
Volume 46
Issue 4 *Dickinson Law Review* - Volume 46,
1941-1942

5-1-1942

Illegal Conditions in Grants of Property

John P. Martin

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

Recommended Citation

John P. Martin, *Illegal Conditions in Grants of Property*, 46 DICK. L. REV. 262 (1942).
Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol46/iss4/5>

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

ILLEGAL CONDITIONS IN GRANTS OF PROPERTY

A device of great practical utility to the landholder who wishes, in the disposal of his property, to provide to the best of his ability for the varying needs of his beneficiaries and to make effective his own wishes and needs in relation to his property, is the insertion of a divesting clause in his grant, with a limitation over to others or a clause calling for reversion to himself.

Such divestiture is based on a condition or limitation, which may take many forms according to what the property owner wishes to accomplish. There is an important limitation on the type of event which may be named as the divesting contingency. This limitation is that the condition¹ must be one which is legal and not in contravention of public policy. If the condition falls within the condemned class, it is void, and the grantee or devisee takes an absolute estate.

Just what conditions are to be stricken down as being illegal or opposed to public policy, is a problem which has produced a mass of conflicting decisions. It is the purpose of this note to set out the present state of the Pennsylvania law on this question, in the hope of aiding the lawyer in his attempt to satisfy his client's desires without running counter to some rule of law which may unexpectedly sweep away his plan and leave all concerned without the desired protection.

Conditions Which Are Impossible or Impracticable

The Pennsylvania courts have always held, in accord with all other courts, that when a condition is impossible of fulfillment at the time the estate is created, or becomes so later, the condition is discharged and the gift becomes absolute if the condition is a divesting one.² But if the condition is a condition precedent, it remains valid, and the gift never will take effect unless the impossibility is removed and the contingency happens.³

The first result follows, whether the condition in itself is impossible intrinsically, or becomes impossible only because of the way in which the particular fact situation happens to develop⁴ (e. g. that a person whose temperance in drinking for one year was the condition, dies within the year).

It is sometimes said that this rule applies only when the condition is rendered impossible by an act of God or an act of the creator of the interest.⁵ No Pennsylvania cases on this point have been found.

¹The word "condition" as used in this note, includes both a condition subsequent and a conditional or special limitation unless otherwise stated.

²Culin's Appeal, 20 Pa. 243 (1853); 1 Tiffany, *The Law of Real Property*, sec. 195.

³Gunning's Estate (No. 1), 234 Pa. 139, 83 A. 60 (1912); Thompson's Estate, 304 Pa. 349, 155 A. 925 (1931).

⁴1 Tiffany, sec. 195.

⁵26 C.J.S., sec. 142.

On the point of impracticability of the condition, no Pennsylvania cases have been found. But impracticability has been held in other jurisdictions to have the same effect as impossibility.⁶ Instances of impracticability would be the requirement of living with a relative who becomes insane, or who refuses to have the person in question live with him, etc.

Conditions Restricting Free Exercise of Religion

Pennsylvania is in accord with all other jurisdictions in holding void those conditions which interfere with freedom of religion.⁷

Conditions Forbidding Contest of Will by Which Estate Is Created

Conditions which forbid the contesting or setting aside of the will in which the gift is made, or the seeking of additional benefits such as the widow's exemption, are often used as a means of making certain that the testator's plan of distribution, and his own ideas, will prevail. Under the rules laid down by the Pennsylvania cases, the creation of such a condition is a rather tricky operation, and at best one which is never certain to be upheld.

