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VALIDITY AND CONSTRUCTION OF CONDITIONS ATTACHED TO GRANTS AND DEVISES OF ESTATES IN LAND

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THE LAW of real property is recognized as being one of the most conservative branches of the law and the rules governing the creation of estates subject to conditions have been subject to less change perhaps than have most legal relationships originating in or antedating the middle ages. Formerly common law conditions were utilized to create relationships now more frequently accomplished by the use of trusts, powers, and even contracts. The restrictions upon the use and alienation of land which are now enforcible in equity have also contributed to restrict the use of common law conditions to a narrower field than formerly. The purpose of this article is, therefore, not so much to discuss new and modified rules of law governing the validity of conditions as it is to bring together a number of decisions passing on the validity of a variety of conditions, novel because so infrequently attempted, and to reconcile those that appear to be in conflict.

A considerable diversity of opinion exists as to the character of conditions precedent or subsequent which will be sustained as valid and enforcible when attached to estates created by deed or by will. The authorities are,

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however, in agreement that all such conditions are enforcible providing their performance is not impossible, or if not in furtherance of matters *malum in se, malum prohibitum,* or contrary to public policy.

An analysis of the conflicting cases indicates that whatever contrariety of opinion does exist arises from a diversity of viewpoint as to what conditions are contrary to public policy. Since there is no standardized public policy, it is not surprising to find a particular condition held valid in one jurisdiction and considered invalid in another. For example, a condition imposing a forfeiture upon an estate if conveyed to a member of a designated race has been held valid in certain states and the estate forfeited upon such a conveyance, while in other states, an identical condition has been held invalid and the grantee or devisee takes the estate free from the condition, the criterion as to validity in both cases being public policy.

The cases involving forfeiture upon alienation have to do with those conditions or limitations providing that, upon alienation, the estate shall come to an end or that a gift over shall take effect. The operation of such provisions is to deprive the persons or their alienees of their estates.

The invalidity of conditions attached to a grant or devise of an estate in fee imposing absolute restraints upon alienation has, in some of the early as well as in the modern cases, been determined on the grounds of repugnancy independent of any violation of public policy. However, a well known American authority[2] on the law of real property has made the statement, "In truth, the rule seems not to call for any reason except public policy." On the other hand, the United States Supreme Court, in construing an Illinois will, said, "But the right of alienation is inherent and an inseparable quality in an estate in fee simple. In a devise of land in fee simple, therefore, a condition against all alienation is void because re-

[2] Gray, Restraint on Alienation, sec. 21.

pugnant to the estate devised.'"[3] Little reason exists, however, for basing the decisions on repugnancy except so far as repugnancy may suggest that gifts over upon forfeiture for alienation are against a sound public policy favoring freedom of alienation.

The modern limitations upon the right of a grantor or testator to impose conditions restricting alienation of vested estates appear to stand upon common law reasons. The common law, since the Statute *Quia Emptores* (1290), has held that a condition restricting all power of alienation even for a single day is inconsistent with an estate in fee, unreasonable and void. An accepted authority states that prior to the Statute *Quia Emptores,* the feoffor or grantor was entitled to the escheat upon failure of the heirs of the grantee, the escheat being treated as a reversion.[4] The grantor as a result, did not part with his entire estate, the interest remaining giving the grantor or his heirs the right to enter upon breach of the condition. Since the estate was not absolute and the grantor or his heirs always had such a reversionary interest, it followed that a condition imposing a restraint upon alienation of a fee subject to escheat in favor of the grantor, was not considered repugnant or inconsistent with an estate so granted, and the estate would be forfeited upon breach of the condition. Whether the Statute *Quia Emptores* became effectual in Illinois or any other state of the United States by express or implied adoption or as a part of the common law need not now be inquired into, for in this country no such right to escheat was ever recognized in the grantor, but the escheat could only accrue to the state.

The question of the right of a grantor or testator to impose such conditions in any of the United States stands upon the common law as it has stood, since the Statute *Quia Emptores,* in England, where conditions against alienation attempted to be imposed upon fees are express-

[3] Potter v. Couch, 141 U. S. 315.

[4] 2 Co. Litt. 27.

ly held void for repugnancy or as being contrary to public policy. This has been the rule except in a few English cases and in one or two American decisions holding that the suspension of all power of alienation of a vested estate in fee for a reasonable time only is valid. This exception to the doctrine has also been assumed by some text writers and authorities and is supported by some dicta in an occasional decision, all of which are referred finally to Larges' Case,[5] an early English decision.

