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## TESTAMENTARY PROVISIONS AGAINST CONTEST

CHARLES H. EDWARDS<sup>1</sup>

THE law of the United States says, in effect, that a man while living may, subject to the sovereignty of the state, own property and direct how it shall be divided and distributed after his death. This right is said by the majority of jurisdictions not to be a so-called natural or inherent right protected by the Constitution<sup>2</sup> but purely a statutory right.<sup>3</sup> Wisconsin on the contrary holds that the right to make a will or testament is an inherent right guaranteed by the constitution in the following language:

[The right to make a will] is not a mere privilege which legislatures can directly or unreasonably regulate or destroy. It is not an incident of the possession of property which courts can deal with in any spirit of mere discretion. It is a right, absolute, which every person of mature mind and disposing memory may exercise, subject to some regulations to prevent abuse of it and to safeguard it, as he sees fit.<sup>4</sup>

This power to make a will belongs to the donor or testator and to no one else—not even the court or jury.<sup>5</sup> The right may be exercised as the testator sees fit, limited only by the statute.<sup>6</sup> It is within the exercise of this right that testators have drafted into their wills and testaments conditions, including the testamentary condition against contest.

Conditions are of two classes, either conditions precedent or conditions subsequent. The terms are self-

<sup>1</sup> L. M. Assistant Trust-officer and Counsel, Merchant's National Bank, Aurora, Ill.

<sup>2</sup> Buerger v. Buerger, 317 Ill. 401.

<sup>3</sup> Selden v. Illinois Trust and Savings Bank, 239 Ill. 67.

<sup>4</sup> Nunnemacher v. State, 129 Wis. 190.

<sup>5</sup> In re Wilson's Estate, 117 Cal. 262, and citations there given.

<sup>6</sup> Pearce v. Pearce, 199 Ala. 491; Taylor v. McClintock, 87 Ark. 243; McCommon et al. v. McCommon et al., 151 Ill. 428.

explanatory—the condition precedent precedes the estate, and no interest or title passes until the condition is satisfied;<sup>7</sup> the condition subsequent, after the interest or title has passed, works a defeasance.<sup>8</sup> To ascertain into which of these two classes a condition falls, it is necessary to examine the statement of the condition and to ascertain therefrom, or from the context of the entire will, the intention of the testator. A testamentary condition against contest may be of either class.

Thus, one testator in his will directs that should any one or more of the beneficiaries named in the will object to the distribution as made or attempt to defeat the provisions of the will such person or persons shall receive the sum of five dollars each and no more.<sup>9</sup> Another declares that, to the end there be no wasting of his estate by litigation, it is his will that any provisions made in favor of his wife or any of his children should, as to his wife or children, be null and void in the event any of them should present any claim against his estate or in any way contest the probate or operation of his will; and a gift over is provided in event such condition is violated.<sup>10</sup> Another provides that if his wife or any of his children should contest his will by objecting to its probate or try to break it, such one or ones should not receive the amounts therein given them.<sup>11</sup>

In construing such provisions, a question of first importance is what is meant by a contest. It was said in *Wright et al. v. Cummins et al.*,<sup>12</sup> “The prohibition does not mean to prevent the assertion of legal rights not amounting to a denial of the will.” In *Harber v. Harber*

<sup>7</sup> *Maquire v. City of Macomb*, 293 Ill. 441; *Cronin v. Cronin*, 314 Ill. 345.

<sup>8</sup> *Whiting's Appeal*, 67 Conn. 379.

<sup>9</sup> *In re Bergland's Estate*, 180 Cal. 629.

<sup>10</sup> *South Norwalk Trust Co. v. St. John et al.*, 92 Conn. 168.

<sup>11</sup> *Harber v. Harber et al.*, 158 Ga. 274. See also *Moran v. Moran*, 144 Ia. 451; *Wright et al. v. Cummins et al.*, 108 Kan. 667, where gifts over were made in the event the beneficiaries contested the will.

<sup>12</sup> 108 Kan. 667.

*et al.*,<sup>13</sup> it was held that asserting a right of dower was not a contest, since that did not amount to denying the will. In *In re Bergland's Estate*,<sup>14</sup> it was held that the offer of a later will to probate was not a contest within the provisions of the condition.

