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Conditions in Restraint of Marriage

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NOTES AND COMMENT

CONDITIONS IN RESTRAINT OF MARRIAGE.

Modern distinctions between valid and invalid conditions in restraint of marriage are deeply rooted in the past, and are the result of the development of the particular spheres of jurisdiction of the several courts. The English ecclesiastical courts, which originally had jurisdiction over the payment of all legacies arising out of personal property,[1] adopted the doctrine of the Roman civil law, which declared absolutely void all conditions in wills restraining marriage, whether those conditions were in partial restraint or whether they were in total restraint.[2] Following the Reformation, the power of the ecclesiastical courts was gradually taken away, and in 1857 their jurisdiction in testamentary and probate matters was transferred to newly created civil courts.[3] However, much of the law of probate and administration of estates, as dispensed by the secular courts, was based upon principles settled by the ecclesiastical courts when they had authority over these matters. Matters involving real property (and consequently devises of real property), on the other hand, were traditionally under the jurisdiction of the common law courts, and the common law recognized the validity of conditions involving reasonable restraints on marriage.[4] In an attempt to reconcile these conflicting theories, the courts of equity, which eventually gained jurisdiction over all legacies, developed numerous and complex distinctions on the subject.[5] As a result, even in this country, the law in regard to conditions in restraint of marriage was, until recently, controlled by many curious and subtle refinements respecting real and personal property, conditions and limitations, conditions precedent and conditions subsequent, gifts with and without valid limitation over, and the application of the rule to widows and other persons. Statutory changes in New York have made most of these distinctions merely academic.

Public Policy.

The fundamental concept underlying this branch of the law is that modern society is built about the home, and its perpetuation is essential to the welfare of the community. Obviously, the state has an

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[1] 1 BOWMAN, HANDBOOK OF ELEMENTARY LAW 201.

[2] Whiting v. De Rutzen, L. R. (1905), 1 Ch. Div. 96, 101 ("The origin of the rule against restrictions on marriage was the tendency of the canon law, in the interests of morality, to favor marriage."); Stackpole v. Beaumont, 3 Ves. Jr. 89, 30 Eng. Rep. 909, 912 (1796).

[3] BOWMAN, *op. cit. supra* note 1, at 202.

[4] Stackpole v. Beaumont, 3 Ves. Jr. 89. 30 Eng. Rep. 909 (1796).

[5] Hughes v. Conlan, 225 App. Div. 29, 232 N. Y. Supp. 84 (4th Dept. 1928); Mann v. Jackson, 84 Me. 400, 402, 24 Atl. 886, 887 (1892).

interest in the marriage institution as such,[6] and its policy is to encourage matrimony and discourage celibacy and illicit relations. "The family is the ultimate foundation upon which the soundness of the structure of the State depends." [7] Therefore, the state will not, in general, allow parties by contract,[8] deed,[9] or by a condition in a will, to make the continuance of an estate depend on the owner not doing that which it is, or may be, in the interest of the state that he should do.[10] Public policy is concerned with future conduct, and, therefore, it is not concerned with bequests which might be deemed a reward for past evil conduct, but is concerned with bequests which may influence future conduct.[11] Partial restraints have been sustained because they tend to prevent hasty and imprudent marriages [12] and to safeguard the welfare of the beneficiary.[13] Conditions in regard to remarriage were not considered as total restraints of marriage, but merely as partial restraint as the person involved had been married at least once.[14] It may be seen, therefore, that considerations of public policy may

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[6] Merriam v. Wolcott, 61 How. Pr. 377, 383 (N. Y. 1881); Matter of Seaman, 218 N. Y. 77, 81, 112 N. E. 576, 578 (1916); Matter of Forte, 149 Misc. 329, 330, 267 N. Y. Supp. 603, 606 (1933) ("The almost innumerable applications of this basic concept in the laws of every civilized community will be obvious upon a moment's reflection, involving as they do, the establishment and maintenance of a family unit, the support of the wife and children by the husband, the care and training of the children by the parents, the obligations of filial regard and obedience, and the protection of the home against injurious alien intrusion. In all these and many other elements which must be necessary contributing factors to the maintenance of successful and happy homes and the training and development of the youth which must be the bone and sinew of the State in the days to come, the community and nation possess a vital interest"); Whiting v. De Rutzen, L. R. (1905), 1 Ch. Div. 96; THOMPSON, LAW OF WILLS (1923) 647.

