VALIDITY OF UNUSUAL CONDITIONS IN WILLS.*

The right of a testator to dispose of his property by a will is not an inherent right or one of citizenship, nor is it even a right granted by the constitution. It rests wholly on legislative force and is derived entirely from statutes.[1] The use or beneficiary interest in land as recognized by the Court of Chancery was disposable by will until the Statute of Uses[2] in 1535 declared to the contrary. The real statute creating wills was passed in 1541 and is known as the Statute of Wills.[3] It empowered a testator to give all his lands "at his own free will and pleasure." There were several restrictions but they do not concern us in this discussion.

Every nation that is concerned with Anglo-American law has adopted the Statute of Wills and they recognize the right of a testator to dispose of his property as he sees fit provided he does not violate the law. Usually the testator is quite particular as to whom he gives his property and if he has any peculiar hobbies concerning that person they frequently creep into the will. These hobbies usually take the form of conditions.

As a way of summing up these conditions, the following statement of the rule is made in Cyc:[4] "A devise or bequest may be conditioned on the beneficiary pursuing particular lines of study or possessing a certain education; or his pursuing a certain trade or occupation; or his membership in a particular religious body, adherence to certain religious

*Is a condition in a Will that the continuance of the devisee's estate shall depend upon his adherence to unusual conditions, valid?

1. Costigan's Cases on Wills, p. 174.
2. 29 Henry VIII.
3. 32 Henry VIII.
4. 40 Cyc. 1708.

beliefs or attendance at a particular church; or his education or the education of his children in a particular religious faith or Order. The Courts have frequently sustained conditions precedent or subsequent that a devisee or legatee should return to or reside in a particular place or occupy the premises devised, etc., but such a condition as applied to a married woman may be illegal and void as tending to cause separation from her husband." It has long been settled that a condition tending to restrain marriage is void.

Often the will requires a person to entirely change his habits of life. This might be said to be unfair. A dead person should not be allowed to use his will as a skeleton hand to guide the devisee according to the testator's ideas and wishes. But, hasn't the devisee the right to ignore the devise, if he thinks more of his present habits than he thinks of the devise? The reason most of these suits get into court is because the devisee wants to "eat his cake and have it, too." He must take his choice. The courts vary in their decisions as to the fairness of these conditions, but the great majority hold that the testator's right to dispose of his property is paramount to the devisee's right to the property with or without the condition. The only ground for a contrary opinion is the condition that is void as against public policy. Restraint of marriage is a condition of that class.

For the purpose of this discussion we have chosen to take six main conditions. First, the condition that the devisee be of a certain religion or belong to a certain religious Order; second, that the devisee become temperate in his habits and abstain from liquor; third, that the devisee follow a certain occupation or trade; fourth, a restriction as to place of residence; fifth, a condition as to the education of the devisee or his children; sixth, a condition that is in restraint of marriage.

The decisions as to the validity or invalidity of a condition prescribing a certain religion are mooted, that is,

there are cases decided both ways. The first Amendment to the Constitution provides that: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." This clause has caused a great deal of argument and is always mentioned in connection with decisions on the question, but this clause was not intended to deprive a testator of the right to dispose of his property according to the dictates of his own conscience. It was to prohibit Congress from establishing a State religion. It cannot be said that the condition deprives the devisee of religious freedom because he is not bound to comply with it and receive the property. He can keep his former religion and forfeit his rights to the property.

There is really only one American case holding that the condition is void. That is the case of *Drace v. Klinedurst*,[5] and was decided June 24th, 1922. The Court held that a condition in a will that the continuance of the estate shall depend upon the devisee's adherence to the doctrines of a particular religion is void. It was said to be against public policy and to hamper religious freedom. How can it be against public policy? In what way does it affect the public? It is a question te be decided by the devisee himself. If he thinks too much of his present religion, he must forfeit the property. This case is the only American case that leaves the beaten path and holds opposite to the trend of Authority.

Another case, *Maddox v. Maddox*,[6] might be considered in the above class. But this case, although of the religious type, was decided on the ground of restraint of marriage. The testator left his daughter a legacy, on condition that she continued to be a member of the Society of Friends. There were only five or six unmarried men of the Society in the neighborhood. She married a man not of the Society and then ceased to be a member of it. It was held that

5. 275 Pa. 266.
6. 11 Gratt. (Va.) 804.

there was an unreasonable restraint of marriage and it was therefore void.

The majority of courts of Anglo-American jurisprudence have taken a broader outlook on the subject. They realize that the decision of changing a religion is up to the devisee and should he choose his former habits then the property must be forfeited. Several cases show the attitude taken by the court with regard to priests.