In the first place, to make such a condition valid, there must be a definite disposition made of the forfeited estate. This requirement, however, is easily satisfied. A gift over to a named person or a mere direction that, should the contingency happen, the estate shall fall into the residue of testator's property for distribution, is sufficient.⁸

In the second place, the courts of Pennsylvania exhibit a marked tendency to vitiate these conditions by means more subtle than holding them void. For example, they are willing to extend themselves a bit to reach the conclusion that the acts done by the devisee do not come within the class of prohibited acts.⁹ And it is also held (with, of course, much more justification) that proceedings taken by an interested party to make sure that the estate is being properly administered, are not within the terms of the condition.¹⁰ There is one further device resorted to by the courts which quite often, and in a manner almost impossible to guard against, renders such a condition ineffective. This is the doctrine that if probable cause for contest exists, a contest of the will does not cause forfeiture of the estate.¹¹ The existence of probable cause is treated as suspending the operation of the condition, which would otherwise act to cut off the devisee's estate. It may seem at first sight

⁶Cases collected in 1 Tiffany, sec. 195.

⁷*Drace v. Klinedinst*, 275 Pa. 266, 118 A. 907 (1922); *Devlin's Trust Estate*, 284 Pa. 11, 130 A. 238 (1925).

⁸*Alexander's Estate*, 341 Pa. 471, 19 A. (2d) 374 (1941); *Chew's Appeal*, 45 Pa. 228 (1863); *Mickey's Appeal*, 46 Pa. 337 (1863).

⁹*Chew's Appeal*, 45 Pa. 228 (1863).

¹⁰*Mitchell's Estate*, 20 D. & C. 101 (1933).

¹¹*Friend's Estate*, 209 Pa. 442, 58 A. 853 (1904); dictum in *Chew's Appeal*, 45 Pa. 228 (1863). The weight of authority is *contra*. See 1 Tiffany, *The Law of Real Property*, sec. 196.

that this rule is a good one, grounded on a sound interpretation of the testator's intent to avoid bothersome actions brought by grabbing relatives upon flimsy pretexts. But this is at least questionable in view of the fact that the ones who would have the most reason for instituting such proceedings—the relatives who are cut off with little or nothing—have little or nothing to lose thereby. The ones who have been given a generous amount of property would not in any event want to set aside the will; and it is probable that, in proceedings to determine whether a contest was started without probable cause, the harsh charges of "you-said-grandfather-was-insane-so-you-would-get-his-money" will cause more family quarrels than a literal adherence to the condition would prevent.

Finally, if the condition is a condition precedent, it appears that it will be treated as valid without further question. In *Alexander's Estate*,¹² this was assigned as one of the reasons for holding the condition valid. Although not presenting a flat holding on this phase of the problem, the case does rely greatly upon that factor, saying that the rule treating illegal conditions as void, as it evolved from the civil law, applied only to conditions subsequent and as this was a condition precedent, the rule would not apply.¹³ This is in line with the well-settled holding that any condition precedent is effective, and must be performed before the estate can vest, even though a like condition subsequent (or conditional limitation) would be void.

Conditions Restricting Use of Property

Every Pennsylvania case which has been found has upheld restrictions on the manner of use of the property. But there is a line of dicta running through all the cases to the effect that such restrictions must be reasonable. They must not restrict the use of the property to an extent which would be "inconsistent with the estate granted."¹⁴ They must not be so inclusive as to be "subversive" of the estate created.¹⁵ Only partial restrictions on use will be upheld, apparently.

Although our courts have in every case sustained the particular restriction involved, it seems safe to predict that should an extremely broad use restriction ever be brought before them, they would apply this dictum and strike down the condition.

The restraints most commonly found are building restrictions and prohibitions against the sale of liquor. Perpetual prohibition of the sale of liquor is valid.¹⁶ Restrictions against ever building within a limited part of the land, or against ever

¹²341 Pa. 471, 19 A. (2d) 374 (1941).

¹³See, *Chew's Appeal*, 45 Pa. 228 at 232.

¹⁴*Lehigh Coal and Navigation Co. v. Gluck*, 5 C. C. 662 (1888); *Clark v. Martin*, 49 Pa. 289 (1862).

¹⁵*Cowell v. Colorado Springs Co.*, 100 U. S. 55; *Janning's License*, 23 Pa. Super. 622 (1903).