These decisions seem clearly to define the word *contest* as the doing of some act derogatory to the will and tending to set it at naught with respect to some provisions or to its entirety. Acts collaterally or incidentally affecting the will but which do not deny its sufficiency or operation are not contests.

Testators more and more are inserting conditions against contest in their wills and it is logical to assume that one of two motives induce such a provision: first, to deter litigation over the will and prevent dissipation of the estate through the expense of such litigation; second, to prevent the scandal and publicity incident to every will contest.

At early times such provisions were denied effect and treated as invalid,<sup>15</sup> the reason assigned by the court being that such a condition was contrary to public policy. At the present time, however, the condition is almost universally held to be valid and given full force and effect. In the case of *Donegan v. Wade*<sup>16</sup> the court sustained such a condition, saying,

The testator had a right to dispose of his property as he saw fit so long as he violated no law or established principle of sound public policy. He could make such distribution on condition subsequent or precedent not illegal. Such contests often breed irreconcilable family feuds and lead to disgraceful family exposures—they not unfrequently, too, waste away vast estates by extravagant and protracted litigation.

<sup>13</sup> 158 Ga. 274. See also *Wright et al. v. Cummins et al.*, 108 Kan. 667, where filing a claim against the estate was held not to be a contest.

<sup>14</sup> 180 Cal. 629.

<sup>15</sup> *In re Keenan's Will*, 188 Wis. 163. See also *Mallet v. Smith*, 6 Rich. Eq. 12.

<sup>16</sup> 70 Ala. 501.

In this case, the brother aided and abetted the sister in a contest of the will and then denied that the condition applied to him. The court held him barred from the beneficence by the condition, because, "to relieve him would put a premium on artifice."

The courts of California have consistently and with insistence held such conditions valid. They have said:

It is to be observed that a condition such as this, not only does no violence to public policy, but meets with the approval of that policy. Public policy dictates that the courts of the land should be open, upon even terms, to all suitors. But this does not mean that it invites litigation. To the contrary, it deplors litigation.<sup>17</sup> Appellant's principal contention is that there was no forfeiture in this case for the reason that she had probable ground for contest \* \* \*. No such exception is stated in the contest provision contained in the will, and we know of no principle that authorizes us to declare it. To do so would be to substitute our own views for a clearly expressed intent of the testator to the contrary.<sup>18</sup>

In *Cooke v. Turner*<sup>19</sup> such a condition was held valid by the English court in the following language:

In the case of a condition such as that before us, the state has no interest whatever apart from the interest of the parties themselves. There is no duty, either perfect or imperfect, on the part of an heir to contest his ancestor's sanity. It matters not to the state whether the land is enjoyed by the heir or by the devisee; and we conceive, therefore, that the law leaves parties to make just what contracts and engagements they think expedient.

If the condition be precedent the court says the question could not arise since there could be no gift until the condition was first satisfied.

<sup>17</sup> In re Hite's Estate, 155 Cal. 436.

<sup>18</sup> In re Miller's Estate, 156 Cal. 119. See also In re Mann, 192 Cal. 393; In re Bergland's Estate, 180 Cal. 629; In re Garcelon's Estate, 104 Cal. 570.

<sup>19</sup> 14 Sim. 493.

The United States Supreme Court and the Supreme Court of Iowa hold such condition valid by the adoption of the following extremely strong language:

The propositions thus laid down [in conditional clauses against contest] fully commend themselves to our approval. They are good law and good morals. Experience has shown that often after the death of a testator unexpected difficulties arise, technical rules of law are found to have been trespassed upon, contests are commenced, . . . and as a result the manifest intention of the testator is thwarted. It is not strange, in view of this, that testators have desired to secure compliance with their dispositions of property and have sought to incorporate provisions which should operate most powerfully to accomplish that result. And when a testator declares in his will that his several bequests are made upon the condition that the legatees acquiesce in the provisions of his will, the courts wisely hold that no legatees shall without compliance with that condition receive his bounty, or be put in a position to use it in the effort to thwart his expressed purposes.<sup>20</sup>

For ourselves we cannot believe that public interests are in any manner prejudiced or the fundamental rights of any individual citizen in any manner violated by upholding a gift or bequest made on condition that the donee waive or release his claim to some other property right, or even upon condition that he observe some specified line of personal conduct not in violation of law, or contrary to good morals. The donee is under no compulsion to accept the gift. He is free to elect. The question he has to decide is the ordinary one which arises in nearly every business transaction—whether the thing offered him is worth the price demanded. The owner of property may give or refrain from giving. He may attach to its offer such lawful conditions as his reason, caprice, or malice may dictate, but he is dealing with his own, and the donee, who claims the benefit of the gift, must take it, if at all, upon the terms offered.<sup>21</sup>

<sup>20</sup> *Smithsonian Institution v. Meech*, 169 U. S. 398.