[7] People v. Olmstead, 27 Barb. 9, 33 (N. Y. 1857); Matter of Forte, 149 Misc. 327, 328, 267 N. Y. Supp. 603, 606 (1933).

[8] Lowe v. Peers, 4 Burr. 2225, 98 Eng. Rep. 160 (1768); Conrad v. Williams, 6 Hill 444 (N. Y. 1844).

[9] Randall v. Marble, 69 Me. 310 (1879); Monroe v. Hall, 97 N. C. 206, 1 S. E. 651 (1887); Gard v. Mason, 169 N. C. 507, 86 S. E. 302 (1915).

[10] Whiting v. De Rutzen, L. R. (1905) 1 Ch. Div. 96, 114.

[11] Matter of Liberman, 279 N. Y. 458, 464 (1939).

[12] Hogan v. Curtin, 88 N. Y. 164, 171 (1882); Pachholder v. Rosenheim, 129 Md. 455, 99 Atl. 672, 674 (1916); Stackpole v. Beaumont, 3 Ves. Jr. 89, 30 Eng. Rep. 909 (Ch. 1796).

[13] Matter of Seaman, 218 N. Y. 77, 83, 112 N. E. 576, 578 (1916) ("It is the duty of the courts, said the Chancellor, 'to favor * * * any * * * legal means which a father may adopt to enforce the authority which the law, for wise purposes, has given to him over his minor children and that regard for his wishes and counsel in the more important concerns of their lives after maturity, which the untrammelled testamentary power conferred by our law, is calculated to secure' ").

[14] *In re* Mortem's Estate, 130 Misc. 34, 224 N. Y. Supp. 75 (1927); *In re* Hotz, 38 Pa. 422 (1861); Overton v. Lea, 108 Tenn. 505, 68 S. W. 250 (1902); Herd v. Catron, 97 Tenn. 662, 37 S. W. 551 (1896); *cf.* Hoopes v. Dundas, 10 Pa. 75 (1848). *Contra:* Crawford v. Thompson, 91 Ind. 266 (1883); Van Gorden v. Smith, 99 Ind. 404 (1885); JARMAN, TREATISE ON WILLS (7th ed. 1930) 1496.

often conflict with the desire of the courts to protect the owner of property in disposing of it under such lawful limitations and conditions as he may subscribe.[15]

Two principles, so basic as to be almost elementary, permeate this branch of the law: one, is that *all* conditions in total restraint of marriage, whether attached to personalty or real property, are void absolutely; and two, that *reasonable* conditions in *partial* restraint may be valid.[16] The questions whether a condition is in partial or total restraint, or whether it is reasonable, are, in themselves, rather simple.[17] The *bona fide* intent of the testator constituted an important factor in the determination of those questions.[18] But the serious problems arose as to the effect to be given to the invalid conditions, and as to the effect which was to be given to the conditions in partial restraint.

Conditions Annexed to Real Property.

Formerly, it was necessary to draw a primary distinction between a devise of, or charge upon real property, and a legacy of personal property.[19] Restrictions in devises of real property presented but little difficulty. The English courts, in deciding cases arising out of

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[15] Hogan v. Curtin, 88 N. Y. 164, 171 (1882).

[16] STORY, EQUITY JURISPRUDENCE (2d ed. 1839) § 280 ("The general result of the modern English doctrine on this subject (for it will not be easy to reconcile the cases) may be stated in the following summary manner. Conditions annexed to gifts, legacies and devises in restraint of marriage are not void, if they are reasonable in themselves and do not directly or virtually operate as an undue restraint upon the freedom of marriage. If the condition is in restraint of marriage generally, then indeed, as a condition against the public policy and the due 'economy and morality of domestic life', it will be void").

[17] Courts have sustained the validity of condition which restrained marriage as to specified persons, Matter of Seaman's Will, 218 N. Y. 77, 112 N. E. 576 (1916), a condition which restrained marriage as to a certain family, Philips v. Ferguson, 85 Va. 509, 8 S. E. 241 (1881), a condition against marriage without the consent of those interested in the devisee's welfare, Onderdonk v. Onderdonk, 127 N. Y. 196, 22 N. E. 839 (1891), a condition against marriage until a certain age (as twenty-one), Bayeaux v. Bayeaux, 8 Paige 332 (N. Y. 1840), a condition against marriage with a member of a named religious group, Hodgson v. Halford, 11 Ch. Div. 959 (1878).