Larges' Case, however, does not in fact support the doctrine that a condition is valid which imposes on a vested estate in fee a restraint upon alienation for a reasonable period. The occasional reliance upon Larges' Case as authority for this limitation of the doctrine appears to have been based upon a literal reading of a clause in that opinion, which, standing alone, might be so interpreted. However, a careful reading of the context of this decision indicates that the court did not intend to announce any such doctrine for reasons fully and convincingly advanced by the Michigan Supreme Court in *Mandelbaum* v. *McDonnell*.[6] There a testator attempted to impose a condition upon an absolute vested remainder in fee, subject only to an intervening life estate, whereby the devisees of the remainder were forbidden to sell their interest during a named period. The condition was held to be void. The court stated that the validity of a condition imposing such a restraint upon alienation is subject to precisely the same rules as would govern the case of a devise of an absolute fee.

In Illinois, a provision for forfeiture upon alienation of a fee or of an absolute interest in personalty is void.[7] In this state it was decided that the primary rule of construction of wills, namely, giving effect to the intent of the testator as ascertained from the entire will, yields before this established rule of law and that a condition

[5] 2 Leo. 82.

[6] 29 Mich. 78.

[7] Davis v. Hutchinson, 282 Ill. 523.

in general restraint of the power of alienation when incorporated in a will otherwise conveying a fee simple, is void as against public policy. In the case cited, the will prohibited the devisee from selling or attempting to sell, mortgaging or attempting to mortgage any portion of the devised property and it was held that such a restraint upon alienation is to be uniformly rejected and the devise sustained, because such a restraint is void as against public policy.

The doctrine that conditions imposing absolute restraint upon alienation for all time are invalid has been extended in many cases to include conditions imposing such absolute restraint for a limited time only. The rule as to invalidity of conditions imposing an absolute restraint upon alienation for a limited period was sustained in another Illinois case[8] wherein the court considered the effect of two limitations in a deed conveying a fee, one providing that the grantee should not, in his lifetime, make any disposal of the fee and the other that the grantee's interest should not become liable for his debts. It was held that the grantee took the fee free from both conditions. There are numerous cases in other jurisdictions holding that an absolute restraint upon alienation for a limited time is void when annexed to a grant in fee, and that the grantee may convey a fee simple title.[9]

Some contrariety of opinion exists as to the validity of conditions imposing a partial restraint upon alienation by forbidding alienation to certain persons or groups of persons. A provision for forfeiture, operative if the one taking the fee alienated to any one except a person named or a small class of persons, has been held void in England.[10] However, in at least two English cases such a provision for forfeiture was sustained.[11]

[8] Hudson v. Hudson, 287 Ill. 286.

[9] Combs v. Paul, 191 N. C. 789; Hill v. Gray, 160 Ala. 273; Woodford v. Glass, 168 Iowa 299.

[10] Attwater v. Attwater, 18 Beav. 330 (1835).

[11] Doe v. Pearson, 6 East 173 (1805); In re Macleay, L. R. 20 Eq. 186 (1875).

In a typical American case[12] the court in construing a deed, containing a clause reserving the use of the land to the grantors for life and prohibiting sale of the land by the grantees to any one except the grantor's heirs, held the condition to be an unreasonable restraint upon the grantees' right of disposal and not binding upon them.

The question of the validity of a condition in a deed imposing partial restraint upon alienation of property in fee simple was raised in a Maryland case.[13] The habendum clause of the deed contained the condition that the grantee, his heirs and assigns, should not devise the property to anyone other than some person or persons of the name of Brown, within the line of consanguinity or blood relationship of the grantor, his heirs or assigns, with a further provision that should the grantee, his heirs or assigns undertake to convey or devise said property to any person or persons other than those of the class named, the grantor, his heirs or assigns shall have the right to re-enter. The court quoted from Blackstone as follows:

> These express conditions, if they be impossible at the time of their creation, or afterwards become impossible by act of God or the act of the feoffor himself, or if they be contrary to law or repugnant to the nature of the estate, are void. In any of which cases, if they be conditions subsequent, that is, to be performed after the estate is vested, the estate shall become absolute in the tenant. . . . For he hath by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or repugnant.[14]

Following this doctrine, it was held that the condition in the deed was void because repugnant to the fee conveyed and that the grantees took an absolute fee. Inasmuch as the condition if held good would have limited the ownership of the land to persons of the name of Brown

[12] Chappel v. Chappel, 119 S. W. 218 (Ky. 1909).

[13] Brown v. Hobbs, 132 Md. 559.

[14] 2 Bl. Com. 156.

within the line of consanguinity or blood relationship, it appears that such condition is contrary to public policy permitting freedom of alienation.

In Illinois,[15] our Supreme Court has gone so far in the other direction as to hold void a gift over if any devisee aliened to a named person or his wife. In this case, the testator after making absolute gifts of his property both real and personal, by a later provision in the will forbade any devisee or legatee from giving any portion of his share under the will to a certain person, under penalty that if he did, then his entire estate should go to the legal heirs of the others. The court, in passing on this question, said, "A testator can bequeath and devise his property by will or not as he sees fit. If he makes an absolute gift of such property, he cannot by another clause in his will restrict the free use or right to dispose of such gifts."