<sup>21</sup> *Moran v. Moran*, 144 Ia. 451. See also *Bradford v. Bradford*, 19 Ohio St. 546; *Hoit v. Hoit*, 42 N. J. Eq. 388; *Whitehurst v. Gotwalt*, 189 N. C. 577; *Tate v. Camp*, 147 Tenn. 137; *In re Barandon's Estate*, 84 N. Y. Supp. 937; *In re Hite's Estate*, 155 Cal. 436; *Massie v. Massie*, 54 Tex. Civ. App. 617; *Schiffer v. Brenton*, 247 Mich. 512; *In re Chambers' Estate*, 322 Mo. 1086; *Congress Hotel Co. v. Martin*, 312 Ill. 318.

Still, in spite of this strong tendency towards holding the conditions valid, some jurisdictions, while otherwise holding them valid, will set the conditions for naught by saying they contravene public policy.

In *South Norwalk Trust Co. v. St. John et al.*,<sup>22</sup> the court, while holding the condition valid, said: "The law provides who may make a will and how it shall be made. . . . Courts cannot know whether a will, good on its face, was made in conformity to statutory requirements, whether the testator was of sound mind, . . . unless these matters are presented in court. And those only who have an interest in the will will have the disposition to lay the facts before the court." Then they say, in effect, if there is good faith and probable cause, public policy would prohibit enforcement of the condition.

Some Courts hold that the conditions are against the "liberty of the law." The theory of such holding is expressed in the personal opinion of Chancellor Wardlaw in *Mallett v. Smith*<sup>23</sup> in the following language: "A condition subsequent of this description is void, whether there be a devise over or not, as trenching on the liberty of the law, . . . and violating public policy. It is the interest of the state that every legal owner should enjoy his estate, and that no citizen should be obstructed by risk of forfeiture from asserting his right by the law of the land."

It is also held that these conditions are not operative if there be good faith and probable cause. This is stated by Mr. Justice Brown in *In re Friend's Estate*<sup>24</sup>:

It is not to be questioned that it was competent for the testatrix, possessing the absolute power to dispose of what she possessed just as she pleased, to impose the condition upon which the appellants rely in asking that their brother shall be deprived of all interest in her estate; and it is equally clear,

<sup>22</sup> 92 Conn. 168.

<sup>23</sup> 6 Rich. Eq. 12. See also *Fifield v. Van Wyck's Executor*, 94 Va. 557, where the court holds such conditions are merely in *terrorem* and inoperative.

<sup>24</sup> 209 Pa. 442. See also *Rouse v. Branch*, 91 S. C. 111.

in view of his attempt to annul her will, that the burden is upon him to show that he now ought to have what it gives him. Such conditions to testamentary gifts and devises are universally recognized as valid, and, by some courts, enforceable without exception. The better rule, however, seems to us to be that the penalty of forfeiture of the gift or devise ought not be imposed when it clearly appears that the contest to have the will set aside was justified under the circumstances, and was not the mere vexatious act of a disappointed child or next of kin. A different rule—and unbending one—that in no case shall an unsuccessful contestant of a will escape the penalty of forfeiture of the interest given him, would sometimes not only work manifest injustice, but would accomplish results that no rational testator would ever contemplate. This is manifest from a moment's reflection, and is illustrated by the class of cases to which the one now before us belongs, in which there is an allegation of undue influence which procured the execution of the will. If, as a matter of fact, undue influence is successfully exerted over one about to execute a will, that same influence will have written into it a clause which will make sure its disposition of the alleged testator's property. He who will take advantage of his power to unduly influence another in the execution of a will, will artfully have a care to have inserted in it a clause to shut off all inquiry as to the influence which really made the will; and, if the rule invoked by the appellants is to be applied with no case excepted from it, those who unscrupulously play upon the feelings of the testator may, with impunity, enjoy the fruits of their iniquity, and laugh in scorn at those whom they have wronged.