In *Barnum v. Baltimore,*[7] a much cited case, at the time of the testator's death, the son, Frank Barnum, was not a priest but later he joined the priesthood. He was entitled to receive the income of the estate until he joined the Order. In *Spencer v. See,*[8] the testator made a gift to Seymour Spencer upon express condition that he renounce the Catholic priesthood, and that he marry. Held, that Seymour had all his life to perform the requirement and the estate could go to the other representatives until his death, he not having performed the requirements. These cases do not treat the conditions as void as against public policy. The young priests thought more of their Order than of the property; but as the testators did not want them to have both, they forfeited the estate by holding on to their religion.

The same principle holds true as to nuns. In two cases a Nova Scotia case, *Re Trust Funds,*[9] and a Maryland case, *Mitchell v. Mitchell,*[10] that point was decided in favor of the validity of the condition.

In *Magee v. O'Neill*[11] it was held that a condition that a man's daughter should be sent to a Catholic school and be reared a Catholic in order to receive money was not void as against public policy. I should think an exception to the

7. 62 Md. 275.
8. 5 Redf. (N. Y.) 442.
9. 1 Sim. N. S. 37; 61 Eng. Reprint 14.
10. 18 Md. 405.
11. 19 S. C. 170.

above statement is where the testator tries to separate mother and child by declaring the child shall be a member of a different religion than the mother in order to receive a legacy. This would most certainly be against public policy and therefore void.

The condition that a boy should attend the regular meetings of a certain named church is certainly not a violation of religious freedom.[12] It is also held that requiring membership in a certain church is not in opposition to religious freedom.

The case of *Hodgson v. Halford*[13] is an unusual one. The mother in her will divided her property among her children on condition that they should not marry anyone who was not born a Jew or who was not of the Jewish religion or that they (the children) should not become Christians. The son married a Christian during his mother's life but without her consent. The daughter became a Christian after her mother's death. It was held that the conditions were not void as against public policy and they were effectual to forfeit the rights of both son and daughter.

A condition providing that the devisee must be of temperate habits in order to receive the estate is on a different basis. It cannot be said to be a violation of the Constitution. There is a moral issue involved and the courts have always been known to uphold moral questions. It is for the betterment of himself, both socially and financially, for the devisee to abstain from liquor and it is for the benefit of the community as well. Of course, if he considers the condition too burdensome he can forfeit his rights to the estate.

The case of *Hauke v. Emyart*[14] illustrates the upholding of a condition to abstain from liquor. A devise was made in favor of a son who drank liquor and who married a woman

12. In Re Paulson's Will, 127 Wis. 612.
13. 11 Ch. Div. 959; 27 Wkly. Rep. 545.
14. 30 Neb. 149.

not of the testator's choice and against his will. He was to get the property provided he changed his habits and became temperate, and provided also, that he did not live with his wife within ten years after the testator's death. It was held that the condition for temperate habits was valid but the other condition was a restraint of marriage and therefore void. The case of *Onderdonk v. Onderdonk*[15] supports this decision and we have been able to find no contrary case.

The condition as to occupation offers interesting speculation. Suppose the testator should go so far as to state a certain occupation that must be followed. Then the devisee meets with certain obstacles which he cannot overcome. What is he to do? The case of *Seeley v. Hincks*[16] involves this question. The testator, Barnum, the showman, desired to make his nephew take up the show business. Barnum's partner refused to let the nephew in the business so Barnum put a condition in his will that the nephew must follow the show business in order to receive the legacy. After the testator's death, the plaintiff (the nephew) offered his services to the defendant (Barnum's partner), who refused them because he resented the fact that Barnum put such a condition in his will. The Court held that the plaintiff's desire to comply with the condition in that he offered his services to the defendant, who refused them, amounted to performance and that the condition had been complied with.

The testator might be a man of set notions and one who has a particular liking for a certain kind of trade. The devisee might be wholly incapable of following this trade. For instance, a lame man might be required to do something that necessitates a great deal of walking or a person with one arm might be required to do a task that requires two

15. 52 Hun. (N. Y.) 614.
16. 65 Conn. 1.

arms. When the prescribed work is too difficult for the devisee to physically perform then the condition, in my judgment, should be void. The devisee ought not be made to forfeit his right to the property because he is mentally incapable that is, insane. The courts would not allow him in any business when he is insane, therefore, he should have the property even if the condition cannot be fulfilled.

In *Webster v. Morris,*[17] the Court says that a bequest with a condition that a party shall learn some useful trade, business or profession is valid and is not indefinite or uncertain or against public policy. But, if only the word trade is mentioned in the will, can a business or profession be included under this heading?

The case of *Colby v. Dean,*[18] answers this question. The will provided that the children should have the property if they followed some useful trade. The plaintiff was a school teacher. It was held that the word trade meant an occupation and that school teaching filled the condition.