It has generally been held that a provision for forfeiture upon alienation of a future interest is enforcible. In Larges' Case, already cited, it was decided that since a contingent remainder is inalienable, a provision that the chance to have it vest be forfeited by attempted alienation while the interest remains future, cannot be void. Some of the English decisions[16] appear to have decided that where the remainder is vested in interest and indefeasible and the interest remains a future one, a provision for forfeiture upon attempted alienation is good. These decisions might have been based on the rule in equity that an attempted alienation of a vested and indefeasible remainder or reversion would be set aside unless a proper consideration was paid and that there was a public policy against allowing the unrestricted alienation of such interests. On this theory, it would follow that provisions for forfeiture upon attempted alienation were not so far contrary to public

[15] Jenne v. Jenne, 271 Ill. 526.

[16] In re Porter, L. R. [1892] 3 Ch. 481; In re Goulder, L. R. [1905] 2 Ch. 100.

policy as to be void. However, the Michigan case previously referred to denied the validity of such a condition. The difference in opinion may be explained by reason of the Michigan court placing emphasis on the fact that a vested remainder is alienable at law and hence a provision for forfeiture on alienation is void.

A provision in the gift of a life estate or interest that the estate or interest shall cease or go over to a third person on alienation, either voluntary or involuntary, is sustained both by principle and by the overwhelming weight of authority. The language of an early Illinois case[17] indicates an assumption by the court that a provision in a gift of a life estate, for forfeiture upon alienation is valid. The gift was of a legal life estate or interest in personal property upon the condition that the life tenant should have no power to sell or encumber the same, and that it should not be subject to sale or legal process or for the life tenant's debts and if the provision was violated, the subject matter of the gift should pass to the next person in remainder. However, the later Illinois cases uniformly hold that such provisions for forfeiture when attached to legal life estates are invalid.[18]

In *Henderson* v. *Harness*,[19] a legal life estate was created by will with the proviso that the life tenant should not sell nor in any way encumber said realty during his lifetime. The will further provided that in case the life tenant during his lifetime should sell or in any way encumber the life estate, then such estate should terminate and the remainderman could enter at once. The life estate was sold on execution and the life tenant later filed a bill to construe the will and have the sale set aside. The decree was in his favor but was reversed by the Supreme Court on the ground that the condition was void for repugnancy. The court based its decision upon the ground that there was no distinction to be

17 Waldo v. Cummings, 45 Ill. 421.

18 Henderson v. Harness, 176 Ill. 302; Streit v. Fay, 230 Ill. 319.

19 176 Ill. 302.

taken between a proviso by way of forfeiture on alienation of a fee and one attached to a legal life estate. In case of a fee, the court said the forfeiture is void for repugnancy, and it is just as repugnant to the legal life estate as to the fee simple since both estates are absolute and the only difference is in respect to their termination. There appears to be no foundation for this reason of repugnancy except so far as it suggests that gifts over, upon forfeiture for alienation, are void on grounds of public policy. If this reasoning of the Illinois court as to conditions imposed upon life estates should be followed through consistently, it would lead to the conclusion that every right of entry attached to a fee should be void for repugnancy and that every gift over cutting short a fee, whether by deed or by executory devise must be void on the same grounds.

The only sound reason for holding a forfeiture upon alienation void in any case is because such forfeiture violates public policy in favor of freedom of alienation and not for any technical grounds of repugnancy. There appears to be no reason of public policy or impropriety forbidding the reversioner after a life estate from dictating who shall have possession nor does there appear to be any contravention of public policy in protecting the remainderman by restricting the ownership or possession of the life estate to the original life tenant. The Illinois doctrine as stated in *Henderson* v. *Harness* seems to stand alone as a decision contrary to the general rule, but the dictum of the court apparently limits the doctrine to legal life estates. The court said: "The rule would be different where the legal title to the property has been vested in a trustee for the use of the beneficiary under specific conditions. That is the most appropriate, if not the only way of accomplishing the protection of the subject of a devise." A later Illinois decision[20] quoted the doctrine of *Henderson* v. *Harness* with approval.

[20] Streit v. Fay, 230 Ill. 319.

It appears doubtful how far a condition which is bad on involuntary alienation may be good on voluntary alienation. It was held however in *Henderson* v. *Harness* that a restriction against voluntary alienation is not effective as to an involuntary transfer. The will provided for the title to the land to vest at once in the remainderman in case the life tenant as first taker permitted it to be sold for taxes or if he sold or encumbered it. The court held that this provision did not effect a restriction against the life tenant's involuntary alienation and stated as follows:

> Except by the intervention of trustees an estate cannot be devised for the benefit of the legatee in such a manner that it cannot be seized for the debts of one having a life estate therein, as our statute authorizes the sale of such estate under execution.

