision of Else-Mitchell, J., but on a different ground. The three judges unanimously held that the proviso was a condition subsequent, but that it was not void for uncertainty, Dixon, C.J. and Windeyer, J. indicating that no greater degree of certainty was made necessary by the fact that it was a condition subsequent. However, by a majority of Dixon, C.J. and Windeyer, J., Kitto, J. dissenting, it was held that the proviso was void as

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[1] *Trustees of Church Property of the Diocese of Newcastle* v. *Ebbeck.* (1960) 34 A.L.J.R. 413.

[2] (1959) 76 W.N. (N.S.W.) 399.

against public policy in that it had a tendency to give rise to discord between husband and wife.

II. *The Question of Uncertainty*

1. The Authority.

The leading case on this point is *Clayton* v. *Ramsden*.[3] In that case, the testator provided that his daughter was to forfeit her interest if she married "a person who is not of Jewish parentage and of the Jewish faith". The House of Lords held that "Jewish parentage" referred to parentage of the Jewish race (and not faith), and that since no indication was given of what percentage of Jewish blood was necessary for this, the condition was void for uncertainty. In addition, the case contained strong *obiter*[4] that even if "Jewish parentage" had meant parentage of the Jewish faith, the condition would still have been void for uncertainty, on the ground that the question of whether a man is of the Jewish faith is a question of degree, and no indication was given as to what degree of adherence to the Jewish faith was required. Lord Wright alone disagreed on this point,[5] on the ground that the difficulty only concerned proof and not, as thought by the other Lords, the actual description of facts.

This case was distinguished by Fullagar, J. in *Re Harris*,[6] where the will established a trust of the balance of the annual income of the estate for the benefit of certain persons "as are then alive and in such year are of the Jewish faith and have not married outside the Jewish faith", provided that if any "cease to follow the Jewish faith or shall marry outside the Jewish faith", their share was to be divided amongst the remainder. His Honour held that *Clayton* v. *Ramsden* was an instance of a strict rule which applies only to conditions subsequent, known as the rule in *Clavering* v. *Ellison*.[7] He said that in *Clayton* v. *Ramsden*, "the condition was held bad because it was not thought possible to postulate *a priori* ('from the moment of its creation') a satisfactory standard by which in all conceivable circumstances the donee could judge whether a particular event or a particular contemplated act would amount to a breach",[8] and that these considerations are applicable only to conditions subsequent. His Honour referred *inter alia* to *Sifton* v. *Sifton*[9] in which the Privy Council, in holding void a condition requiring that a beneficiary reside in Canada, had felt it necessary to decide that it was a condition subsequent. He then gave the following explanation of the distinction:

> Where an interest given in the first place is intended to vest at a particular time, a beneficiary would be able to prove, or unable to prove, once and for all, that he fulfils the condition or qualification. The matter can be decided once and for all at the time appointed for vesting. But there is something to be said for the view that, when once an interest is vested, the beneficiary ought to be in a position to know exactly and precisely what conduct on his part or what event will bring his interest to an end.[10]

The first requirement of the will he held to be a description of the class of

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[3] (1943) A.C. 320.
[4] *Id.* at 334-335 *per* Lord Romer (with whose judgment Lord Atkin and Lord Thankerton agreed); and at 325 *per* Lord Russel of Killowen.
[5] *Id.* at 331.
[6] (1950) V.L.R. 182.
[7] (1859) 7 H.L.C. 707. The classic statement of the rule is made at 725 by Lord Cranworth: "When 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".
[8] (1950) V.L.R. at 187.
[9] (1938) A.C. 656.
[10] (1950) V.L.R. at 190.

beneficiaries and not a condition subsequent, and so not void for uncertainty. The proviso to it he held to be a condition subsequent, so that the strict rule applied; and he held it void for uncertainty.[11]

A similar decision was made by the Court of Appeal in *Re Allen*,[12] which concerned a devise of real property, subject to limited interests, to the eldest son of X who should be "a member of the Church of England and an adherent to the doctrine of that Church", with a gift over to Y. The Court of Appeal by a majority held that the requirement was valid, being a qualification or limitation or condition precedent, and not a condition subsequent. Sir Raymond Evershed, M.R. stated that "the strictness of the special rule as to conditions subsequent was the basis of all the opinions of the noble Lords in *Clayton* v. *Ramsden*", and that he felt "no doubt that if the present formula constituted a condition subsequent it would . . . be held to be void".[13] He went on to say:

> . . . whether the formula be a condition precedent or a qualification, it seems to me that no such general or academic test is called for as a condition subsequent requires. All that the claiming devisee has to do is at the relevant date to establish, if he can, that he satisfies the condition or qualification whatever be the appropriate test. If the formula is such as to involve a question of degree (as, *prima facie*, is implicit in any requirement of "adherence" or "attachment" to a particular faith or creed), the uncertainty of the test contemplated may well invalidate the formula as a condition subsequent but will not, in my judgment, necessarily do so in the case of a condition precedent; for if the claimant be able to satisfy any, or at least any reasonable test, is he disentitled to the benefit of the gift?[14]

Birkett, L.J. substantially agreed with him, but Romer, L.J. thought that the second limb of the requirement was too uncertain even for a condition precedent.[15]

2. The Basis of the Present Holding.

The holding in *Ebbeck's Case* that the condition subsequent was not void for uncertainty seems contrary to this line of authority. To distinguish *Clayton* v. *Ramsden*, it would be necessary to show either (i) that the condition was sufficiently certain to satisfy the strict rule or (ii) that this was not a case to which the strict rule applied. These alternatives will now be considered in turn.

(i) To show this it would be necessary to show either that "profess the protestant faith" is a more precise expression than "of the Jewish faith", or that the condition is made sufficiently certain by leaving the question of compliance to be decided by the trustees and making their decision final.

No serious attempt is made by any judge to do the former. It is submitted that it could not be done, for each expression is surely just as much a question

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[11] Fullagar, J., having decided that the defendants in the case came within the description of the class of beneficiaries, ordered that the trustees pay the annual sums to such of them as should be "living at the end of each year . . . until the death of the last survivor of them" (1950) V.L.R. at 191. As pointed out by Sholl, J. in *Re Kearney* (1957) V.L.R. 56, this would seem incorrect, for the will required that in order to receive each annual sum the beneficiary should satisfy the specified requirement "in such year", so that it should not have been sufficient that they *once* proved themselves to satisfy the requirement, but it should have been ordered that they prove this *each year* to become entitled to each annual sum. But this objection in no way vitiates the decision in this case.

[12] (1953) 1 Ch. 810.

[13] *Id.* at 816.

[14] *Id.* at 817.

[15] A further decision to the same effect in *Re Kearney* (1957) V.L.R. 56. It dealt with a disposition to such of certain persons as should at the time of the distribution "be Roman Catholics and not have married protestants". Sholl, J. held that the distinction between the rules applying to conditions precedent and subsequent was well established, having the express authority of the Court of Appeal, and that since the requirement here was not a condition subsequent, it was not void for uncertainty.

of degree as the other. It would possibly be different if the condition required not "*faith*" or "*adherence*", but merely *membership* of a particular religious group, as did the first limb of the condition in *Re Allen*.

As for the latter, both Dixon, C.J.[16] and Windeyer, J.[17] state that leaving the question to the trustees could "make the validity more sure",[18] but neither rely on this point; Dixon, C.J. expressly indicates that his decision does not depend on it.[19] The present writer submits that this point could not help to satisfy the strict rule, for the object of that rule is to ensure that it can be seen from the start precisely what will bring the interest to an end[20]; leaving the question to trustees might ensure that it is quite certain when the interest *has been* brought to an end, but could not help one to see from the start what (apart from the mere decision of the trustees) *will* bring the interest to an end.

This view is confirmed by authority. The leading pronouncement on the point is that of Jenkins, J. in *Re Coxen*.[21] His Honour there distinguished between "uncertainty as to events prescribed by a testator as being those in which the condition is to operate . . . and difficulty in ascertaining whether those events . . . have happened or not".[22] He stated the former is generally fatal to the validity of a condition subsequent, but that the latter is not necessarily so;[23] and that while leaving the question of compliance to the trustees could not save the condition in the former case, it could help to do so in the latter.[24] In *Clayton* v. *Ramsden*, as we have seen, Lord Wright alone considered that the only difficulty in the expression "of the Jewish faith" was difficulty in proving whether the facts prescribed by it had occurred; the majority clearly considered that there was uncertainty as to what facts were prescribed by it. This would be so also in the present case, and so leaving the question to the trustees could not have saved the condition if the strict rule applied.

