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CONDITIONAL WILLS AND WILLS WITH CONDITIONS IN PENNSYLVANIA

by

A. J. WHITE HUTTON*

In a recent case,* our Supreme Court in an opinion by Allen M. Stearne, J follows Moore's Estate, 2 explaining the distinction between wills that are actually conditional from those in which the testator merely states the occasion for the writing of the instrument. In the Morrison case the decree of the Orphans' Court was reversed and the appeal from probate dismissed. The words of the instrument were:

"Nov 29 Dear Frank if I never see you again I want you to have everything I own keep this it may be of use to you some day your Father J. H. Morrison."

This case is the inspiration for the following resume on the topic of conditional wills and wills with conditions.

A will may be conditional either as to its operation as such or as to a particular disposition contained therein.

Concerning conditions generally Bigelow has said: 3

"A thing is made dependent upon a condition when it is made dependent upon an uncertain event, act or omission."

"The event, act or omission may be past, present, or future. In a sense a thing present or past cannot be uncertain; such a thing is a fact, and hence has or has not taken place, or exists or does not exist; but whether it has taken place or now exists may not be known, and a thing is uncertain within the meaning of the definition, if, though present or past, knowledge of the fact is unknown to the person who creates the condition."

Conditions may be either precedent or subsequent. In the first class they must happen or be performed before the estate, right or obligation takes effect. In the second class are those whose effect is not produced until after the vesting of the estate or bequest or the commencement of the obligation.

In the present discussion conditional wills are first considered, then wills containing particular conditions.

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1 In Re Morrison's Est., 361 Pa. 419 (April 11, 1949) 65 A.2d. 384.
2 332 Pa. 257 (1938) 2 A.2d. 761.
3 The Law of Wills (Student Ed.) 263.
A conditional will is one whose operation as a valid will depends upon the happening or the fulfillment of some condition precedent. The condition, therefore, affects the entire will and not merely a portion thereof.

Text writers generally agree that the policy of the law is to construe such wills as unconditional and merely expressing an inducement for its execution where, as in most cases, the testator uses expressions explanatory of just why the will has been prepared at the particular time. However, until recently, the trend of the Pennsylvania cases had been the other way. Over a century ago there arose a case which had very powerfully affected the law in this state by reason of the glamour of Chief Justice Gibson's name. In Todd's Will the testator prefaced his will with these words:

"My wish, desire, and intention, now is, that if I should not return, (which I will, no preventing providence), what I own shall be divided as follows:"

Then followed some general and specific bequests of a moderate total value, with the remainder of the estate to testator's wife.

A caveat was sustained by the Register's Court rejecting the paper offered for probate. In affirming the decree of the court below refusing to admit the will to probate, Gibson, C.J. declared:

"No textwriter seems to have distinguished between a condition attached to a particular testamentary disposition, and a condition attached to the operation of the instrument. But in Parsons v. Lance, 1 Vez. S. R. 191, Lord Hardwicke said without hesitation that he would not require an authority for such a distinction, and that a paper subject to a condition ought not to be admitted to probate after failure of the contingency on the happening of which it was to have taken effect. Why should it be proved as a will, when it could not have the effect of one? ... The testator, in contemplation of a journey to the State of Indiana, for the amendment of his health, then in an advanced state of decline, begins an informal testamentary paper addressed to his friend and intended executor in these very distinctive words (quoting the words already given). He then proceeds to give his property in reference to the state of his family as it then existed."

The Court then states that according to the facts the arrangement was intended to be provisional and not to serve in the event of his death at home and the will was decided to have been conditional upon the facts as they appeared at the time of the execution of the will.

It is doubtful whether this interpretation is correct as it appears the will was in no way unusual or inapplicable to the situation at the time of death. Rather it would seem the testator was stating the occasion impelling the making of a will at the particular time. The testator actually died about a month after the return from

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4 2 W. & S. 145 (1841).
the journey. Forty-six years later in *Morrow's Appeal*, the testamentary words were as follows:

"I am going to town with my drill and I ain't feeling good and in case I should end get back do as I say on this paper."

The testator went to town and while away became ill but was brought home where he soon died in the same illness. The Register of Wills refused to admit this alleged will to probate and the Orphans' Court of Perry County affirmed this conclusion in an opinion reviewing other cases on the subject. The Supreme Court affirmed the decree upon the "very lucid and exhaustive opinion of the learned court below in this case." Said Green, J.:  

"A testament is to take place if there is no return. But, there was a return in both instances (referring to *Todd's Will* and the present case) and the testament does not transpire. There is no will because the condition on which it was to come into existence has not occurred. In both cases the deceased did not return."