The validity of conveyances or conditions in leases against assignment or subletting except with the written consent of the landlord, appears to be unquestioned and recognized in Illinois and all other jurisdictions. It is common practice to make the breach of such conditions a ground for forfeiture and there appears to be no public policy against such conditions, since it is considered to be proper that landlords should be able to protect themselves from the occupancy of the premises by others than the lessee. The lessee's interest being an estate for years, there would appear to be as much sound reasoning in holding such a forfeiture void on technical grounds of repugnancy as there is in the case of life estates. Obviously, the Illinois doctrine, that conditions imposing forfeitures are void when applied to life estates, is irreconcilable with the holding that such forfeitures are valid when imposed upon an estate for years.

The validity of conditions imposing restrictions upon alienation to members of a particular race has been upheld in a number of states on the ground that such conditions are not contrary to public policy. In Cali-

fornia[21] it has been held that a provision in a deed that the property shall not be sold, leased or rented to any person other than of the Caucasian race is an illegal restraint on alienation and that such a provision, limited both to persons of a particular race and to a comparatively brief period of time, cannot be upheld on the ground that the restraint is but partial, since there is no distinction in California between partial and general restraints upon alienation in view of section 711 of the Civil Code of that state. While this decision is based directly on the condition being *malum prohibitum* under the California Code, it seems proper to assume that a restriction against alienation to the members of any particular race is in violation of the public policy of that jurisdiction for the reason that the code reflects the public policy of that state.

A Missouri case[22] decided in 1918, pursuant to a different public policy, held that a condition in a deed providing for forfeiture if the property is sold or leased to negroes is good and that the forfeiture will be enforced, since the condition does not come within the rule prohibiting restraints upon alienation. The court stated:

> There is nothing against public policy in inserting a condition in a deed that the property shall not be sold or leased to colored people. Such restrictions tend to promote peace and prevent violence and bloodshed and should be encouraged.

This decision is in a jurisdiction where the courts have sustained laws providing for separate schools for negroes, and appears not to be antagonistic to the public policy of that state or of other states having laws which provided for separate coaches on railroad trains and in street cars, as well as laws prohibiting negroes from attending theatres attended by white people.

[21] Los Angeles Investment Co. v. Gary, 181 Cal. 680.

[22] Koehler v. Rowland, 275 Mo. 573.

A Louisiana case[23] is indicative of the public policy of that state wherein the court, mindful of the Civil Code giving the fullest liberty to contract and to dispose of property, held valid a condition in a deed imposing a forfeiture for alienation or lease to a negro. It was further held that the condition did not violate the fourteenth amendment to the United States Consitution so far as prohibiting discrimination against the negro race, since that amendment applies only to state legislation and has no application to the contracts of individuals.

There appears to be no Supreme Court decision in Illionis raising the question of the validity of a condition in a deed or will imposing a forfeiture for sale of land to a negro. However, the court has held that the refusal of a cemetery corporation to sell burial lots to colored persons is not a violation of the rights of such persons under the State Constitution nor under the fourteenth amendment to the Federal Constitution, which applies only to acts of the state.[24] In view of this decision, and of the general recognition of the validity of restrictions on sub-division property as well as of agreements of property owners not to sell or rent land to negroes, it seems probable that the validity of such a condition in a deed or in a will may be sustained and the provision as to forfeiture upheld when the question comes squarely before the court.

The right of an individual property owner to attach conditions limiting the use of the land conveyed by deed or by will is universally recognized, and the validity of such conditions is determined by the same public policy as conditions imposing restraints upon alienation.

It has been held in Illinois[25] that a condition in a conveyance to a railroad company of a right of way,

23 Queensborough Land Co. v. Cazeaux, 136 La. 724.

24 People v. Forest Home Cemetery Company, 258 Ill. 36.

25 Gray v. Chicago, Milwaukee & St. Paul Ry. Co., 189 Ill. 400.

requiring the company to build a depot on the land and to stop all accommodation trains there, is not as a matter of law, illegal and void as opposed to public policy. It was also held that compliance for a number of years would not satisfy the condition but the condition would continue as long as the railroad company used the right of way and ran accommodation trains.

A condition attached to a grant of land to a railroad company has been held void as contrary to public policy in Illinois,[26] where the condition provided for forfeiture of the grant should the company build a station within three miles of the land so granted. Since the directors of the railroad company were held to be trustees both for the public and for the stockholders of the railroad, between whom there was no conflict of interest, and the interest of both forbade that there should be a positive prohibition against locating a station at any point on the line of the railroad, the prohibition was held to be in the nature of a condition subsequent, void as against public policy, and the railroad company took the land free from the condition.