(ii) The holding must therefore be explained on the ground that the strict rule did not apply; and this does seem the basis for the decisions of both Dixon, C.J. and Windeyer, J., for each of them stated that no greater certainty was required of the condition in this case than would have been required if it had been a condition precedent.[25] But all the judges in this case agreed that the condition in question was a condition subsequent; and so, according to the cases, the strict rule should have applied. Only Dixon, C.J. referred to any authority on this question, and he merely referred to "the great distinction between this case and *Clayton* v. *Ramsden*",[26] without saying what that distinction is, and then referring (by name only) to *Re Harris* and *Re Kearney*, which would hardly help, since they depended on the distinction between conditions precedent and conditions subsequent.

What this case seems to decide is that the strict rule does not apply even to a condition subsequent if, as in this case, the question of whether the condition is satisfied must be decided once and for all before the beneficiary first takes an interest in possession or enjoyment. Dixon, C.J. says:

> It is none the less a condition operating only at a defined point, namely the termination of the life estate, and once for all, a condition that must be

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[16] (1960) 34 A.L.J.R. at 416.
[17] *Id.* at 419. [18] *Ibid.* [19] *Id.* at 414.
[20] See (1859) 7 H.L.C. at 725; (1950) V.L.R. at 187.
[21] (1948) Ch. 747 at 760-762; applied in *Re Jones* (1953) Ch. 125 and in *Re Burton's Settlements* (1955) Ch. 82.
[22] (1948) Ch. at 760.
[23] *Ibid.*
[24] *Id.* at 761-762. Contrast the position as to conditions precedent, and the like, in which cases the pronouncement or opinion of the trustees itself may be the fact on which the condition operates: *Dundee General Hospitals Board of Management* v. *Walker* (1952) 1 All E.R. 896, 898.
[25] (1960) 34 A.L.J.R. at 415 (Dixon, C.J.); and at 418 (Windeyer, J.)
[26] *Id.* at 416.

complied with before an estate or interest vested already in interest vests in possession or enjoyment. There is no room in such a limitation for the application of the usual reasons given for requiring certainty in the definition of conduct or occurrences which will work a forfeiture of an otherwise continuing estate or interest although a similar lack of definition of a like condition precedent would not prevent the acquisition, attachment, commencement or "vesting" of the estate or interest.[27]

The same reasoning is implicit in the judgment of Windeyer, J.[28] Kitto, J. does not really deal with the problem at all.

It can be argued that this is in line with the reasoning, if not the decisions, of the previous cases, on the grounds that it is not until the interest is vested in possession or enjoyment that a beneficiary needs to know (in the words of Fullagar, J.[29]) "exactly and precisely what conduct on his part or what event will bring his interest to an end"; and that a condition subsequent which operates once and for all before an interest vests in possession or enjoyment has more in common with conditions precedent than with other types of conditions subsequent.

But against this it can be contended that vesting in interest is by no means an academic matter of no practical significance: at the least it means that the interest is an asset of the beneficiary, which will pass under his will or to his next of kin. Further, one of the main reasons for not applying the strict rule to conditions precedent is that if such a condition is avoided, the gift generally fails,[30] and it was thought unfair that the intended beneficiary should lose the gift if he was able to satisfy any reasonable test that the condition could be interpreted to require;[31] this consideration does not apply to any conditions subsequent, for if a condition subsequent is avoided, the beneficiary takes the gift free of the condition.[32]

It is the present view that there was no justification for the departure from the previous cases in making an exception from the rule that conditions subsequent must measure up to the rule in *Clavering* v. *Ellison;* and that the decision of Else-Mitchell, J. was correct.