Courts have declared void a condition that daughter remain single, Matter of Denfield, 156 Mass. 265, 30 N. E. 1018 (1892), a condition that daughter inherit only if she be separate and apart from her husband, Matter of Hutchins, 147 Misc. 462, 263 N. Y. Supp. 896 (1933), a condition which gave the entire estate to a son when and if he divorced from his wife. Matter of Haight, 51 App. Div. 310, 64 N. Y. Supp. 1029 (2d Dept. 1900).

[18] Whiting v. De Rutzen, L. R. (1905) 1 Ch. Div. 96, 112 ("If instead of creating a condition absolutely enjoining celibacy or widowhood, the same be referred to the advice or discretion of another, particularly an interested person, it is deemed a fraud on the law and treated accordingly; that is the condition so imposed is holden for void."). SCHOULER, LAW OF WILLS (6th ed. 1923) 1506.

[19] Mann v. Jackson, 84 Me. 400, 402, 24 Atl. 886, 887 (1892); JARMAN, TREATISE ON WILLS (7th ed. 1930) 1496, 1497.

devises of land, followed the common law, and, consequently, any conditions in such devises were strictly construed.[20] If a condition precedent was void as being in general restraint of marriage, the devise itself was void; if the void condition was subsequent, the devise was absolute.[21] If the condition was such that marriage was only partially restrained as to time, place or person and what was reasonable, it was good. Such a condition did not require a gift over to make it valid.[22] This principle is said to be based on the rule that if there was a breach of condition, the heir-at-law of the testator could enter and, therefore, the necessity for a gift over was non-existent. Under a devise to *A* of land, upon condition that *A* marries with the consent of *X*, the condition is precedent, and *A* takes nothing unless he marries in accordance with the condition.[23] If land is devised to *A*, subject to a condition that he shall not marry without the consent of *X*, the condition is subsequent, and if he marries without the required consent, his estate is divested.[24]

However, it was very often difficult to decide whether a condition was precedent or subsequent.[25] No technical words indicating the difference between conditions precedent and subsequent were recognized,[26] and the question was regarded as one of intention. It was considered sufficient to make the condition subsequent if it appeared

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[20] Stackpole v. Beaumont, 3 Ves. Jr. 89, 92, 30 Eng. Rep. 909, 911 (1796).

[21] Scott v. Tyler, 2 Bro. Ch. 432, 29 Eng. Rep. 241 (Ch. 1788); JARMAN, TREATISE ON WILLS (7th ed. 1930) 1443.

[22] Hogan v. Curtin, 88 N. Y. 164, 174 (1882) ("In the latter cases (touching real estate) the doctrine of the common law in respect to conditions is strictly applied. If the condition is precedent, it must be strictly complied with in order to entitle the party to the benefit of the devise or gift. If the condition be subsequent, its validity will depend upon its being such as the law will allow to divest an estate."); JARMAN, TREATISE ON WILLS (7th ed. 1930) 1499.

[23] Merriam v. Wolcott, 61 How. Pr. 377, 383 (N. Y. 1881); Harvey v. Aston, 1 Atk. 361, 26 Eng. Rep. 228 (Ch. 1737); Reynish v. Martin, 3 Atk. 330, 26 Eng. Rep. 991 (Ch. 1746).

[24] Fry v. Porter, 1 Mod. 300, 86 Eng. Rep. 898 (K. B. 1809).

[25] Peyton v. Bury, 2 P. Wms. 626, 24 Eng. Rep. 889 (Ch. 1731) (The testator bequeathed the residue of his personal estate to *S*, provided she married with the consent of *A* and *B*, his executors in trust, and if she should marry otherwise, he bequeathed the said residuum to *W*. *A* died; after which *S* married without the consent of *B*. The court observed it was very clear that, in the nature of the thing and according to the intention of the testator, this could not be a condition precedent; for, at that rate, the right to the residue might not have vested in any person whatever for twenty or thirty years after the testator's death, since both of the executors might have lived, and *S* have continued so long unmarried, during all which time the right to the residue could not be (beneficially) in the executors, they being expressly mentioned to be but executors in trust. In this case, it was observed, the bequest over showed that the testator meant to make marriage without consent a forfeiture. The case seems to be analogous in principle to those in which a devise or bequest, if the object shall attain a certain age, with a gift over in case he shall die under that age, has been held to be immediately vested).

