THE JUDGES AND THE JEWS

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The Jews have been a source of constant trouble to the judiciary of this country; but, to be fair, only for the last 350 years. Between 1066, when the first Jews to settle here came over from what is now France in the wake of the Norman Conquest, to 1290, when the Jews were expelled, Jewish issues do not appear to have concerned the judges. This discussion of judicial involvement with Jewish issues begins in 1655, when, following Menasseh ben Israel's famous initiative, two senior judges, Chief Justice Glyn and Chief Baron Steel, advised the assembly that had been summoned by Cromwell to consider the matter, that 'there was no law which forbids the Jews' return into England'.

Shortly afterwards Jews in increasing numbers did settle here. It was however in some ways an intolerant age. This intolerance extended to all who refused to follow the tenets of the established Church. Yet whatever the strict legal position, the Jews were if anything shown more tolerance than dissenting Christians. In 1673 Jews who had met for a religious service, probably on Simchat Torah, in Dukes Place in the City of London, were indicted on a charge of riot. But the King in Council ordered the Attorney General to stop the proceedings. And in 1685, when 37 Jews were arrested under an obsolete but then unrepealed statute of Elizabeth I (during whose reign there were no recognised Jews in England) compelling the attendance at Church of all persons over the age of sixteen, the Attorney General was again so ordered: 'His Majesty's intention being that [the Jews] should not be troubled upon this account, but quietly enjoy the free exercise of their religion, whilst they behave themselves dutifully and obediently to his government'.

Examples of similar tolerance extended to the Jews by the judges are numerous: these mainly consist of concern to avoid embarrassment or worse for observant Jews who would otherwise be compelled to violate the Sabbath or High Holydays. As long ago as 1677, a plaintiff was given leave to have his case heard in Middlesex and not in London, because all London sittings were on a Saturday and the plaintiff's main witness was an observant Jew.[1]

Two more modern instances are worth recording. In 1900, the Vacation Court was due to sit on Yom Kippur, the Day of Atonement. The then President of the Board of Deputies of British Jews, Mr D L Alexander QC, was leading counsel practising in that court, and at his request Ridley J postponed the sitting of the court until the following day. And in 1904 Bigham J sat late and arranged the list at the Liverpool Winter Assizes so as to ensure that the evidence in the case before him, a libel action brought by a Mr

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[1] *Barker v Warren* (1677), 2 Mod Rep 271.

Fineberg against the Liverpool Board of Schechita, should be completed before the commencement of the Sabbath. Such arrangements are now commonplace and it is almost inconceivable that any judge would refuse to assist the parties in similar circumstances.

But there are examples of intolerance as well. One is to be found in a statute of Anne intended to oblige a Jew to maintain and provide for a child who turned Protestant (the policy being to encourage the conversion of Jews to the established religion). In 1718 the Lord Chancellor made an order under this statute against the estate of a wealthy Jew in favour of his forty-four years old daughter who had turned Protestant, overruling the objection that the statute did not operate when the parent was dead.[2]

However, the judges, even in those days, refused to tolerate anti-Semitic incitements to racial hatred. In 1732, one Osborne published an allegation, said to be a criminal libel, that some Jews had murdered a Jewish mother and her daughter because the daughter had had a child by a Christian, and that the like cruelty was often committed by Jews. The Court of King's Bench said that by this allegation 'the whole community of the Jews is struck at' and that the publication was 'deservedly punishable in an information for a misdemeanour (apparently inciting to a breach of the peace) and that of the highest kind; such sorts of advertisements necessarily tending to raise tumults and disorders among the people and inflame them with a universal spirit of barbarity against a whole body of men, as if guilty of crimes scarce practicable and totally incredible'.[3]