¹⁶*Cambria Iron Co. v. Schry*, 20 Dist. 1110, 38 C. C. 410 (1911); *Lehigh Coal and Navigation Co. v. Gluck*, 5 C. C. 662 (1888); *Janning's License*, 23 Pa. Super. 622 (1903).

building a certain kind of structure, are also valid,¹⁷ as are limitations on the kind of activities which may be carried on upon the land.¹⁸

It is worthy of note that the Pennsylvania courts are quite liberal in construing restrictions on use not to be conditions subsequent or conditional limitations, but merely words indicating the reason the grantor had in mind in making the grant, or at most to be words of covenant. An interesting case along this line is *Commonwealth v. Delaware Division Canal Co.*¹⁹ The result of this, of course, is to vitiate the effectiveness of such restrictions. If they are mere words of purpose, no penalty attaches to their non-observance; if mere covenants, non-observance gives rise only to a right of action for damages or for specific performance instead of causing loss of the estate.

There are no Pennsylvania cases on the point, but there is a split of authority as to whether a condition is valid which restricts the sale of merchandise by the grantee to such as is bought from the grantor or from a specified third person. In the same category are conditions prohibiting merchandising with the intent of securing to the grantor a monopoly of the business in the district. Such conditions are often held invalid as being in restraint of trade.²⁰

Conditions Restraining Alienation

Any restraint of alienation of a fee simple estate is void in Pennsylvania, although for a long time there was considerable doubt as to the illegality of a partial, reasonable restraint on the sale of the property.

The early case of *McWilliams v. Nisly*²¹ started the difficulty. There G deeded land to M in fee, with a condition that M was not to sell in the lifetime of G unless G first sold the land on which he himself then lived. If M died before G died or sold his own home, M was to leave the land to his wife and her issue. But if G died or conveyed his home before M died, M had free liberty to alienate. M, during G's life and while G still owned his home, conveyed to N. G then died, M surviving. The court, through Justices Tilghman and Gibson, held that the deed to N was effective, as of the date of G's death. The actual basis of the holding seems to have been to treat G's deed as a use conveyance. Had the contingency occurred, the wife and her issue would have had an interest superior to N's, but the contingency did not happen, so N took a clear title.

However, both Justices used language strongly indicating that they considered a reasonable restraint on alienation, such as this one, valid. Both said that M had

¹⁷*Slegel v. Lauer*, 148 Pa. 236, 23 A. 996 (1892); *Muzzavelli v. Hulshizer*, 163 Pa. 643, 30 A. 291 (1894); *Clark v. Martin*, 49 Pa. 289 (1862); *Devlin v. Poor Richard Club*, 19 Dist. 326 (1909); *St. Andrew's Lutheran Church's appeal*, 67 Pa. 512 (1871).

¹⁸*McKissick v. Pickle*, 16 Pa. 140 (1851) (limited to use for school, church, and cemetery). 19332 Pa. 53 (1938).

²⁰26 C.J.S., sec. 477; 1 *Tiffany, The Law of Real Property*, sec. 198.

²¹2 S. & R. 506 (1816).

no power to convey at the time he attempted to do so. They they went on to state that when G died, N's deed would become effective on the principle of equitable enforcement of a conveyance of after-acquired property.

The first basis for the decision—the “use conveyance on a contingency” theory—is the one on which they apparently rested their holding. But the second basis is at least an acceptable one, and even though it be considered dictum, the reputation of these two Justices, along with a misunderstanding of the actual basis of the decision, caused many courts to reiterate the doctrine that a reasonable restraint on alienation would be valid. This statement, however, is clearly dicta in the other cases.

Cases containing this dicta include *McCullough's Heirs v. Gilmore*,²² *Jaur-ette v. Proctor*,²³ *Sparr v. Kidder*.²⁴ In 1920, a lower court case, *Segall v. Soifer*,²⁵ approached very closely to making an actual decision that a partial restraint on alienation was valid. There, heavily mortgaged lands were conveyed, on the condition that should they be sold on foreclosure proceedings, all proceeds over the amount of the mortgages were to go to the grantor. This provision, although admitted to be an indirect restraint, was held valid. The court tried hard and succeeded in convincing itself that this was not actually an out-and-out restraint on the *right* to alienate, but only on the *manner* of the alienation. The court further rationalized that this provision had a good purpose—to discourage the grantee from allowing the payments to lapse, causing a sale, and thereby being able to buy in the land free of the incumbrances. (It is, at least, highly doubtful whether this provision would deter the grantee from such action). So this case comes as close as possible to actually holding partial restraints to be valid.