III. *The Question of Public Policy*

1. The Authority.

A very important and relevant case on public policy in relation to marriage is *Fender* v. *St. John-Mildmay*,[33] which concerned a promise to marry made by a married man after a decree nisi for the dissolution of his existing marriage. The majority of the House of Lords held that the promise was not contrary to public policy. In the leading judgment, Lord Atkin distinguished between two types of promise which are contrary to public policy: a promise to do something

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[27] *Id.* at 415-416.
[28] *Id.* at 418.
[29] (1950) V.L.R. at 190.
[30] There are apparently some cases where this is not so: for example *Re Piper* (1946) 2 All E.R. 503.
[31] See (1953) 1 Ch. at 817.
[32] These arguments raise an interesting question on which the writer knows no authority. Which rule should apply to a determinable gift to X "for so long as he shall be of the Jewish faith"? X would be liable to lose his interest on a contingency which could happen at any time, so that it should be possible to see from the start precisely what would bring this about, so the strict rule should apply. But if the strict rule applied, the gift would fail; and that would be unfair to X if he could satisfy and continue to satisfy any reasonable test which the expression "of the Jewish faith" could be taken to require.
[33] (1938) A.C. 1.

contrary to public policy, which he called a "harmful thing", and a promise which has a "harmful tendency".[34] He went on to discuss what is meant by a harmful tendency:

> It can only mean . . . that taking the class of contract as a whole the contracting parties will generally, in a majority of cases, or at any rate in a considerable number of cases, be exposed to a real temptation, by reason of the promise, to do something harmful, that is against public policy; and that it is likely that they will yield to it. All kinds of contracts provide motives for improper actions, for example, benefits deferred until the death of a third party, and contracts of insurance. To avoid a contract, it is not enough that it affords a motive to do wrong: it must surely be shown that such a contract generally affords a motive and that it is likely to be effective.[35]

His Lordship decided that since the obligations of the existing marriage were substantially at an end, the promise in this case had no harmful tendency. The other Lords of the majority applied a similar test.

Lord Atkin's test was applied by the majority of the High Court of Australia in *Ramsay* v. *Trustees Executors and Agency Co. Ltd.*,[36] which concerned a gift of property to trustees in trust to pay the income to the son of the testatrix for such period as he should remain married to his present wife, and on the determination of such period in trust for him absolutely, provided that should he predecease his said wife during such period, there was to be a gift over. The proviso to the gift was challenged on the ground that it contravened the policy of the law to maintain and preserve marriage. This argument was rejected by a majority of the Court.

Latham, C.J. said that the question was whether the provision had a harmful tendency, and that this was to be decided in accordance with the test of Lord Atkin.[37] He referred to the case of *Re Caborne*[38] in which Simonds, J. (as he then was) held void a provision which all the judges in *Ramsey's Case* agreed to be indistinguishable from the one before them, on the ground that it was one which "is designed or tends to encourage an invasion of (the) sanctity (of marriage)" and which was "an inducement to (divorce) by the promise of material gain".[39] Latham, C.J. then continued:

> In spite of what is said in *Re Caborne*, I can see no adequate reason for presuming that it can be said generally of beneficiaries under a will that they will be likely to use wrongful methods in order to obtain a divorce so as to get money . . . I am not prepared to adopt the view of mankind applied in *Re Caborne*. The result of that view would be that if a father had a married daughter and provided in his will for the payment of an allow-

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[34] *Id.* at 12. This distinction seems vague. It is true that some principles of law say contracts *of certain classes* (defined without express reference to tendencies) are against public policy, and others say contracts *with certain tendencies* are against public policy. However, in many cases, in order to show that a contract is one of the former type, it is necessary to consider its tendency. An example of the former type given by Lord Atkin is a contract unreasonably to restrict a man's economic activities; in order to decide whether a restriction is unreasonable, it must often be necessary to consider its likely consequences. Further, some contracts classified as of the latter type are in a class of the former type; marriage brokerage contracts are classified as contracts *tending* to prejudice the status of marriage, but to avoid them it is not necessary to consider their likely consequences.

[35] *Id.* at 13.

[36] (1948) 77 C.L.R. 321.

[37] Unless, his honour said, it is evident that the object of the settlor or testator was to bring about something contrary to public policy, in which case it is difficult to deny that the provision has a harmful tendency. He held that the object in this case was to prevent the wife obtaining any interest, which was not illegal but merely the selection of beneficiaries: *Id.* at 326.

[38] (1943) Ch. 224.

[39] *Id.* at 228, 229.

> ance to her if her husband died or if she were unfortunate enough to be divorced from him, the provision would be invalid because it would tempt her to terminate her marriage in order to get the allowance.[40]

Consequently, he held the proviso valid. Starke, J. and McTiernan, J. argued along similar lines to the same conclusion.