The condition for education is for the betterment of the devisee more than any other one that we are considering in this discussion. And yet, why is it that a great many legatees want the money without fulfilling the requirements? The courts ought to be extremely strict in upholding this sort of a condition.

In the case of *Redmond v. Burroughs,*[19] the testator put $2,000 in trust for the education of his son. He, the testator, survived the making of the will twelve years. When he died his son was a married man twenty-four years old. He had refused to go to school during his childhood and declined to go to school after his father's death. The Court held that he could receive the legacy even though he refused to go to school. The courts probably would not hold this way today.

17. 66 Wis. 366.
18. 70 N. H. 591.
19. 63 N. C. 242.

There is no reason why a married man twenty-four years old could not go to school, especially if he wanted the legacy. He seems to be a lazy boy who had a dislike for school all his life. If he opposed his personal improvement and education why should he be paid $2,000 for his ignorant indifference?

A case tending to show the other extreme is *Shepard v. Shepard.*[20] Here it was held that where the money was left for a theological education, this money could not be used to defray the expenses of a scientific education. That decision holds to the words of the will in their strictest sense. The courts seem to wander on decisions pertaining to education and they are not as particular as they might be in enforcing this condition.

A case illustrating this point is *Coppedge v. Weaver.*[21] The devisee's mother said that the son should not marry until he received an education, although she made no financial provision for the same. It was held that the son did not forfeit his right to the property when he did not get any further education after his mother's death because he already had a limited education. If she had thought his education sufficient she probably would not have put a provision for further education in her will. The case of *Baker v. Red*[22] upholds the educational condition of a will.

A testator has a right to require a certain place or residence for the devisee. In *Jenkins v. Horwitz*[23] the Court held a condition that the devisee should not leave the property before the time of expiration mentioned in the will, valid. In *Marston v. Marston*[24] it was held that where it is provided in the will that if the devisee's mother ceases to be a widow he can have the property, he loses his rights if

20. 57 Conn. 24.
21. 90 Ark. 444.
22. 34 Ky. 158.
23. 92 Md. 34.
24. 47 Me. 495.

he leaves the place. In *Lowe v. Cloud*[25] the Court held a condition that a party must come to live on the land in order to receive it, valid. This rule, however, like all others, has certain exceptions.

Separation of a family or separation of a mother and her small children would excuse a non-compliance with the condition. In the same manner the separation of a husband and wife is void.[26] The States as a whole agree to the general doctrine of residence.[27]

"The general rule regarding a condition in restraint of marriage is that general restraint of marriage as in the case of a legacy or devise to a person on condition that he shall or shall not marry or a gift of an estate on his marriage is void as being against public policy and therefore illegal. The courts have long been champions of the sacred institution of marriage but like their decisions regarding other conditions, their views on this subject are not to declare all conditions pertaining to marriage void."[28]

In the case of *Greene v. Kirkwood*[29] the courts have sustained a condition against a devisee marrying a man below her "in social position." Conditions have been held valid prohibiting marriage under a certain age or marrying without the consent of those interested in the devisee's welfare. If the courts held void a condition that the legatee should not marry a certain person it would defeat the efforts of a testator or his executors to control his untrustworthy children after his death.

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25. 45 Ga. 481.
26. Wilkinson v. Wilkinson, 40 L. J. Ch. 242.
27. Hart v. Chesly, 18 N. H. 373; Casper v. Walker, 33 N. J. Eq. 35; Newkerk v. Newkerk, 2 Cai. (N. Y.) 345; Reeves v. Craig, 60 N. C. 208; In Re Kern, 2 Woodw. (Pa.) 272; Keeler v. Keeler, 39 Vt. 550; Crawford v. Paterson, 11 Gratt. (Va.) 364; Connor v. Sheridan, 116 Wis. 666; Wynne v. Fletcher, 53 Eng. Reprint 423; Irvine v. Irvine, 12 Ky. L. Rep. 827; Lindsey v. Lindsey, 45 Ind. 552.
28. 40 Cyc. 1699.
29. 1 Ired. Eq. (N. C.) 130.

Thus we have shown in our discussion that for the most part the courts recognize the paramount right of a testator to dispose of his property as he sees fit. There is only one instance in which the courts really clash with the wishes of a testator and that is regarding the general rule in restraint of marriage. Upon conditions restricting religious freedom only one prominent case goes against the weight of authority. The better view is to hold a condition in regard to religion valid. There seems to be no case that goes off the beaten path in regard to the question of temperate habits and character.

The decisions in regard to the condition as to education are far too lax. It is a provision that will improve the devisee more than any other one, and if the devisee does not realize this he should forfeit his right to the property. The testator should have a right to prescribe within reasonable bounds the residence of his devisee. The provision that the legatee should follow a certain trade within a reasonable sphere, is for the benefit of the devisee as well as the general public and should be upheld.

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