Other courts make an exception if the gift is of personalty and there is no gift over on breach of the condition although they hold the condition otherwise valid and no estate over necessary as to realty.<sup>25</sup> This doctrine is thoroughly discussed in *In re Hite*,<sup>26</sup> and this

<sup>25</sup> *Green v. Old People's Home*, 269 Ill. 134; *Bradford v. Bradford*, 19 Ohio St. 546; *Morris v. Burroughs*, 1 Atk. 399; *Pray et al. v. Belt et al.*, 26 U. S. (1 Pet.) 670; *In re White's Estate*, 163 Pa. 388; *Fifield v. Van Wyck's Executor*, 94 Va. 557.

<sup>26</sup> 155 Cal. 436.



distinction between realty and personalty repudiated very aptly. Here the court says:

It is recognized that a forfeiture of land devised will result, under such circumstances [condition against contest], without a specific devise over. That decisions in abundance may be found holding that the same rule does not apply in cases of legacy is an anomaly of the law of wills. It rests upon no substantial distinction, and, where recognized, it is adopted in deference to the weight of earlier adjudications. It was not a part of the common law as such, but came to be recognized in England by the chancery courts to preserve uniformity, since legacies could be sued for and recovered in the ecclesiastical courts, which followed the rule of the civil law. By the civil law, the fiction was introduced that, unless there was a gift over of such legacy, a forfeiture would not be decreed . . . . We are not embarrassed in its consideration by any adjudication of our own, and are at liberty to decide in accordance with sound reason. If it be that the rule anciently rested for its support upon the doctrine of public policy, we find, even in England, where the rule prevails, that such support has been withdrawn. If it rests, as it seems to have rested in England, upon the desire of the chancery court to conform to the decisions of the ecclesiastical court, such a reason does not in this state, obtain. In brief, no reason can be found why such a rule, founded neither upon public policy, nor dictates of the common law, should by us be given recognition.

It has been held, following these decisions, that a general residuary clause is no such gift over unless there is an express provision to that effect.<sup>27</sup>

The next exception we find being applied by the courts on the rule of the validity of the condition is where the suit is by a minor. In *Bryant v. Thompson*<sup>28</sup> it was held that on grounds of public policy the conditions was inapplicable to minors.

In our opinion, however, the better way to reach the same result was devised by the court in *Moorman v.*

<sup>27</sup> *Fifield v. Van Wyck's Executor*, 94 Va. 557.

<sup>28</sup> 59 Hun. 545.

*Louisville Trust Co. et al.*<sup>29</sup> Here the court held the rule applicable to minors, but since a minor is due the protection of a court of equity, the court in its discretion dismissed the suit thereby preventing the contest and the subsequent forfeiture, and said in effect that the right would still be with the minor when it reached majority. Thereafter the minor could make its own election on the condition and sue if it wished. The only objection that could be offered to such a holding would be that the evidence would be dissipated within that period, yet this is not a substantial objection, since our practice offers adequate methods whereby evidence may be preserved.

From these authorities we see plainly that there is no conclusive uniformity among the decisions. This justifies us in stating our own views. We are of the opinion that the testamentary conditions against contest should be held valid and operative without exception and that any violation by any one should effect the forfeiture absolutely:

First, because the property passes as a gift without consideration and the right of ownership should imply a right of unqualified disposition—a disposition with or without condition, unless the condition attached be immoral or derogatory to some actual rather than fictitious rule of public policy. In our brief examination of the historic development of this subject we found that the position of wills strengthened with the strengthening of the right of private ownership. This should continue. Private ownership in this country is our most cherished fundamental right. Any limitation placed upon the right of conditions is an infringement of the right of private ownership and private disposition of property. The will is the owner's last contract—his final dealings with man.

In consideration of this question, we must appreciate that every state by positive legislation saves to the surviving spouse inherent rights of property which no condition can contravene. Some states by express enact-

<sup>29</sup> 181 Ky. 30.

ment give certain statutory rights in property to children which cannot either be contravened by will or testament, such as a child's award, interest to children by a former marriage, and the like. Where the state has some particular interest in distributing property to certain individuals this is or should be expressed in statutes and if not so expressed the courts should not assume to determine such a question on the hypothesis of public policy.