[26] Booth v. Baptist Church, 126 N. Y. 215, 242, 28 N. E. 238, 241 (1891).

from the context of his will that the testator intended an immediate interest to pass to the object of his bounty.[27]

Conditions Annexed to Personal Property.

Gifts charged on personalty were originally within the jurisdiction of the ecclesiastical courts. Therefore, the civil law, which was opposed to all conditions in restraint, was applicable to them. In regard to conditions precedent the civil law differed in some respects from the common law; the rule of the civil law being "that where a condition precedent is originally impossible, or is illegal as involving *malum prohibitum,* the bequest is absolute just as if the condition had been subsequent. But where the performance of the condition is the sole motive of the bequest, or its impossibility was unknown to the testator, or the condition which was possible in its creation has since become impossible by the act of God or where it is illegal as involving *malum in se,* in these cases the civil agrees with the common law in holding both gift and condition void." [28] Practically all conditions in restraint of marriage were considered as *malum prohibitum,* and, consequently, were accorded this liberal construction.

Conditions annexed to gifts of personal property had, as a general rule, to be accompanied by a gift over, otherwise the condition was regarded as *in terrorem* and inoperative.[29] The distinction made in cases where there was an express devise over does not seem to be founded upon any principle and may possibly have grown out of an effort to partially restore the harmony of the law.[30] It would seem that if the condition was legal, it ought to be given effect, as no gift over would make an illegal condition effectual.[31] Several reasons have been given for the rule requiring a gift over. One is that the gift over manifests the intention of the testator not to make the declaration of forfeiture merely *in terrorem;* [32] the other, that the interest of the legatee over is the distinguishing feature, and the clause became

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[27] O'Brien v. Barkley, 78 Hun 609, 28 N. Y. Supp. 1049, 1052 (3d Dept. 1894) ("Whether the condition is precedent or subsequent depends on the order of the time in which performance is required").

[28] Dusbiber v. Melville, 178 Mich. 601, 146 N. W. 208 (1914); JARMAN, TREATISE ON WILLS (7th ed. 1930) 1444.

[29] Hogan v. Curtin, 88 N. Y. 164 (1882); Bostich v. Blades, 59 Md. 231 (1882); Crawford v. Thompson, 91 Ind. 266 (1883); Gough v. Manning, 26 Md. 347 (1867); Parsons v. Winslow, 6 Mass. 169 (1810); Reynish v. Martin, 3 Atk. 330, 26 Eng. Rep. 991 (Ch. 1746); Whaler v. Bingham, 3 Atk. 364, 26 Eng. Rep. 1010 (Ch. 1746); Stackpole v. Beaumont, 3 Ves. Jr. 89, 30 Eng. Rep. 909 (Ch. 1796); Whiting v. De Rutzen, L. R. (1905) 1 Ch. Div. 96.

[30] Hogan v. Curtin, 88 N. Y. 164, 193 (1882).

[31] Stackpole v. Beaumont, 3 Ves. Jr. 89, 30 Eng. Rep. 909, 913 (Ch. 1796) ("I do not see the great importance of the distinction upon a bequest over of the legacy. It is one of the points that occurred to judges sitting here to deliver them from the difficulty arising from the rule of the civil law, adopted without seeing the ground and the reason of applying it to this country under different circumstances").

[32] Whiting v. De Rutzen, L. R. (1905) 1 Ch. Div. 96, 101.

a conditional limitation to which the courts were bound to give effect.[33] This rule was absolutely fixed only as to conditions subsequent.[34] The law as to conditions precedent without a gift over, was rather unsettled. However, the rule may be stated thus: A condition precedent without a gift over was considered merely *in terrorem* except where the legatee took a provision or legacy in the alternative (the smallness of the alternative legacy made no difference),[35] or where the condition concerning marriage was only one of two, on either of which the legatee would be entitled to the legacy,[36] or where marriage with consent was confined to minority.[37] The courts did not consider that a residuary bequest amounted to a gift over.[38] Thus it may be seen that a valid condition expressing a legitimate desire of the testator could be defeated in its practical effect by a mere technicality. This resulted in the absurdity of having a court declare a condition valid and at the same time deny it effect.