In more recent times, this country has not been free of anti-Semitism, to put it mildly. But I am aware of only one case the report of which contains any judicial observation that could be construed as anti-Semitic. The case was decided in 1926; in those days, between the two World Wars, anti-Semitism flourished in upper-class and middle-class circles in England. I fear Viscount Dunedin, a member of the House of Lords, was all too typical of the times. He it was who gave the leading speech about a case in which one Sapsy Glicksman sought to claim against his insurers in respect of a burglary at his premises. Sapsy Glicksman was a small ladies' tailor. A burglary did happen and he lost a large portion of his stock in trade. The insurers alleged there had been no burglary and no stock in trade. This allegation was rejected. But then the insurers took another, more technical point, based on an ambiguous answer given by Sapsy Glicksman to a question asked by the insurers on their proposal form. The judge at first instance rejected this point, too. As Viscount Dunedin said: 'I do not altogether wonder when one thinks of the scene: On the one hand Mr Cohen, agent for the insurance company, and, on the other hand, this wretched little ladies' tailor [who] could neither read nor write and could only sign his name, and whose natural and best language was Yiddish and not English ...'. Viscount Dunedin found himself unable to agree with the judge; but, he said, 'at least I am left with this

[2] *Vincent v Fernandez* (1718), 1 P Wms 524.
[3] *Osborne's Case* (1732), 2 Barn KB 138 at 166.

impression, that those—shall I call them attractive?—qualities which we are prone to ascribe to the Hebrews, among whom Shylock has always been the prototype, have been quite as satisfactorily developed on the part of this insurance company as ever they were by the little Polish Jew'.[4]

We may now pass, with relief, from this isolated case to a selection of others in which the judges have had to grapple with problems involving Jews. These are mainly concerned with Jewish charities and with Jewish marriages and divorces. The law of England favours charity. It will uphold a trust for charitable purposes even if unlimited in time and even though no individual beneficiaries are specified, features that would be fatal to the validity of a private trust. The advancement of religion is a recognised charitable purpose. But what religion? In earlier times it was considered that only gifts for the advancement of the established religion would qualify as charitable and that gifts for the advancement of other religions were altogether illegal.

So, in 1753, it was held by Lord Hardwicke LC that a gift for the establishment of a 'Yeshiba' was illegal because it was contrary to the established Church; no one could found, by charitable donation, an institution for the purpose of teaching the Jewish religion. But, paradoxically, the gift was nonetheless held to be charitable and to be applied as directed by the Crown.[5]

Similarly, in 1786, it was held by the Master of the Rolls that an annuity given for the support of the Great Synagogue, although not legal, was charitable: but it was directed to be applied in establishing a foundling hospital and not for the benefit of the synagogue.[6]

In 1815, the Lord Chancellor Eldon had to consider a claim by a Jewish father that his children were entitled to benefit from a trust set up for the education of boys, and the provision of marriage portions for girls, in the town of Bedford. But it was held that the provisions of the trust instrument requiring attendance at church demonstrated that no 'Jew boy' or 'Jew girl' was intended to benefit under it.[7] In 1818, the illegality argument was raised again when Mr Israel and others, responsible for the management of a synagogue in Denmark Street, sued Mr Simmons for the rent of his seat. Mr Simmons had become a member of the synagogue twenty years before and had paid his rent until 1810. He then seceded, and became a member of another synagogue; but he retained the key to his seat until 1813. His counsel argued that there was no law that legalised the establishment of Jewish synagogues and that 'it was not open to all people of that persuasion, without any grant or licence, to erect places of worship, according to their own pleasure, and to employ preachers at their own discretion. The Toleration Act did not embrace Jewish synagogues of any description; and since the

[4] *Glicksman (Pauper) v Lancaster and General Insurance Co Ltd* [1926] AC 138 at 142, 143, HL.
[5] *Da Costa v Da Paz* (1753), 2 Swan 487.
[6] *Isaac v Gompertz* (1786), 7 Ves 61.
[7] *Re Bedford Charity* (1815), 2 Swan 470.

doctrines preached there were in direct hostility to the Christian religion, such establishments were to be considered as illegal'. That argument, if it had succeeded, would have defeated the claim. But Abbott J summarily rejected the argument; he said that 'since no authority could be produced to the contrary, he should certainly hold that such establishments were lawful, and consequently that the plaintiffs were entitled to recover'.[8] This case decided that a synagogue was not an illegal establishment: in 1837 it was decided further that a gift to a synagogue was charitable.