"It is useless to speculate as to what the deceased would have done had he foreseen the precise facts which were to happen. He has made no provision for them."

Like *Todd's Will*, in this case there were no facts in the will indicative of peculiar conditions which the testator was seeking to take care of at the precise time of the execution of the will, and the only evidence of a condition was contained in the opening words of the will already quoted.

It is very doubtful whether either of the aforesaid cases represents a true type of conditional will. In *Todd's Will*, supra. Gibson, C. J. relied upon certain English Cases which have since been more or less questioned and in *Morrow's Appeal* the ruling followed *Todd's Will* with little attempt to distinguish or to maintain any independence of view.

However, in *Forquer's Estate* there is an example of very careful consideration of all of the authorities and although the two cases just discussed were not criticized but rather distinguished, nevertheless the departure is well marked. In this case the testator directed as follows:

"I intend starting tomorrow morning to Montana to see my brother. Knowing the uncertainty and risk of a journey, know all persons that I do hereby will and bequeath . . . ."

After leaving his real and personal property to his wife, the testator further declared:

"And should anything befall me while away or that I should die, then in that event all my estate, etc."

It was held that the will was not solely contingent upon testator's death on his journey but continued operative after a safe return and his death thereafter.

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There was evidence of a republication and therefore it may be said that in part the case went off that point. However, in a very able opinion Galbraith, P.J., reviewed the entire list of cases and then concluded that in the facts under consideration there was no conditional will. The learned court laid down the following rule which was later adopted per curiam by the Supreme Court:

"When the event which constitutes the contingency expressed in the instrument can be reasonably construed to have been the occasion for making the will at a particular time, rather than as the reason for making it in a particular way, it should be so construed; and further, that unless it clearly appear from the instrument itself that it was not to operate in a certain event, it will be entitled to probate."

Continuing the learned judge observed:

"Having arrived at the conclusion that the will under consideration was absolute in character and not contingent, and there being no evidence of its subsequent revocation, it would seem unnecessary to determine the contention of proponent's counsel that the testator, a few days before his death, in the presence of his wife and another, did republish his will. The evidence, however, of what took place at that time is uncontradicted and is sufficient to establish a republication of the will, and the will so republished is, we think, relieved of the contingency expressed therein, the event having been passed. This would seem not only reasonable but to be supported by authority. In Schouler on Wills, sec. 287, it is said: 'But where a will, written as though conditional upon a long journey, is re-executed and duly witnessed after the testator's safe return, the condition ceases, and the will may fully operate by remaining uncancelled.' We see no reason why this rule should not govern where, instead of a re-execution of the will, there has been a republication of it, supported by the necessary evidence."

The will was accordingly admitted to probate and this decree was affirmed by the Supreme Court.

Following Forquer's Estate, supra, Whittaker's Estate was decided by the Supreme Court in a per curiam affirming the decree of the lower court. The facts were that testatrix left in her safe a large sealed envelope marked on the outside "to be opened by Ike if I do not come back." This envelope contained a second sealed envelope marked, "If I do not come back this is my will." In this second envelope was found a testamentary paper dated February 4, 1899 signed by the decedent and attested by two witnesses. The endorsements on the outside of the envelopes were in the handwriting of the decedent as well as the body of the paper found in the envelope. Apparently the endorsements were not signed and there was no reference made in the testamentary paper to the writings on the envelopes, nor was there any reference to any proposed journey. It appeared however that about the time of the execution of the instrument the testatrix did make a trip to Florida and returned to her home about a month later. The paper was admitted

7 "Oral republication of itself shall be ineffectiv to revive a will." Wills Act of 1947. Sec. 6.
8 219 Pa. 646 (1908) 69 A. 39.
to probate and Isaac R. Whittaker, the husband surviving, appealed alleging either that the paper was a conditional will or that the publication thereof was conditional and that it should not be admitted to probate. Over, J., opined:

"If a testamentary paper signed by Mrs. Whittaker had contained the sentence, 'If I do not come back this is my will,' endorsed on the envelope in which the paper was found, it would have been a conditional will, contingent upon her death on the journey she contemplated when the paper was executed, and as she returned from her journey it would be inoperative. There is nothing in the paper, however, indicating that the testamentary disposition made therein was contingent; no reference is made to the writing on the envelope in which the paper was found inclosed; and as the writing was not signed by her it cannot be treated as part of the will, nor as a codicil to it: Plumstead's Appeal, 4 S. & R. 545; Jacoby's Estate, 190 Pa. 382; Willing's Estate, 212 Pa. 136; In Forquer's Estate, 216 Pa. 331, in an able and exhaustive opinion which was adopted by the Supreme Court, Judge Galbraith held that 'Unless it appears from the will itself that it was not to operate in a certain event it will be entitled to probate,' and that 'The character of a will as being contingent or not contingent in its operation depends on the intention of the testator as expressed in the will itself, without the aid of extrinsic evidence in the form of subsequent declarations made by the testator in an incidental way as to the disposition of his property.' Then, as here, there is no condition expressed nor implied in the paper; if there is sufficient evidence of its execution and publication it should be probated. Its execution is proven as required by the statute, and is not questioned."

"The paper is testamentary in substance, was signed by the decedent, attested by two witnesses at her request, and although she did not declare it to be her will to them, yet the presumption is that she published it as such. But it is contended by appellants that the writing on the envelope shows that its publication was conditional, and the condition not being fulfilled, there was no publication. The execution and publication, however, was of the paper itself as a will, and not of the writing on the envelope as a part of it, and was complete and perfect. The writing did not refer to the publication, which is not affected by it, and is only a declaration made after the execution of the paper of her intention that the will should be conditional; but as this intention was not expressed in a writing signed by her, it could not revoke or annul the unconditional testamentary disposition in the paper, and the decision of the register admitting it to probate must be affirmed and the appeal dismissed."\^9

In Davis' Estate\(^10\) the language of the paper offered for probate was that certain dispositions were to be made "Should I dye in the near future." The paper was held to be testamentary in character, citing McCune's Estate,\(^11\) and per Sadler, J., it was declared that the language as quoted, if conditional, was still within the facts of the case as the testator had died within a little more than three months

\(^11\) 263 Pa. 523 (1920) 109 A. 156.
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thereafter and as the word "near" is a relative term the Court was convinced that the construction in favor of the disposition as made by the lower court was correct.

In Kimmel's Estate the language of the testamentary paper was, inter alia, "if enny thing hapens." This was held to be a condition but as pointed out by the Court was still existing when the testator died suddenly on the same day he wrote and mailed the letter which was the basis of the testamentary disposition.

The above three cases are undoubtedly sound in their ultimate conclusions, but it is submitted that the expressions concerning conditional wills are misleading and not in accord with the trend of the cases.

On the other hand in Dowling's Estate there is an example afforded of sound determination on this question. The paper in the handwriting of the decedent read as follows:


"To whom it may concern that I. Michael P. Doweling is to go on
operation for a growth in the head if anything serious should happen
to me I leave all I own to Catherine Jane Doebley for what she has done
for me in the past consisting of
The house at 459 E. Moyer St.
" " 915 E. Columbia Ave.
Bank account Land Title Bldg.
" " Phila Saving Fund

Yours truly

MICHAEL DOWLING

Witnesses:
Matilda Isell
163 W. Gerard Ave.
Nellie F. McDevitt
1029 N. Front St.,"

This paper was probated by the Register and an appeal was taken, the petition averring and the answers admitting that at the time of the execution of the writing the decedent was about to undergo a surgical operation; that he did undergo the operation and subsequently recovered therefrom and lived nearly twelve years thereafter. The sole question was one of law, whether the instrument was conditional or absolute. Stearne, P. J. held that the writing was absolute and after reviewing the authorities concluded:

"I have carefully considered the words of the present instrument, and have formed the opinion that the testator merely recited the facts of the impending operation as the motive which induced him to write his will; that decedent was contemplating the possibility of death generally and expressed his desires with respect to the disposition of his estate in such event. I can discover no expressed or implied intention to stay his testamentary provisions unless death resulted solely from or because of the operation. Putting the matter in slightly different words: The

12 278 Pa. 435 (1924) 123 A. 405.
13 16 D. & C. 381 (1932) per Stearne, P.J. and Sinkler, J. Stearne, J., now of the Supreme Court, see Morrison's Estate, supra, note (1).
statement of the impending operation and the contemplation of the possibility of death was the occasion for making the will at that time and was not the reason for making it in that particular way."