But in the following year, the confusion was settled. The case of *Pattin v. Scott*²⁶ held void a restraint on alienation for twenty-five years. The court traced the course of the decisions outlined above, pointed out that there were only dicta to uphold the proposition that such restraints could be valid, traced a trend away from this idea, and finally concluded that on principle there should be no distinction, and that any restraint on alienation is void. This is the present state of our law on the subject. Restrictions on involuntary alienation are subject to the same rule.²⁷

There are exceptions to this rule, however. A restraint on the alienation of property held on a charitable trust was held valid in *Yard's Appeal*.²⁸ Spendthrift trusts, which this note does not purport to discuss, are of course recognized as valid.

There might possibly be one other exception to this rule. Dicta in two early

²²11 Pa. 370 (1849).

²³48 Pa. 466 (1865).

²⁴265 Pa. 61, 108 A. 204 (1919).

²⁵29 Dist. 729 (1920).

²⁶270 Pa. 49, 112 A. 911 (1921).

²⁷*Kaufman v. Burgert*, 195 Pa. 274, 45 A. 725 (1900).

²⁸64 Pa. 95 (1870).

Pennsylvania cases²⁹ say that a restraint on the alienation of a life estate, as distinguished from a fee, is valid. It is impossible to predict the result should a decision on this point be sought today.

Conditions Which Are Too Indefinite

Conditions which are phrased in such vague language as to make their interpretation and application impossible, or extremely difficult, are stricken down as void for uncertainty. Thus in *Brothers v. McCurdy*,³⁰ a condition "not to offer to sell it to anyone for the purpose of brick-making" was considered to be one with too many shades of meaning, so that it would be too difficult for a court to say whether each and every possible phrase used by the owner in discussing his property, could be said to constitute an "offer" to sell it.

Again in *McCullough's Heirs v. Gilmore*,³¹ a condition not to alien land to anyone but "the heir of his (the grantee's) father's family" was held to be too uncertain and hence void. The court said it was impossible to determine how widely or how narrowly the grantor intended the word "family" to be extended; and since it was susceptible of almost any construction, it was so uncertain that they were forced to declare it void.

In *White's Estate*,³² the court said by dictum that if a condition based upon "any attempt" to take a child from the custody of its guardian should be construed to mean any attempt, successful or not, abandoned or defeated, by any person at all, it would be void for uncertainty. The problem is also mentioned in *Lehigh Coal and Navigation Co. v. Gluck*.³³

Conditions Encouraging Divorce or Separation

There is little authority on this problem in Pennsylvania, and the few cases dealing with it are very unsatisfactory in their discussion of the question. The only thing deducible from them is, that the matter of the validity or invalidity of such conditions depends upon a very forced and arbitrary distinction which is capable of being applied so as to get either result, at the whim of the particular court.

In *Justus's Estate*,³⁴ a condition that the gift was to be effective provided the donee survived her husband or separated from him, was declared void; while in *King's Estate*,³⁵ a condition that the gift was to take effect if the donee finally got away from his wife by death or absolute divorce, was held valid. The court distinguished the *Justus* case on the ground that there the condition offered a direct

²⁹Hoge v. Hoge, 1 S. & R. 144 (1814), and Turner v. Fowler, 10 Watts 325 (1840).

³⁰36 Pa. 407 (1860).

³¹11 Pa. 370 (1849).

³²163 Pa. 388, 30 A. 192 (1894).

³³5 C. C. 662 (1888).

³⁴5 D. & C. 749 (1924).

³⁵58 Pitts. L. J. 377.

inducement to separation, with no restraint on the method of accomplishment other than the whim of the donee.