Of the dissenting judges, Williams, J. agreed that Lord Atkin's test should be applied, but did not closely consider whether or not it was satisfied, being content to say that he agreed with *Re Caborne*. Dixon, J. (as he then was) also agreed with *Re Caborne*, but his decision was on a different basis. He held that it was the policy of the law to maintain and preserve marriage, and that this proviso was void as framed in opposition to that policy, irrespective of its probable consequences:

> . . . the law having adopted a settled policy, once it is seen that a condition subsequent is framed in opposition to that policy, the law does not proceed to examine or weigh the probabilities of the inducement established by the limitation proving effective. It does not do so either in the given case or by considering the responses of the average reasonable man.[41]

It is submitted with respect that this approach is incorrect. What is meant by saying that the condition is "*framed in opposition to*" the policy of the law to preserve marriage? His Honour made it clear that he did not mean that detriment to marriage was *intended* by the testator or a *likely consequence* of the condition. And it could not mean that the condition could be fulfilled in effect *only* by the doing of something to the detriment of marriage, for this was not the case here. It must mean that the condition could be fulfilled *inter alia* by the donee's doing something of detriment to marriage. But surely the law does not avoid all conditions which can *inter alia* be satisfied by the donee's doing something against public policy. If it did, it would avoid, for example, a condition providing for the accrual of benefits to one person on the death of another, since it could be satisfied by the former murdering the latter. This situation seems distinguishable from that in *Ramsay's Case* only by a test based on the intention of the testator or the likely consequences of the condition; that is, the sort of test which Dixon, J. rejected. It is submitted, therefore, that (in the absence of any special rule) a test of that sort is necessary in the case of a condition which can be satisfied *inter alia* by the donee's doing something contrary to public policy, although it could well be otherwise if this was in effect the *only* way in which the condition could be satisfied.[42]

The writer thinks therefore that the majority in *Ramsay's Case* were right in considering the tendency of the condition, but submits that it is perhaps arguable that the condition did have a tendency contrary to public policy; that is, that there was some likelihood of detriment to marriage. In any case, it seems possible that the case might be distinguished on the facts, for the circumstances of each case (though not the characters of the people concerned) can be taken into consideration.

2. The Basis of the Present Holding.

At first sight, the decision that the condition in *Ebbeck's Case* was void seems inconsistent with *Ramsay's Case*. In the earlier case, the gift over did not operate if before the death of the donee, either his wife died or he and his wife were divorced. In the later case, each gift over did not operate if the donee

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[40] (1948) 77 C.L.R. at 328-329.

[41] *Id.* at 33.

[42] 34 *Halsbury's Laws of England* (2 ed. 1940) 105 states: "Conditions against public policy are those conditions as to which the State has or may have an interest that they should remain unperformed or unfulfilled." This applies if a condition can only be fulfilled by the occurrence of something against public policy, but not if it could be fulfilled in other ways.

remained a protestant and, before the death of the testator's wife, either the donee's wife died or the donee and his wife were divorced, or the wife became a protestant. The only real differences are the time within which the conditions had to be fulfilled, which was not regarded as material, and the addition of the third alternative which could satisfy the condition; the different holding must be explained on this latter difference.

Dixon, C.J.[43] persisted in the opinion which he expressed in the earlier case, which the writer has quoted above and with respect submitted to be incorrect; and he made no real attempt to distinguish *Ramsay's Case*. The other judge of the majority, Windeyer, J. said that he accepted *Ramsay's Case*, but held that the policy of the law being "not merely that marriages should not break up by divorce or separation" but that "the *consortium* of matrimony and all that that means should not be interfered with",[44] the provision in this case was void as likely to interfere with such *consortium*.[45]

Kitto, J. in his dissenting judgment said that "there is not any principle of law which is offended by the creation of a potential cause of dissension between spouses unless the dissension would be likely to result in divorce or separation", and that, applying Lord Atkin's test, he was "not prepared to affirm that in the generality of cases, . . . the conditions would be likely to produce such a degree of ill-feeling between husband and wife" that a divorce or separation was probable.[46]