This point arose for consideration by the court because a testator by his will made a bequest to 'The Rulers and Wardens of the Great Synagogue in this City of London', the income arising 'to be, every year on the Eve of the Passover, distributed at least among 10 worthy men who have wives and children, among whom there ought to be some learned men, to purchase meat and wine fit for the service of the two nights of Passover'. The Vice-Chancellor Shadwell held that the bequest, being intended to enable persons professing the Jewish religion to observe its rites, was good.[9]

But other Jewish causes did not fare so well. In 1842, a testator by his will made a bequest for 'the political restoration of the Jews to Jerusalem and to their own land', then part of the Turkish Ottoman empire. The Vice-Chancellor Knight-Bruce held that the gift was not of a charity legacy, but was void. He said that: 'If it could be understood to mean anything, it was to create a revolution in a friendly country. Jews might at present reside in Jerusalem: and, if the acquisition of political power by them was intended, the promotion of such an object would not be consistent with our amicable relations with the Sublime Porte'.[10]

In 1860, another testator, Abraham Michel, fared better. He made a bequest 'to the parnosim or wardens of the congregation of Ostrovesy, near Opateir in Little Poland' to pay the income 'to three persons ..., to learn, in their Beth Hammadrass, or college, two hours daily for ever, and on every anniversary of my death, to say the prayer called in Hebrew *Candish*' [sic]. It was stated that the term to 'learn in the Beth Hammadrass, or college, two hours daily' signified to study either the Bible or the Talmud, and that the *Candish* was a short Hebrew prayer in the praise of God and expression of resignation to his will; that both were acts of piety, and that the prayer was generally said by the sons of the deceased, during the year of mourning and on the anniversary of the death, but if there were none, it was said either by the relatives or by some other person. By 1860 gifts to Jewish charities had been placed by statute on the same footing as gifts to Roman Catholic and dissenting Protestant charities, and the Master of the Rolls said that he had no doubt as to the validity of the bequest. He rejected an argument that the *Candish* was a prayer for the soul of a deceased person (which might have defeated the gift under the rule against so-called 'superstitious uses' held to

[8] *Israel v Simmons* (1818), 2 Stark 356 at 359.
[9] *Straus v Goldsmid* (1837), 8 Sim 614 at 615.
[10] *Habershon v Vardon* (1851), 4 De G & Sm 467 at 468.

invalidate gifts for the saying of the Catholic Mass). He said 'Here, nothing is said as to praying for the soul of anyone ... the Candish ... is nothing but a short prayer in the praise of Almighty God ... this has no reference to praying for souls of the founders, and I do not know that there would be anything superstitious in a bequest by members of the Church of England to wardens to select a scholar to learn the Greek testament two hours daily, and on a certain day to repeat the Lord's Prayer, although the day selected may be the anniversary or birthday of the founder. There is nothing here to show that this was to be done under the notion that the soul of the testator would derive any benefit from it. I think that this is a valid gift for the benefit of a Jewish charity ...'.[11] It may be worth adding, as a footnote to this case, that the argument in favour of charity was presented by a Mr Jessel, later to become Sir George Jessel, the first Jewish Master of the Rolls.

In 1892, the court was faced with a bizarre and ultimately unsuccessful argument equating a synagogue with a convent. James Braham, who had died in 1873, made by his will a gift of income of a fund in perpetuity to the lecturer and reader of the Liverpool Old Hebrew Congregation. The argument was that the congregation 'existed for the exclusive sanctification of its members'. This nonsense was roundly rejected by the judge (North J), who held that a gift to pay such income to the lecturer and reader of a well-known Hebrew congregation that had existed at Liverpool for possibly one hundred years was a good charitable trust.[12]

In 1932, the Jewish National Fund (under its name of Keren Kayemeth L'Israel) claimed to be entitled to charitable status. Its main object was the acquisition of land in Palestine as the inalienable property of the Jewish people. In an echo of the case in 1851 that I have already mentioned, the House of Lords held that this was not a charitable object.[13]

Finally, and as recently as 1962, the court (Cross J) had to decide whether land held for the purposes of a synagogue hall was held for charitable purposes. He decided that since the purposes of the hall were ancillary to the purposes of the synagogue, the hall was similarly held for charitable purposes.[14]

I now turn to the problems presented to the English courts concerning Jewish marriage and divorce. The first case I have discovered was decided in 1759. As the report of the case relates, in about 1720 a marriage was arranged between Mr Isaac Francis, a considerable dealer in jewels, who was worth about £80,000, and Simcha, the eldest daughter of Mr Moses Hart, an eminent stockbroker. The families were Ashkenaz. All three parties entered into articles of agreement, of considerable complexity. The instrument was written in Hebrew by Aaron Hart, head rabbi of the German Jews' synagogue in London, the brother of Moses Hart. When, many years later,