A dictum in *Gunning's Estate (No. 1)*³⁶ supports this "distinction", and there is outside authority to the same effect.³⁷

How the condition when worded as it was in the *King* case offers any lesser inducement to break up the marital relationship, or makes it less remunerative, than does the phraseology in the *Justus* case, is difficult to perceive.

The case of *Gunning's Estate, supra*, holds the condition valid on the ground that it is a condition precedent and as such must be complied with. This is in accord with the rule pointed out in other sections of this note, that any conditions precedent must be complied with before the estate vests. Why the *King* and *Justus* cases were not decided on this ground is not apparent. Indeed, it seems that all conditions based on securing a divorce or leaving the spouse could be upheld on this ground, as it is hard to imagine such a condition being other than a condition precedent.

Conditions Restricting Marriage

The Pennsylvania cases on this type of condition have been confused and involved from the earliest days of our judicial history, and it is only within recent years that the muddle has begun to be clarified. Until the latter part of the last century, there were intricate rules and distinctions, depending upon whether the gift was of personalty or realty, whether the contingency was in the form of a condition subsequent or of a conditional limitation, whether or not there was a gift over or something that might be construed to have the same effect as a gift over, and whether or not the donor's intent was a proper one. The courts added to the confusion by such errors as speaking of a "condition subsequent with a gift over".

This confusion was caused by the fact that the civil law, from which we derive much of our law of personal property, considered restraints of marriage as absolutely invalid, whereas the English common law, the ancestor of our real property law, did not look upon them with such great disfavor. The civil law doctrine of illegality was borrowed and applied; applied in all its strictness for a time even to real property. Then the courts felt the desirability of breaking away from this doctrine, and the abandonment of the rule was carried out by the usual judicial process of hedging and making exceptions.³⁸

A. Restraint of Marriage in Gifts of Personal Property

The earliest cases held that such a restriction placed on a gift of personal property was valid only if there was a gift over after the contingency.³⁹ In other

³⁶234 Pa. 139, 83 A. 60 (1912).

³⁷*Conrad v. Long*, 33 Mich. 78 (1875); 1 *Tiffany, The Law of Real Property*, sec. 196.

³⁸Note, 95 Amer. State Rep. 214 at 215; *Lancaster v. Flowers*, 9 Dist. 241, 23 C. C. 613 (1900).

³⁹*McIlvaine v. Gethen*, 3 Wharton 575 (1838); *Hoop v. Dundas*, 10 Pa. 75 (1848).

words, if the qualification was a true condition subsequent, it was void. Two reasons are given for this distinction—the wish to avoid defeating the rights of the third person;⁴⁰ and the entirely theoretical reason that a conditional limitation could be allowed to stand because its operation does not *deprive* the grantee of anything—he only held his estate “so long as” or “until” he married, therefore that event marks the natural end of the estate; whereas a condition subsequent operates to take away, bring an unnatural termination to, his estate.⁴¹

This rule is still being applied to gifts of personal property, in spite of dicta in various cases disparaging it⁴² and in spite of occasional attempts on the part of various courts to nullify it in practical effect by strained constructions of the gift.⁴³ And, most of the more recent cases use as an alternative ground for upholding such conditions, the argument that in the particular case the intent of the donor was to make provision for the donee's support (the donee being a woman) until such provision was rendered unnecessary by her marriage. Thus the courts are able to say that the donor did not have the evil intent of outright forbidding marriage.

So it appears that if this is the purpose of the condition, it will be upheld, although the courts cling to the annoying practice of resting their decision partly on the fact that an express gift over after the condition happens is present. To this effect, see *Holbrook's Estate*⁴⁴ and *Morton's Estate*.⁴⁵ And in *Bruck's Estate*,⁴⁶ the court went so far as to *imply* a gift over in order to preserve the validity of the condition. All in all, the test of intent seems to be the one toward which the modern decisions are tending.