The essential difference in the positions of Kitto and Windeyer, JJ. is that the former considered that the policy of the law was merely that marriages should not break up by divorce or separation, and the latter considered that the policy was also that the *consortium* of matrimony should not be interfered with. The latter is the view of Lord Atkin and the two dissenting Lords, Lord Russell of Killowen and Lord Roche, in *Fender's Case;* of the other two Lords in that case, Lord Thankerton expressly disagreed and Lord Wright did not consider the point. This, together with the case of *Re Kersey*[47] quoted by Windeyer, J., seems to show that his view is probably correct. If so, *Ebbeck's Case* is distinguishable from *Ramsay's Case*, for it can be accepted that generally a husband would not be likely to divorce his wife for lucre, but nevertheless asserted that generally a protestant husband with a Roman Catholic wife would be likely to put some pressure on her to change her religion, and that, especially in view of the difficult position of the wife, this would be likely to cause unhappy differences between them and thus interfere with the *consortium* of their marriage. This, it is submitted, must be regarded as the basis of the decision in *Ebbeck's Case*.

IV. *Conclusions*

As regards the question of uncertainty, it is submitted:

i. The strict rule applied in *Clayton* v. *Ramsden* applies to all conditions subsequent.

ii. Conditions which prescribe requirements that are a matter of degree do not satisfy this strict rule.

iii. Leaving to trustees the question whether certain requirements are satisfied is of avail only if the requirements are precisely prescribed, and the only difficulty is ascertaining whether they are satisfied.

iv. The provision in *Ebbeck's Case* should have been held void for uncertainty.

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[43] (1960) 34 A.L.J.R. at 415.
[44] *Id.* at 420.
[45] *Id.* at 421.
[46] *Id.* at 417.
[47] (1952) W.N. (*Eng.*) 541.

As regards the question of public policy, it is submitted:

i. A condition may be contrary to public policy if it can *only* be satisfied by the doing of something contrary to public policy, or if it has a harmful tendency in that its likely result would generally be the doing of something contrary to public policy.

ii. It is the policy of the law that the *consortium* of matrimony should not be interfered with.

iii. The holding void of the provision in *Ebbeck's Case* is justified in that the likely result of such a provision would generally interfere with such *consortium*.

iv. *Ebbeck's Case* is genuinely distinguishable from *Ramsay's Case*.

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COMMUNITY OF PROPERTY AND THE CONFLICT OF LAWS

CALLWOOD v. *CALLWOOD*

In the conflict of laws one difficult problem concerns the extent to which courts of England or New South Wales should apply principles of foreign law which have no local counterpart. A second problem concerns the scope to be allowed to foreign law when rights to local immovable property are involved. These two problems arose together to confront the Privy Council in *Callwood* v. *Callwood*[1] where the Court was invited to decide that the Danish system of community of property between spouses determined the rights of a widow to certain land in a territory subject to English law. Testator at the time of his marriage, and thereafter until his death, was domiciled in a territory in which Danish law was in force. Under Danish law the effect of the marriage was to subject the property of either spouse to a system of community of property. Within this system the husband and wife had power, *inter alia*, to execute a joint will under which the surviving spouse was, during his or her life, to retain the whole joint estate undivided until death or remarriage. Such a joint will was executed. At the time of his death the testator owned Great Thatch Island in the British Virgin Islands, which was subject to English law. The question arose between the testator's widow and his son whether the will could effectively render the island part of the joint estate vesting in the widow, or whether it devolved, in accordance with the English law of intestacy, upon the son. One party thus claimed that the issue was to be decided according to the Danish system of community of property, the other that it was to be decided according to the English law of intestate succession to realty.

Unfortunately the Privy Council did not find it necessary to decide the important issue of private international law which, at first sight, appeared to be raised. Their Lordships found for the son on the ground that the widow had failed to prove that the Danish law of community of property purported to operate extraterritorially upon foreign immovables. The widow, carrying the onus of proving such operation, first referred the Court to a judgment of Maris, J. in the United States Court of Appeals in the case of *Callwood* v. *Kean*[2] (an action brought by the widow concerning the proceeds of a sale of immovables situated in Danish territory), and then produced an affidavit sworn by a Mr. Bough, an attorney and counsellor at law practising in that territory. Mr. Bough, in his brief affidavit, stated that he had read the judgment of Maris, J. and that

[1] (1960) 2 W.L.R. 705.
[2] (1951) 189 F. 2d 565.