The question of the validity of a condition in a deed imposing a restraint upon use of property was again raised in Illinois in a case[27] where the court had under consideration a deed of one acre of land to the Town of Jefferson, the deed containing the express provision that the grantee should use the land for town purposes and upon ceasing so to use the premises, either in whole or in part, the conveyance was to be void. The Town of Jefferson subsequently became the Village of Jefferson and later the village was annexed to the City of Chicago and the property was thereafter occupied by the city. It was contended that performance of the condition subsequent was made impossible or unnecessary by law and was, therefore, void. The court held that the Town of Jefferson having thus permitted the exercise

[26] St. Louis, Jacksonville & Chicago R. R. Co. v. Mathers, 71 Ill. 592.
[27] Sherman v. Town of Jefferson, 274 Ill. 294.

of its powers to pass to the City of Chicago, this amounted to an abandonment by the Town of its entire use of the property and that the violation of the condition, not being by act of law but by voluntary act of the grantee, the grantor's heirs should recover the property in an action of ejectment.

The rule that a condition subsequent attached to a grant of land becomes void when it subsequently becomes impossible of performance by act of God or by law so that the grantee thereafter holds the estate free from the condition, has been followed by the Illinois courts. A change in the law making it impossible for a railroad company to perform such conditions was held to excuse the railroad company from performance.[28] Failure of performance did not divest its estate but on the contrary, the estate became absolute upon performance becoming legally impossible.

There appears to be some difficulty in determining just how far a condition in a deed or a will which restricts the use of the property may go without being considered as in contravention of public policy. It has been held that a condition in a deed, made in good faith and imposing restrictions upon use of land, will not be held void as against public policy unless the benefit to the public from so holding is certain and substantial. The Illinois Supreme Court, in passing on a condition in a deed which conveyed four lots and provided that "no grain elevator should be built or grain handled thereon," held the condition to be valid and binding, there being no showing that the condition of the property or of the surrounding neighborhood had changed in the meantime.[29] The grain elevator, erected upon the property in violation of the condition, was a public warehouse, but in the absence of a showing that the property was the only one available for a public warehouse, it was held that the restriction as to use was not

28 City of Chicago v. Chicago & Western Indiana R. R. Co., 105 Ill. 73.
29 Wakefield v. Van Tassell, 202 Ill. 41.

against public policy. Referring to the condition, the court said:

The condition as expressed in the deed is plain and unambiguous and needs not the aid of a court to construe its meaning. Parties have a right to make deeds and insert therein such conditions as they see fit, and contracts entered into freely and voluntarily must be held sacred and be enforced by the courts. As the parties make their deeds and contracts so the courts must take them; and yet they must not be such contracts as are in contravention of the paramount principle of public good. So long as the beneficial enjoyment of an estate conveyed in fee simple is not materially impaired by restrictions and conditions contained in a deed, such restrictions and conditions, as to the mode of use, are held valid. The enforcement of these conditions by the court arises from the principle of law that every owner of the fee has the legal right to dispose of his estate either absolutely or conditionally, or to regulate the manner in which the estate shall be used and occupied, as the grantor may deem best and proper. Just so long as the conditions and restrictions are not violative of the public good or subversive of the public interest they will be enforced.

It is not the intent of the parties alone which is to be considered the true test, but in each particular case, under the facts, the judicial inquiry is, "Will the enforcement of the condition be inimicable to the public interest?"

Public policy appears to be violated by a condition in a deed the observance of which results in restraint of trade not limited as to time, space and extent. A condition in a deed providing that the premises conveyed "should be used for saloon purposes at all future times when same may be legally maintained" and that the beer sold thereon shall be beer manufactured by a named brewing company was held contrary to public policy and void.[30]

A gift of property with a condition imposing forfei-

[30] Ruhland v. King, 154 Wis. 545.

ture if the donee marries at all is void as against public policy and the donee takes the property free from the condition. The American decisions have not followed the law of England which seems to be in a state of confusion and conflict both as to realty and personalty.[31]

It appears to be the general rule that conditions restraining marriage are to be considered as subsequent and therefore void, but the English cases have not followed the rule strictly as to realty. Such conditions were held void as to personalty in *Morley* v. *Rennoldson*[32] and as to a mixed fund made up of the proceeds of both realty and personalty in *Bellairs* v. *Bellairs*.[33] However, when the language of the testator shows an intention not to restrain marriage, but to furnish a maintenance to the donee or legatee while single, the English courts have held valid a provision confining the devise or legacy to the period in which the donee remains single, this rule holding regardless of whether the gift is to a widow or to others. *Jones* v. *Jones*[34] is among the English cases holding such a condition, in a devise of realty, valid for this reason. In personalty, the same principle is followed although frequently based on the theory that a limitation so terminating an interest on marriage is good, while a condition is not.

An exception is generally made where the devise is to the testator's widow; as to her such a provision for forfeiture in most cases seems to be regarded as not *in terrorem* but valid and enforcible, and the widow loses the property in the event of her remarriage.