Also, it is safe to assume that a condition forbidding, not marriage but the *re-marriage* of one previously married, will be upheld. The case of *Lancaster v. Flowers*⁴⁷ expressly lays down this rule. All the modern cases in which this type of restraint was involved have held it valid, although not expressly mentioning this as the basis of the decision.⁴⁸

⁴⁰Cornell v. Lovett's Ex., 35 Pa. 100 (1860).

⁴¹Cornell v. Lovett's Ex., 35 Pa. 100 (1860); Bruck's Estate, 185 Pa. 194, 39 A. 813 (1898); Morton's Estate, 14 Dist. 121 (1905).

⁴²See, e. g., Commonwealth v. Stauffer, 10 Pa. 350 (1849).

⁴³Cooper v. Pogue, 92 Pa. 254 (1879).

⁴⁴213 Pa. 93, 62 A. 368, 110 American State Reports 537 (1905).

⁴⁵14 Dist. 121 (1905).

⁴⁶185 Pa. 194, 39 A. 813 (1898).

⁴⁷9 Dist. 241, 23 C. C. 613 (1900).

⁴⁸Cornell v. Lovett's Ex., 35 Pa. 100 (1860); Cooper v. Pogue, 92 Pa. 254 (1879). The early cases of *McIlvaine v. Gethen*, 3 Wharton 575 (1838) and *Hoopes v. Dundas*, 10 Pa. 75 (1848) are *contra*, but these were decided before the tendency arose to get away from the intricate common law rules, and are based solely on those involved rules as to condition subsequent and conditional limitations.

B. Restraint of Marriage in Gifts of Real Property

Here our courts have not experienced the same difficulty in piercing the fog of the early common law rules that was felt in the cases involving personality. The early case of *Commonwealth v. Stauffer*⁴⁹ held valid a restriction on marriage placed upon a gift of land, even though they decided that it was a condition subsequent rather than a conditional limitation. Previously, such conditions on land had been held valid and effective because they were on land rather than on personal property,⁵⁰ but these prior cases had not been clear in expressly repudiating the distinction, as was the *Stauffer* case. The subsequent cases, down to the present day, have held such conditions valid when applied to land,⁵¹ and have definitely stated that the rule governing gifts of land had a different origin, and logically should be different, than the rule governing personality.⁵²

Again, as was the case with personality, all the decisions involving a restraint of re-marriage by a person once married have held them valid, but without expressly making this factor the ground of the holding.⁵³

But there apparently is a limitation on the rule that such conditions are valid. In the case of *Osborne's Petition*,⁵⁴ the condition was that the devisee was not to marry a named person. The court, in holding this valid, stressed the fact that it was a limited restraint on marriage, and said that an absolute restraint, or one which was too rigid and unreasonable, would be invalid. Thus, although a dicta in the *Stauffer* case, *supra*, had rejected this view, it appears that a restraint on marriage rather than on re-marriage must be limited and reasonable to be valid.

JOHN P. MARTIN

⁴⁹10 Pa. 350 (1849).

⁵⁰*Walker v. Quigg*, 6 Watts 87 (1837); *Bennett v. Robinson*, 10 Watts 348 (1840).

⁵¹*Cornell v. Lovett's Ex.*, 35 Pa. 100 (1860); *McCullough's Appeal*, 12 Pa. 197 (1849); *Lancaster v. Flowers*, 9 Dist. 241, 23 C. C. 613 (1900).

⁵²*McCullough's Appeal*, 12 Pa. 197 (1849); *Lancaster v. Flowers*, 9 Dist. 241, 23 C. C. 613 (1900).

⁵³*Commonwealth v. Stauffer*, 10 Pa. 350 (1849); *Holtz's Estate*, 38 Pa. 423 (1861); *Cornell v. Lovett's Ex.*, 35 Pa. 100 (1860); *Bennett v. Robinson*, 10 Watts 348 (1840); *Lancaster v. Flowers*, 9 Dist. 241, 23 C. C. 613 (1900); *McCullough's Appeal*, 12 Pa. 197 (1849); *Cooper v. Pogue*, 92 Pa. 254 (1879).

⁵⁴21 D. & C. 293 (1934).