[11] *Re Michel's Trust* (1860), 28 Beav 39.
[12] *Re Braham* (1892), 36 Sol Jo 712.
[13] *Keren Kayemeth Le Jisroel Ltd v Inland Revenue Comrs* [1932] AC 650, HL.
[14] *Neville Estates Ltd v Madden* [1962] Ch 832, [1961] 3 All ER 769.

disputes between the families arose, one side claimed that it was merely a *ketubah*, which was an instrument that did not bind the father of the bride but only the husband. The other side claimed that, on the contrary, it constituted a *shtor*, a form of contract in common use among German Jews, and that when a Jew entered into a contract of this nature he could not make any subsequent will even in favour of his wife and children (as Moses Hart had purported to do). A learned argument ensued, between the Attorney General on one side and the Solicitor General on the other side, with lengthy citations of Jewish law going back to the judgment of God in the case of the daughters of Zelophehad, reported in Numbers 27:7 (as subsequently qualified at 36:5). The Lord Keeper was unimpressed. He described the instrument as 'new to this country, and unprecedented' and added that he was 'under very great difficulties to ascertain the import and intent of it'. He said that 'the words of this instrument being unintelligible by themselves, the plaintiffs led evidence to explain it' but that 'the witnesses give as little satisfaction as the instrument'. He said of them, 'If the witnesses are of the species of the drawers of these deeds, they are the most ignorant of men, and destitute of the capacity of putting their ideas into writing'. He described the argument that Moses Hart had voluntarily abdicated his power of devising, and disabled himself from providing in that way for his wife and children, as 'shocking'. And he concluded, with, you may think, a touch of asperity: 'I do think, notwithstanding the boasted learning of the rabbis who were said to have prepared it, that there is not an attorney from *London* to the *Land's end*, who would have drawn so senseless and inconsistent a settlement'. He sent both sides away with no relief and no costs; and his decision was upheld by the House of Lords. The report of the case[15] does not suggest that the parties had first taken their differences to a rabbinical court, which one might have expected them to do. One cannot help but feel that such a court would have proved a more sympathetic tribunal than the Lord Keeper.

At least, however, there was no suggestion in that case that a Jewish marriage would not be recognised at all in English law. Such a suggestion was made a few years later, in 1795, but was rejected in a case in which the English ecclesiastical courts were called on, to their obvious reluctance, to consider the difference in Jewish law between a betrothal and a marriage.[16]

But what of a Jewish marriage between uncle and niece, invalid under English law, but contracted between the parties abroad? In 1900, Stirling J ruled such a marriage valid.[17] Since 1900, the cases concentrate rather on divorce than on marriage. In 1953, it was decided by the Court of Appeal that evidence of Israeli law as to the validity of a bill of divorcement, or *get*, given by the Israeli husband to the wife at the court of the Chief Rabbi in London, and purporting to dissolve a marriage contracted in Israel, could be received here. One member of the court differed; he thought it was desirable for the Israeli court, not the English court, to determine a matter

[15] *Franks v Martin* (1759), 1 Eden 309.
[16] *Lindo v Belisario* (1795), 1 Hag Con 216.
[17] *Re Wilton* [1900] 2 Ch 481.

affecting the position of those two persons of the Jewish faith and which raised the question of the validity of the *get*, but he was in the minority.[18]

In 1953, an unusual problem came before the court. The parties to the case, both Jewish, had married in synagogue in Shanghai in 1926. In 1936 the husband deserted the wife. In 1947 the husband settled in England. In 1948 the wife came to England and obtained a *get* from him. In 1951 she presented a petition for divorce based on the husband's desertion. But it was held that by obtaining the *get* she had agreed to the husband living separate and apart from her and that his desertion had thereby been terminated. The court considered the consequences of a *get* in English law. Jenkins LJ accepted that the *get* had no effect in English law, either as a decree of divorce or as an agreement to separate. But nevertheless, he said, 'It must, in my judgment, have some efficacy within its own field, that is to say, the field of Jewish religious law. I cannot accept the position that where a *get*, which purports to effect a divorce according to Jewish law, has been given by a husband to a wife with the approval of the Beth Din, both spouses being of the Jewish faith, it would be consistent with the religious obligations of those two persons to ignore the *get* and live together again as man and wife'. In his view, the wife's successful request for the *get* amounted to a consent on her part to the husband's living separate and apart from her.[19]

In 1957, on one significantly different fact, the former case was distinguished and the husband was held to be in desertion. That fact was that in the later case the prime mover in the obtaining of the *get* was the husband, not the wife, who did not at any time really consent to the husband's leaving her.[20] It should be noted that reforms in the English law of divorce mean that the situation considered in these two cases will not arise again.