In the event that a gift arose partially out of personal property, and partially out of real property, so far as it was payable out of each species, it was governed by the rule applicable to that species.[39] It can be easily seen what extraordinary complications might arise through such a bequest.

Limitations.

There is apparent in the later decisions, an anxiety on the part of the judges to limit the rule adopted from the civil law.[40] A testamentary disposition, although it appeared in a form which was capable of being construed as a condition, was construed, nevertheless, as a limitation if that appeared to have been the testator's intention. Thus, where a testator bequeathed a life interest in certain property to a single woman with a provision for its termination in the event of her marrying, the provision was construed as showing an intention to provide for her while she was unmarried and not as a condition in restraint of marriage.[41] A testator using the phraseology of a limita-

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[33] JARMAN, TREATISE ON WILLS (7th ed. 1930) 1503.

[34] Scott v. Tyler, 2 Bro. Ch. 432, 29 Eng. Rep. 241 (Ch. 1788); Dashwood v. Lord Bulkeley, 10 Ves. 230, 32 Eng. Rep. 832 (Ch. 1804).

[35] Creagh v. Wilson, 2 Vern. 522, 23 Eng. Rep. 972 (Ch. 1706); Gillet v. Wray, P. Wms. 284, 24 Eng. Rep. 390 (Ch. 1715).

[36] Hemings v. Munckley, 1 Cox 39, 29 Eng. Rep. 1052 (Ch. 1783).

[37] JARMAN, TREATISE ON WILLS (7th ed. 1930) 1503.

[38] Wheeler v. Bingham, 3 Atk. 364, 26 Eng. Rep. 1010 (1746); Lloyd v. Branton, 3 Mer. 118, 36 Eng. Rep. 42 (1817).

[39] JARMAN, TREATISE ON WILLS (7th ed. 1930) 1503.

[40] Matter of Seaman, 218 N. Y. 77, 83, 112 N. E. 576, 578 (1916) ("Where it is possible that the condition may be legally performed, it will not be presumed that the testator intended an illegal performance. * * * The legal presumption is that men do not commit criminal offences.").

[41] Heath v. Lewes, 3 De G. M. & G. 954, 43 Eng. Rep. 374 (Ch. 1853); *In re* Moore, L. R. (1888) 39 Ch. Div. 116.

tion [42] could obtain the practical effect of a restraint on marriage. The distinction between a provision granting a devisee an estate "until she marry", and a provision that the estate is granted "on condition she remain unmarried" is shadowy. The ultimate result is the same —upon marriage the estate ends. Nor can it be said that the temptation to refrain from marriage is greater in the one instance than in the other.

Criticism.

The law in regard to conditions in restraint of marriage was severely criticized by many eminent jurists.[43] "This branch of the law is one with which it is not very satisfactory to deal, and I cannot say that I think the mode in which it has been dealt with is very easy to weld into one consistent whole." [44] Yet the courts felt constrained to follow decisions which had become so firmly engrafted on the system as to become an integral part thereof.[45] Unsatisfactory as

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[42] *In re* Horton's Will, 160 Misc. 64, 289 N. Y. Supp. 618 (1936) (Gift to a daughter as long as she remain unmarried, held to be a valid limitation and not a provision in restraint of marriage); Maddox v. Yoe, 121 Md. 288, 88 Atl. 225 (1913) (A devise or bequest to a woman of an estate so long as she remain single and unmarried is valid, and does not operate as a condition in restraint of marriage); Harlow v. Bailey, 189 Mass. 208, 75 N. E. 259 (1905) (A devise to one "so long as shall remain unmarried" is not invalid as in restraint of marriage, though the devisee may be induced to remain single to enjoy the benefits of the devise); Trenton Trust Co. v. Armstrong, 70 N. J. 572, 62 Atl. 456 (1905) (A gift intending to provide for the legatee while single may contain a valid condition against marriage. Thus a provision in a will for support of daughters so long as they continue unmarried and need support is a valid provision and not in restraint of marriage); *In re* Bruch's Estate, 185 Pa. St. 194, 39 Atl. 813 (1898) (A bequest of income of a certain sum to a person so long as she remain single and bear her then name, is not in restraint of marriage, but merely on a limitation as to time); *In re* Holbrook's Estate, 213 Pa. 93, 62 Atl. 368 (1905) (Testator by his will gave the income of a fund during the beneficiary's life or so long as she remained unmarried, with a gift over in case of her death or marriage. It was held that though the gift was upon a limitation in favor of the beneficiary while she remained unmarried, it was not invalid as an unlawful restraint of marriage).