[31] Perrin v. Lyon, 9 East 170 (1807); Jones v. Jones, 1 Q. B. Div. 279 (1876); Bellairs v. Bellairs, L. R. 18 Eq. 510 (1874); Morley v. Rennoldson, 2 Hare 570 (1843); Barton v. Barton, 2 Vern. 308 (1694); Newton v. Marsden, 2 J. & H. 356 (1862); Allen v. Jackson, 1 Ch. Div. 399 (1875); Thomas Jarman, A Treatise on Wills (4th Ed.), II, 50.

[32] 2 Hare 570.

[33] L. R. 18 Eq. 510.

[34] 1 Q. B. Div. 279.

Barton v. *Barton*[35] is authority for the statement that a condition attached to a legacy to a widow may sometimes be deemed *in terrorem* only and void and *Newton* v. *Mardsen*[36] is authority for the statement that it makes no difference whether the widow be the widow of the testator or of some other person. *Allen* v. *Jackson*[37] applies the same rule to gifts to widowers by the statement that what is law for a widow is also law for a widower.

In the United States, conditions which impose an absolute restraint upon marriage are in general held void except where they apply to gifts to the testator's widow. *Gard* v. *Mason*,[38] a typical case, states the American doctrine as it is applied to gifts to others than widows, as follows:

> Where a deed to land is clearly and unambiguously expressed, and conveys it to another, but upon a condition subsequent in general restraint of marriage, the condition, as a general rule, will be disregarded; and a conveyance of the land to C with full covenants of warranty, but if C should marry, the property shall revert to the grantor, is construed to be in fee simple, the condition annexed being in general restraint of marriage and therefore void.[39]

The doctrine applies in America as in England that the condition is valid if the will indicates that such provisions are not *in terrorem* but are to be considered as a provision for maintenance so long as the donee, usually a widow, remains single. An Indiana case,[40] holds that it makes no difference whether the widow be the widow of the testator or of some other person.

35 2 Vern. 308.

36 2 J. & H. 356.

37 1 Ch. Div. 399.

38 169 N. C. 507.

39 See also Otis v. Prince, 76 Mass. 581; Phillips v. Ferguson, 85 Va. 509; Lowe v. Doremus, 84 N. J. 658; Robert T. Devlin, A Treatise on the Law of Deeds, II, sec. 965.

40 Crawford v. Thompson, 91 Ind. 266.

The Illinois Supreme Court,[41] in discussing the policy of the law in permitting a testator to impose reasonable restraints on the objects of his bounty, stated that the testator "may not, with one single exception, impose perpetual celibacy upon the objects of his bounty, by means of conditions subsequent or limitation." That exception is in the case of a husband in making bequests or legacies to his own wife. He may rightfully impose the condition of forfeiture upon her subsequent marriage. The reasons for this exception being permitted are perhaps out of regard to the family of the testator rather than to any morbid sensibility or jealousy toward one who might come after him, which might be supposed to have prompted the condition.

The same rule as to conditions imposing restraint upon marriage of a widow was later impliedly recognized by the court[42] in passing upon the nature of the estate given to a widow. It was held that a devise of land in fee simple to the testator's widow, followed by the qualifications that if she remarries, she should have only one-third, passed a base or determinable fee and not merely a life estate. While the real question the court was considering was whether the widow had only a life estate, the validity of the condition against restraint of marriage was necessarily recognized by deciding that she had a base or determinable fee.

The validity of conditions imposing only partial restraint upon marriage has been frequently before the courts in England. The variety of possible partial restraints upon marriage that have been attempted has resulted in no definite rule other than that a condition which tends to encourage or promote celibacy for an indefinite period is void. The English cases have recognized the validity of conditions subsequent imposing partial restraint upon marriage, as for example, in

41 Shackelford v. Hall, 19 Ill. 212.

42 Becker v. Becker, 206 Ill. 53.

Perrin v. *Lyon*,[43] wherein the condition was that the donee should not marry a Scotchman; the imposing of a forfeiture if the donee married contrary to the rules of the Quakers;[44] not to marry a domestic servant;[45] and marrying anyone but a Jew[46] are typical of conditions, the validity of which has been sustained.

Although the restraint is in form partial, if it renders marriage very difficult or practically impossible, then the condition imposing it has been held invalid. In a case containing a gift providing that the donee should not marry any one who has not a freehold property of five hundred pounds a year and wherein the grantee's situation was such that an opportunity for such a marriage was extremely remote, the donee took free from the condition.[47] In several instances, it has been held that if the condition subsequent against marriage becomes impossible, the estate then becomes indefeasible on general principles.[48]

The few American decisions relating to such conditions appear to be based on the same principles as the cited English cases. For example, in one case, a condition imposing a forfeiture for marriage to a named person was held valid and enforcible.[49]

Shackelford v. *Hall*[50] states the Illinois doctrine as to forfeiture upon violation of conditions imposing partial restraint upon marriage. This case, by way of dictum only, affirms the doctrine that a condition in partial restraint of marriage, where the gift is of personalty and there is no gift over, may be entirely disregarded

[43] 9 East 170.