The final case of interest in this class came before the court in 1994. The petitioner was Dayan Berkovits, acting, I hasten to add, not on his own behalf but in his capacity as a Dayan of the Beth Din of the Federation of Synagogues. He wanted to know whether Simon Grimberg, who wanted to marry in a member Synagogue, was entitled to do so. Mr Grimberg had been married before, but had written a *get* in England that had been delivered to his wife in Israel and registered in a rabbinical court there. This was effective to dissolve the marriage under the law of Israel. But could those proceedings be recognised in England as having that effect? Wall J set out in full the Dayan's lengthy and of course authoritative description of the *get* and the procedure for obtaining it. The judge accepted that these were divorce proceedings but concluded that under English law a so-called 'overseas divorce' could be recognised here only if the *whole* of the relevant divorce proceedings had taken place abroad. He therefore refused recognition of the divorce; but he did encourage Mr Grimberg to petition for a divorce in England.[21]

[18] *Har-Shefi v Har-Shefi* [1953] P 161, [1962] 2 All ER 821.
[19] *Joseph v Joseph* [1953] 2 All ER 710, [1953] 1 WLR 1182, CA.
[20] *Corbett v Corbett* [1957] 1 All ER 621, [1957] 1 WLR 486.
[21] *Berkovits v Grimberg* [1995] Fam 142, [1995] 2 All ER 681.

I now turn to a brief discussion of the 'Who is a Jew?' cases. These are the many cases in which testators (and occasionally settlors) have tried to make wills (or settlements) under which those who have 'married out' (to use the familiar colloquial expression) are to be disqualified from taking or from continuing to take any or any further benefit under the will (or settlement).

As these cases show, the fundamental problem faced by the draftsmen of these instruments has been the difficulty of expressing their clients' intentions in terms sufficiently certain to have legal effect. And that difficulty has been aggravated by the distinction (often criticised) that the law draws between conditions that a beneficiary has to satisfy in order to take a benefit in the first place (conditions precedent) and conditions that have to be satisfied before a beneficiary can be deprived of a benefit that he has already started to take (conditions subsequent). The distinction is that the degree of certainty required in the latter case is more stringent than that required in the former case.

The first of the 'uncertainty' cases is *Re Blaiberg*.[22] There the judge (Morton J) had to construe a codicil that provided: '... should any child or grandchild of mine ... marry any person not of the Jewish faith, such child or grandchild shall forfeit and be deprived of any interest or share under my said will, or codicil thereto ...'. The argument, which the judge accepted, was that this provision was void for uncertainty (and accordingly ineffective). The judge said: 'It seems to me that, while "professing" a faith may be a matter of outward observance, the question whether a person is "*of* the Jewish faith" or not is a matter which lies in his or her conscience and is a matter of belief. Supposing, for example, that the marriage had taken place in a synagogue, to my mind that would not establish that the other contracting party was of the Jewish faith. In my view it depends on whether he holds or does not hold certain beliefs. What the beliefs are which make a man of the Jewish faith or not of the Jewish faith I do not know. It is possible that the Court could ascertain that by evidence. I do not know whether there would be any difference of opinion among persons called as witnesses to say what are the beliefs that it is necessary for a man to hold in order to be of the Jewish faith. But the further question, does a particular man hold those beliefs, is not, to my mind, a matter which a Court could ascertain with certainty'.

The next case is the leading case. It is *Clayton v Ramsden*,[23] a decision of the House of Lords. In this case the testator had settled funds on an unmarried daughter, but declared that if at any time after his death she should marry a person 'not of Jewish parentage and of the Jewish faith' the trusts in her favour should cease and determine and his will should operate as if she had died at the date of the marriage. After his death she did marry a person not of Jewish parentage and not of the Jewish faith: he was an English Wesleyan called Clayton.