[43] Stackpole v. Beaumont, 3 Ves. Jr. 89, 30 Eng. Rep. 909, 912 (1796) ("It is impossible to reconcile the authorities or range them under one sensible, plain general rule. There can be no ground in the construction of legacies for a distinction between legacies out of personal and out of real estate. The construction ought to be precisely the same. I do not see more importance in reality in the distinction between conditions precedent and subsequent. * * * there was a blind superstitious adherence to the text of the civil law. They never reasoned; but only looked into the books, and transferred the rule, without weighing the circumstances, as positive rules to guide them. It is beyond imagination except from that circumstance, how in a *Christian* country they should have adopted the rule of the *Roman* law with regard to conditions as to marriage").

[44] Whiting v. De Rutzen, L. R. (1905) 1 Ch. Div. 96, 116.

[45] *Id.* at 117 ("But in my opinion, we are not really in a position to deal with such matters according to our view of what might or might not be desirable for the community. I think we are bound to follow the decisions of Lord

were the results obtained under this system, the courts of New York were not liberated from the necessity of applying it until rather recently. Even then, liberation came from without, and not from within.

Recent Modifications.

Statutory changes within the last decade have wrought important modifications of the old rules concerning these conditions. Under Section 18 of the Decedent Estate Law,[46] a widow now has the right to elect against a will which provides that a trust or legacy is made on condition that she does not remarry. Where, therefore, the common law held that such conditions were valid and enforcible, the statute now gives the widow an opportunity to defeat such a condition without declaring such conditions invalid expressly or impliedly.[47] Important as this statute may be in its operation in individual instances, its importance, when compared with another statutory change, is trivial. In 1930, Section 81 of Decedent Estate Law [48] took effect. This statute abolished the distinction between personal and real property for testamentary purposes.[49] Consequently, the fact that a condition has been attached to a devise of real property, rather than to a gift of personal property, will no longer have any effect on the ultimate outcome.[50] As a secondary result, the fact that the testator has or has not provided for a valid gift over will no longer operate to defeat a valid condition. Therefore, the conflicting results of the old rule will no longer be possible. It is now only necessary to determine whether the condition is contrary to the public policy of the state, whether the condition is reasonable, whether the condition is precedent or subsequent, and the effect that is to be given to that condition. In a recent case,[51] the Court of Appeals was confronted with a will, the terms of which afforded the court an excellent opportunity to exercise its new freedom. The testator had two sons and a daughter. The younger son had twice been married to women of a different faith, and the testator had strongly disapproved. By the terms of the will, the residuary estate vested in the other two children, subject to being

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Eldon in Dashwood v. Lord Bulkeley, 10 Ves. 230 and Sir William Grant in Lloyd v. Branton, 3 Mer. 108, 17 R. R. 33").

[46] N. Y. DEC. EST. LAW § 18.

[47] Matter of Byrnes, 260 N. Y. 465, 184 N. E. 56 (1933), *motion for reargument denied,* 261 N. Y. 623, 185 N. E. 765 (1933).

[48] N. Y. DEC. EST. LAW § 81.

[49] N. Y. DEC. EST. LAW § 81: "All existing modes, rules and canons of descent are hereby abolished. * * * All distinctions between the persons who take as heirs at law or next of kin are abolished and the descent of real property and the distribution of personal property shall be governed by this article except as otherwise specifically provided by law. * * *."

[50] *In re* Wainrights's Will, 157 Misc. 531, 284 N. Y. Supp. 578 (1935), *rev'd on other grounds,* 248 App. Div. 336, 289 N. Y. Supp. 510 (2d Dept. 1936).