[44] Haughton v. Haughton, 1 Moll. 611.

[45] Jenner v. Turner, 16 Ch. Div. 188.

[46] Hodgson v. Halford, 11 Ch. Div. 959.

[47] Keily v. Monch, 3 Ridg. 205.

[48] Peyton v. Bury, 2 P. Wms. 626; Collett v. Collett, 35 Beav. 312; Gray's Cases on Property, I, 23-24.

[49] Graydon v. Graydon, 23 N. J. Eq. 229.

[50] 19 Ill. 212.

as being *in terrorem*. The court held that a devise with a condition annexed that the donee shall not marry till he or she arrives at the age of 21 is lawful, and that a violation of the condition, after notice thereof, will forfeit the estate devised. But the violation of such a condition will not work a forfeiture of the estate against the devisee, if such devisee is also heir-at-law; unless it plainly appears that the devisee had been expressly notified of the condition upon which the devise depended. One who has an estate or title real independently of the will or instrument containing a condition of forfeiture, shall not be presumed to have notice of the condition, and shall not be held to have incurred the forfeiture unless he committed the breach with knowledge of the condition and its consequences. It was further stated that the courts have very rarely held void such a condition against partial restraint of marriage even though such condition may appear harsh, arbitrary and unreasonable, so long as it did not absolutely prohibit the marriage of the party within the period wherein issue of the marriage might be expected; so an absolute prohibition of marriage until 21 years of age must be adhered to as a good condition, a violation of which may defeat a vested estate.

The will under construction in *Shackelford* v. *Hall* provided a condition of forfeiture if any devisee of the real estate married before reaching the age of 21. A daughter of the testator, who was one of the devisees, married under 21 in apparent ignorance of this provision in her father's will and the executor, who was an older brother of this daughter, was the complainant seeking to have the condition enforced against his sister, as he would profit thereby. The court refused to enforce the forfeiture because the condition was attached to a gift to all the heirs-at-law of the testator and it was not proven that the complainant, who was executor and therefore had knowledge of this provision of forfeiture in the will, had given any notice thereof to his sister. The court cited the rule followed by the English authori-

ties as set forth by Jarman,[51] who states

> that where the devisee, on whom a condition affecting real estate is imposed, is also the heir-at-law of the testator, it is incumbent on any person who would take advantage of the condition, to give him notice thereof; for as he has, independently of the will, title by descent, it is not necessarily to be presumed, from his entry on the land, that he is cognizant of the condition.

This case is interesting as illustrative of the length to which courts will sometimes go in seeking to void the result of a violation of a rule of law which if enforced will work injustice and also further the fraudulent purposes of a complainant endeavoring to take advantage thereof. The Justice who wrote this opinion, in later commenting on the case, is reported to have stated that the court was unanimously of the opinion that the schemes of this unnatural brother should be frustrated if possible, and it was only after several weeks search of the authorities that this ancient doctrine was uncovered which was made the basis of the decision departing from the general rule. The attitude of the court in endeavoring to avoid sustaining a forfeiture in this case is more fully set forth in a treatise on the law of future interests in Illinois.[52]

Provisions for forfeiture upon breach of conditions tending to encourage divorce are held void for the same reasons of public policy as govern conditions in restraint of marriage. The rule is exemplified in an Illinois case[53] wherein the complainant filed a bill to have set aside as void certain conditions in his father's will including a condition whereby a life estate given to the complainant was to be enlarged to a fee in case he should become divorced from his wife. The court indicated that under ordinary circumstances such a provision would be treated as violative of public policy and contrary to good morals as tending to encourage or pro-

[51] Thomas Jarman, A Treatise on Wills (4th Ed.), II, 526.
[52] Kales, Future Interests (2nd Ed.), pp. 869-870.
[53] Ransdell v. Boston, 172 Ill. 439.

mote divorce, but that this case should be an exception, because plaintiff and his wife had been separated for a long time prior to the date of the will. It has held that since plaintiff and his wife had been living separated for several years prior to the execution of the will and the divorce suit between them had been pending for more than two years, and such divorce proceedings and living apart were continued for many years after testator's death, it could not be said that the condition tended to encourage separation or promote divorce. The testator did not disinherit his son upon condition that he should live with his wife or should obtain a divorce from her. He simply made one provision for his son in case they were not divorced, and another if they were and the condition was therefore not contrary to public policy and was valid.