[22] *Re Blaiberg* [1940] 1 Ch 385, [1940] 1 All ER 632.
[23] *Clayton v Ramsden* [1943] AC 320, [1943] 1 All ER 16, HL.

The House of Lords held that the testator had created one condition of forfeiture with two limbs, so that the whole condition would be void if either limb was void; and they held that the first limb, as to Jewish parentage, was void for uncertainty, so that the whole condition was void. Four out of five of their number held that the second limb, as to Jewish faith, was also void for uncertainty: one, Lord Wright, disagreed about this, saying that he did not think that 'Jewish faith' was an expression of insufficient clearness and distinctness; but of course that made no difference.

Lord Atkin said that he viewed with disfavour the power of testators to control from their grave the choice in marriage of their beneficiaries but that at least the control by forfeitures imposed by conditions subsequent must be subject to the strict rule as to certainty with which such conditions had to comply. (This was that the court should be able to see from the beginning precisely and distinctly on the happening of what event it is that the condition is to operate.)

Lord Romer asked what the testator meant by the stipulation as to Jewish parentage (which he took to be a reference to Jewish race or descent). He said: 'It cannot reasonably be supposed that the husband was to show an unbroken line of descent from the patriarch Jacob. If the daughter were compelled to wait for such a husband she would remain a spinster all her life, and the condition would be void as amounting to a total restraint on marriage. It seems far more probable that the testator meant no more than that the husband should be of Hebraic blood. But what degree of Hebraic blood would a permissible husband have to possess? Would it be sufficient if one only of his parents were of Hebraic blood? If not, would it be sufficient if both were? If not, would it be sufficient if, in addition, it were shown that one grandparent was of Hebraic blood or must it be shown that this was true of all his grandparents? Or must the husband trace his Hebraic blood still further back? These are questions to which no answer has been furnished by the testator. It was, therefore, impossible for the court to see from the beginning precisely and distinctly on the happening of what event it was that Mrs Clayton's vested interests under the will were to determine, and the condition was void for uncertainty'.

As to 'Jewish faith', Lord Romer disagreed with the view of the Court of Appeal that the question whether a man was or was not of the Jewish faith was a mere question of evidence. He said: '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 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. 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. 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 forfeiture of her interest in his estate'. Accordingly, the 'Jewish faith' limb of the condition was also void for uncertainty.

This case set the scene for the many similar cases that were to follow, including two in which I was myself engaged. The first of these two cases was *Re Selby's Will Trusts*.[24] Here the testator had declared that no beneficiary who married 'out of the Jewish faith' should take any benefit. The judge held that the requirement was a condition precedent to qualifying as a beneficiary and was not a condition subsequent and he held it valid. In his view the prohibition was against marrying someone who was not an adherent of the Jewish faith at the time of the marriage, and although there might be difficult borderline cases the words were not meaningless and were sufficiently definite and intelligible to be valid as a condition precedent. He said he could not believe that in the case at any rate of some people the court would not find it easy to determine whether they are or are not of the Jewish faith. For instance, he said, a professing and practising Christian would manifestly not be of the Jewish faith; whereas a devout and practising Jew, whatever kind of Jewish faith he practises, would, he thought, qualify as being of the Jewish faith.[25]

Re Selby's Will Trusts was followed by *Re Abrahams' Will Trusts*.[26] It is similar to *Re Selby* in that no one married out and no one lost anything. The testator conferred benefits on his son, happily named Gerald, one of which he would forfeit if he married 'a person not professing the Jewish faith' and another of which he would qualify for only if he met that condition. Since Gerald married a lady who did profess the Jewish faith, the first benefit was not affected by the condition attached to it (even though, as a condition subsequent, it was void for uncertainty); and he qualified for the second benefit which, as a condition precedent, was not void for uncertainty. As to this, the judge said: 'In some cases, no doubt, there may be difficulty in saying whether the person in question is professing the Jewish faith or not, and it is because of that possibility that the condition subsequent is void, but I do not think that the expression "professing the Jewish faith" is meaningless. One can say of some persons that without a doubt they profess the Jewish faith. It would, for example, be absurd to say that one could not be sure whether the Chief Rabbi was a person professing the Jewish faith'.