[51] Matter of Liberman, 279 N. Y. 458 (1939).

divested if the younger son married with the consent of his sister and brother. The intent of the testator was to prevent his son from marrying any but a Jewess. The court said: "We decide in this case only whether the condition in the present case is reasonable and does not contravene our public policy, and we may not ignore any of those factors which determine either the purpose or the extent of the restraint." [52] The fact that the restraint was imposed upon an adult, forty years of age, combined with the fact that there was no limitation as to time and that the very persons whose consent was required would benefit by the withholding of their consent,[53] made the condition invalid and inconsistent with public policy, the natural tendency of such a condition being to restrain all marriage. The court asserted: "Whether a condition in restraint of marriage is reasonable depends, not upon the form of the condition, but upon its purpose and effect under the circumstances. What has been said and decided in other cases *may often guide* in analogous cases; but no rigid rule *based upon ancient precedents dictates a decision where the circumstances are different and reason points to another conclusion.*" [54] (Italics ours.) In deciding what effect was to be given to the invalid condition precedent, the court turned its back upon the strict rules of the common law and adopted the rule that where a void condition is merely *malum prohibitum,* the beneficiary takes as if no condition had been annexed to the gift or as if he had complied with the void condition. "We recognize that it [the above rule] is rooted in considerations of practical expediency or necessity rather than logic. To give the rule less force: to declare the condition void without at the same time giving effect to the gift made upon the void condition, would be a mockery of the beneficiary and by indirection would permit a testator to accomplish a result which we hold contrary to the 'common weal'." [55] While the court was setting a precedent within its own jurisdiction,[56] it was not without precedents in jurisdictions outside of New York.[57]

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[52] *Id.* at 466.

[53] Bayeaux v. Bayeaux, 8 Paige 332, 333 (N. Y. 1840) ("He also appears to have had some confused idea of a power in trust to take the property from the children and give it to others, in case of disobedience or upon their marrying without the consent of their mother. But, even that power is not given in such a way that it can be effectually exercised; as the mother is not authorized to appoint the property to others in such a case. And a power to keep the property herself, by withholding her assent to the marriage of her child, would probably be invalid and inconsistent with the principles of public policy; as it might operate as an inducement to her to withhold her consent to a proper marriage").

[54] Matter of Liberman, 279 N. Y. 458, 465 (1939).

[55] *Id.* at 469.

[56] The Appellate Division, in Matter of Haight, 51 App. Div. 310, 64 N. Y. Supp. 1029 (2d Dept. 1900), adopted the rule, but the question never before directly presented itself to the Court of Appeals.

[57] Brizendine v. American Trust and Savings Bank, 211 Ala. 694, 101 So. 618 (1924).

In any question arising from a condition in restraint of marriage, there is a balancing of two opposing interests—the desire of the courts to give effect to the testator's wishes as expressed in his will, and the desire of the courts to uphold the public policy of the state. In view of the onslaughts made on the common law doctrine in regard to these conditions by both the legislature and the courts, the intention of the testator has been reduced to a secondary position. The courts, freed from the necessity of giving lip-service to outmoded and antiquated legalisms, have torn aside the veil of technicalities and regarded the problem afresh. If, in the final analysis, the condition is one which tends to restrain all marriage, or is unreasonable, the testator will not be permitted, by the use of technical language, to indirectly achieve the result which he could not achieve directly. Nor can it be doubted that it is better, in the long run, to sacrifice the intentions of individual testators to the interests of uniformity and public policy.

ROSE M. TRAPANI.

"END" OF A WILL IN NEW YORK.

Miss Emma, a spinster, wishes to make a will. She buys a blank will form from her corner stationery store, and, being satisfied that the printed matter is in nice, technical, legal language, she starts to fill it out in her own handwriting. This will form consists of one sheet of paper, so folded on the left as to make four pages. The formal opening is on the first page, and the formal termination is on the second page, leaving the third and fourth pages blank. There is a blank space of a few inches on the first page for the dispositive provisions of her will. But there is not enough room for all the bequests she wishes to make. And seeing there is no space above the formal termination on the second page, Miss Emma continues and concludes her bequests on the third page, still in her own handwriting. In thus carrying over from the first to the third page, she has followed the method employed by many people in writing informal letters. She then calls in two of her neighbors, declares to them that the document is her will, signs her name in the proper place on the second page, and asks them to subscribe their names below the attestation clause, which they do. Miss Emma dies a short time later, and the will is presented to the surrogate for probate. Should the surrogate admit the will to probate?[1]

It is easy enough to say that she should have sought the advice of her attorney, but she no longer is in a position to remedy her mis-

[1] These are substantially the facts in Matter of Golden, 165 Misc. 205, 300 N. Y. Supp. 737 (1937), *aff'd*, 253 App. Div. 919, 3 N. Y. S. (2d) 886 (2d Dept. 1938). In that case, it was held that the will was subscribed at the literary end and, therefore, entitled to probate.