The court quoted with approval the language of Judge Story[54] as follows:

> So, also, conditions annexed to a gift, the tendency of which is to induce a husband and wife to live separately or to be divorced, are, upon grounds of public policy and public morals, held void.
>
> This whole subject as to what conditions in restraint of marriage shall be regarded merely *in terrorem* and so void, and what ones are valid, is certainly, both in England and in this country, involved in great uncertainty and confusion.
>
> The question as to what conditions affecting marriage are valid must depend upon the circumstances of each particular case, and will be very materially affected by the consideration how far the condition was one fairly applicable to the relation of the parties and the peculiar views and situation of the donor and donee.

The court indicated that conditions tending to encourage divorce are subject to the same rules as conditions imposing restraint upon marriage and should be

[54] Joseph Story, Commentaries on Equity Jurisprudence (12th Ed.), I, 276, secs. 291a, 291e, 291d.

treated as conditions precedent, and on this point, quoted with approval, a well known writer[55] as follows:

> In devises and other gifts of real estate, courts of equity follow the rules of the common law concerning the operation of conditions generally, and their effects upon the vesting and divesting of estates. In gifts of real estate, therefore, when a condition in restraint of marriage is precedent and is broken, it prevents the estate from vesting at all, whether the restraint be absolute or partial, and whether there be a gift over or not. When the condition is subsequent and void, it is entirely inoperative, and the donee retains the property unaffected by its breach.

The court held the condition to be precedent and void, but nevertheless operative to defeat the gift of the fee to the son. In this connection, it is interesting to note that while our courts have held conditions as precedent and void, the effect of which is to encourage separation of husband and wife, and operative regardless of their validity or invalidity, the English courts have, in such cases, recognized the civil law doctrine as stated by Jarman[56] that when a condition precedent is impossible, the gift upon such a condition takes effect in spite of the non-fulfillment of the condition, except under certain circumstances. Jarman also states as one of the exceptions to this rule, that the fulfillment of a condition precedent which is illegal only because it is *malum prohibitum,* as distinguished from *malum in se,* will not prevent the future interest from taking effect. In several English cases[57] where this exception has been discussed, the courts have stated that a condition, illegal as tending to cause the separation of husband and wife, is mere *malum prohibitum,* and have endeavored to avoid the exception by construing the condition as subsequent rather than precedent.

55 John Norton Pomeroy, A Treatise on Equity Jurisprudence, II, 439, footnote 2, Gifts of Real or of Personal Estate.

56 Thomas Jarman, A Treatise on Wills (4th Ed.), II, 524.

57 Brown v. Peck, 1 Eden. 140; Wren v. Bradley, 2 De G. & Sm. 49; In re Moore, 39 Ch. Div. 116.

No authority is found in Illinois for making any distinction between conditions *malum prohibitum* and *malum in se*. In *Ransdell* v. *Boston*,[58] the court seems to have ignored this distinction in construing the condition as precedent and accordingly held that the gift to the son to take effect upon getting a divorce could not be enforced.

A later Illinois case[59] furnishes another interesting example of a condition held precedent and inoperative. The testator having devised to his three children "Eighty acres of land each, which I may select or elect for each to have out of my land," failed in his lifetime to select the eighty-acre tracts as provided in his will. The court held that such failure did not operate as a waiver or abandonment of such act as a condition precedent and that the devises having failed to take effect, the land descended to his heirs as intestate property.

As has appeared in the preceding paragraphs, conditions precedent or subsequent are upheld or not according to whether they impose terms which courts favor or disfavor. The excuse for disfavoring may be "repugnance" or "public policy."

To say that a condition is repugnant is to say that a condition is not to be upheld because it is a condition. The very purpose of a condition is to limit that to which it is attached. It is inevitable that the scope of the donating words will be curtailed. The effect of making an absolute gift with a condition subsequent divesting the gift is exactly the same as a gift, not absolute in its face, but purporting to give an estate for a time indefinitely limited, yet one will be good and the other not. To call one condition bad for repugnance is to call all conditions bad.

The right of a court to define public policy and apply it according to the judge's conception of the best in-

[58] 172 Ill. 439.

[59] Goff v. Pensenhafer, 190 Ill. 200.

terests of the people is too long settled to criticize now. The right of a court to nullify conditions on that ground, therefore, cannot be denied, and any disapproval of the decisions which we may entertain must be only because we disagree as to what is or is not necessary for the public welfare.[60]

[60] In this paper, we have discussed only common law authorities, all of which are in general accord as to the underlying principles controlling the validity of conditions imposed by a grantor or a testator upon land. No attempt has been made to follow through the statutes of the various states which, in some instances, have expressly modified the common law rules and in others, have been construed in a manner to modify the common law. It is, therefore, probable that, in a few jurisdictions from which cases have been selected as typical of the common law rules governing forfeiture, later cases may be found at variance therewith by reason of the statutory changes.