Second, the owner of property can, during his life, do with his property as he pleases. He may sell, give away under any legal conditions, destroy, (if in so doing he does no actual or threatened injury to the property of another), barter, trade, convey, etc., as his caprice, desire, or malice may direct. This is an inalienable right connected with ownership. There is no logical reason in equity or good conscience why this right should not also exist by will or testament. As in the case of wills, so in the case of deeds, does the law provide the mode and method of execution and the capacity of parties. These satisfied, the deed may be on any condition not violating a positive law. Why not also a like rule with respect to wills?

Third, on the authorities of other conditions in wills the condition against contest should be sustained. It has been held "the fact that the will is unjust and unnatural does not render it invalid."<sup>30</sup> Conditions that the beneficiary support some one are universally held valid, as are conditions to render specified personal service and to pay stipulated expenses.

Conditions with reference to the conduct of the recipient of the bounty are held valid in the following cases: Settles down and marries, reforms from intemperate habits;<sup>31</sup> refrains from the use of intoxicating liquors and tobacco;<sup>32</sup> demonstrates good habits and business capacity;<sup>33</sup> proves to be good moral character;<sup>34</sup> that the

<sup>30</sup> *Waters v. Waters*, 222 Ill. 26; *Cunniff v. Cunniff*, 255 Ill. 407.

<sup>31</sup> *Cassem v. Kennedy et al.*, 147 Ill. 660.

<sup>32</sup> *Holmes v. Connecticut Trust & Safe Deposit Co.*, 92 Conn. 507.

<sup>33</sup> *Campbell v. Clough*, 71 N. H. 181.

<sup>34</sup> *Webster v. Morris*, 66 Wis. 366.

devisee do not present any claim against devisor's estate.<sup>35</sup>

While it is true that conditions in wills in general restraint of marriage are held invalid, still conditions in limited restraint of marriage are uniformly sustained. The same rule is also applicable to conditions in restraint of alienation and use and occupancy of realty. Behind this rule there exists an actual public interest or concern. Marriage is not only a legal but also a social and spiritual institution. Upon it depends to a tremendous extent the public morals and welfare of society. It is ruled, regulated, and governed by extensive and intricate legislative acts; not so with descent or distribution of property. There is no general or specific public concern involved in whether one or another legatee, heir-at-law, or next of kin receives the testator's bounty.

With respect to alienation, use or occupancy, of property there is a general public concern. The free transmission of property is the foundation of our present economic structure. Laws and decrees are numerous to prevent defeat of free alienation. Every public concern in such matters is codified in decisions or acts. The testamentary condition against contest has no relation to our economic structure. Such conditions cannot impair the state's economic well-being.

Conditions with respect to religious belief have been, with some exceptions, held valid. In *Hodgson v. Halford*<sup>36</sup> a condition that the gift should fail if legatee abandoned the Jewish religion was held valid. In *In re May*<sup>37</sup> and *Lasnier v. Martin*<sup>38</sup> similar conditions were enforced also to the same effect.

Such conditions could more logically be held to contravene public policy than the condition against contest, particularly in the United States, where the right of

<sup>35</sup> *Rogers v. Law*, 66 U. S. (1 Black) 253.

<sup>36</sup> 11 L. R. Ch. Div. 959.

<sup>37</sup> [1917] 2 Ch. Div. 126.

<sup>38</sup> 102 Kan. 551; see *Barnum et al. v. Mayor of Baltimore et al.*, 62 Md. 275.

freedom of religious worship is a fundamental and constitutional right. Yet the courts seem to incline to the view that the election here belongs to the beneficiary, and if he accepts the bounty, he does so subject to the price assessed by the testator.

Fourth, we cannot see where the condition contravenes the "liberty of the law." The right of contest remains although there is a premium placed upon its exercise. He who desires may disregard the condition and assert his right of suit. It would be impracticable to assume that any one would instigate a contest unless he were to obtain some gain if such suit succeeded. What then is the problem confronting the legatee, beneficiary, or devisee? Logically it is, "Shall I take what is offered or shall I strive for more?" Is not a testator justified in an attempt to stifle such a mercenary attitude toward his bounty? Is it not better thus than for the testator in effect to say "I offer you this, but if you contest, and although by doing so, slander my name and that of my family as well as belittle my character, if you can win more, I shall furnish the funds for you and place no obstacle in your way."

What can be this fictitious something, abstract as it must be, called "good faith and probable cause?" Are not good faith and probable cause those elements, which, when found, are only the ingredients of a successful litigation?