[24] *Re Selby's Will Trusts* [1965] 3 All ER 386, [1966] 1 WLR 43.
[25] Lord Millett, who was also engaged as Counsel in the case, has reminded me that one "beneficiary" of the testator's bounty was his non-Jewish chauffeur: but that nobody at the time realised that the testator's words might well have applied to deprive *him* of his legacy.
[26] *Re Abrahams' Will Trusts* [1969] 1 Ch 463, [1967] 2 All ER 1175.

Perhaps the most significant case in this long series is *Re Tuck's Settlement Trusts*.[27] I recall this case with affection since I succeeded in arguing before both courts that the settlor had expressed himself in terms that were not void for uncertainty, although the reasons given by the Court of Appeal for coming to that conclusion were different from those given by the judge.

The settlor was Sir Adolph Tuck, Bt. He was the first baronet and he was Jewish. He wanted to keep the baronetcy in the hands of successors of Jewish blood and faith. He settled a fund on trust to pay all the income to the baronet for the time being if and when and for so long as the baronet should be of the Jewish faith and married to 'an approved wife'. 'An approved wife' was defined as 'a wife of Jewish blood by one or both of her parents and who has been brought up in and has never departed from and at the date of her marriage continues to worship according to the Jewish faith as to which facts in case of dispute or doubt the decision of the Chief Rabbi in London of either the Portuguese or Anglo-German Community ... shall be conclusive'. The third baronet married out. The questions were whether the 'approved wife' condition was void for uncertainty and whether the provision making the opinion of a Chief Rabbi conclusive as to the relevant questions was void as purporting to oust the jurisdiction of the court.

The judge held that, even if there was uncertainty in the condition, the reference of any dispute or doubt to a Chief Rabbi was not an ouster of the court's jurisdiction and cured the uncertainty. The Court of Appeal held that the condition was a condition precedent and showed that the settlor, by using the words 'of Jewish blood by one or both of her parents', had not intended that 'an approved wife' should necessarily be wholly of Jewish blood, and might well have considered that the condition as to 'Jewish faith' was a sufficient safeguard against undue dilution of Jewish blood in the baronetcy. The condition was therefore not void for uncertainty. Lord Denning MR, agreeing with the judge (and with Lord Wright's opinion expressed in *Clayton v Ramsden*, above), added that in any case he saw no reason why the settlor should not delegate to a Chief Rabbi the decision as to facts in cases of dispute or doubt. He said that a testator might well think that the courts of law were not really the most suitable means of deciding such dispute or doubt, and that he would be quite right. Lord Denning expressed himself trenchantly. He said: 'As this very case shows, the courts may get bogged down in distinctions between conceptual uncertainty and evidential uncertainty and between conditions precedent and conditions subsequent. The testator may want to cut out all that cackle and let someone decide it who really would understand what the testator was talking about ... for my part, I would not blame him'.

I arrive at the end of the story, at any rate so far, with *Re Tepper's Will Trusts*.[28] This was something of a breakthrough, since the judge held that

[27] *Re Tuck's Settlement Trusts* [1976] Ch 99, [1976] 1 All ER 545 (Whitford J); [1978] Ch 49, [1978] 1 All ER 1047, CA.
[28] *Re Tepper's Will Trusts* [1987] 1 Ch 358, [1987] 1 All ER 970.

gifts, in the testator's will, to his grandchildren to be paid 'provided that they shall remain within the Jewish faith and shall not marry outside the Jewish faith' were not necessarily void for uncertainty, although the proviso was a condition subsequent. He adjourned the case, to enable the parties to adduce evidence of the relevant surrounding circumstances that would show the meaning that the testator attributed to the expression 'the Jewish faith' when using it in his will. After this sensible decision I can, I think, echo the words of Lord Atkin *in Perrin v Morgan*:[29] 'I anticipate with satisfaction that henceforth the group of ghosts of dissatisfied testators who, according to a late Chancery judge, wait on the other banks of the Styx to receive the judicial personages who have misconstrued their wills, may be considerably diminished'.[30]

[29] *Perrin v Morgan* [1943] AC 399, [1943] 1 All ER 187, HL.
[30] [1943] AC 399 at 415, [1943] 1 All ER 187 at 194, 195, HL.