Upon exceptions the Court en banc, per Sinkler, J., dismissed the exceptions and confirmed absolutely the decree of the presiding judge, reviewing the pertinent cases and thus concluded:

"The exceptions are dismissed upon the following grounds: First, the tendency of the courts, particularly in recent times, is to construe a will as an absolute one and not conditional; second, the contingency expressed in the instrument is to be considered as the occasion for making the will at a particular time, not as the reason for making it a particular way; third, the wording of the will indicates that the bequest was made to Catherine Jane Doebley because of what she had done for him in the past; fourth, the evidence discloses that the testator had preserved the will among his other documents up until the time of his death, and that his relations to the beneficiary, out of which his obligation to her arose, remained unchanged up to the time of his death."

In Moore's Estate\(^\text{14}\) there is a striking example of a homemade will and of a case well decided upon correct principles. Forquer's Estate\(^\text{15}\) is cited with approval and it would appear that earlier cases are impliedly overruled. Probably, following established procedure,\(^\text{16}\) the next case to be decided would expectedly overrule directly previous inconsistent cases. The Moore case was an appeal from the order and decree of probate of the following paper:

"Johnstown Aug 1926

"I am writeing my Will if any thing Hapins to me Before I come Home I will ten thousand to Mrs. Lizzie Lewis the rest of My Estate to be Sold and all Debts Paid I to be laid way the Same as Bob all Debts Paid the remainder to be Devided Between My Nephues, & Neic and Bob Nephues & Neices and five Hundred to the Methodist Church and Five Hundred to each of the Home and Foreign Mishinary Cocity and Five Hundred to the Cemetery Accation to Keep the Graves and Lots of Moores and Bushs in repair this is my Will I write and Sign

Mrs. Annie S. Moore"

It was contended that the will was conditional and according to the agreed statement of facts the testatrix shortly after writing the paper in question did make a journey to Cincinnati and remained there about three weeks, later returning and dying almost twelve years later, viz: March 8, 1938. Linn, J. in affirming the order of the lower court explained:

"Contemplating her visit to Cincinnati, she may have intended her will (a) to be effective only if she died before returning, or (b) she may

\(^{14}\) 332 Pa. 257 (1938) 2 A.2d. 761.

\(^{15}\) See note 6, supra.

\(^{16}\) Cf. Wertheimer's Estate, 286 Pa. 155 (1926) 133 A. 144, and Weber v. Kline, 293 Pa. 85 (1928) 141 A. 721 for study of gradual change in doctrine of meretricious relations and undue influence. This was the hope of this writer expressed before Morrison's Estate, supra, was decided.
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have referred to the proposed visit as explaining why she made her will at that time. In the first case, her will would be effective if she died before returning, but of no effect if she returned; in the second case the will would be regarded as an absolute paper which, not having been revoked, was entitled to probate."

The learned justice then quoted with approval Forquer’s Estate, supra, and particularly a quotation from that case already given herein, after which the justice observed:

"While the paper might have been less ambiguous if testatrix had punctuated it, we must deal with it as it appears in the record; its ambiguity requires consideration of the circumstances in which it was written. We think her reference to the proposed trip to Cincinnati was intended as an explanation why, at that time, she made her will, to be effective whenever she might die, unless, of course, she revoked it; instead of revoking it, she retained it until her death twelve years later. Her conduct supports the inference that she did not wish to die intestate."

There are in the Pennsylvania reports very few cases exemplifying true types of conditional wills. However, these are striking and apt examples. In Hamilton’s Estate the testator was confronted with a situation that required very grave consideration. He desired to make certain changes in his will which contained important charitable bequests and at the same time it was doubtful whether in executing a new will he would live the period of one calendar month. Apparently guided by able counsel, testator executed a codicil referring specifically to the law relating to bequests to charities and then stipulated:

"Now, I declare said will of 20th November, 1871, to be my last will should I die before the first of March, 1873, otherwise the will of January 13, 1873 shall be my last will."

The testator died in the 23rd of January, 1873, and it was held that the paper of November, 1871 constituted his will and that the writing of January 13, 1873 was not his will as the contingency on which it was to become so had not happened and it did not therefore revoke the will of 1871. Said Williams, J.:

"It is clear that the testamentary paper of January 13th 1873 admitted to probate by the register, cannot be regarded as the will of James Hamilton. It is not his will, for the contingency upon which it was to take effect never happened; Todd’s Will, 2 W. & S. 145. It was a provisional will, and was only to become operative if he did not die before the 1st of March 1873; if he did, it was to have no force or effect. He died on the 23rd of January, 1873, and therefore, by the express provisions of the codicil to which it is subject, it did not take effect as his will. If, then, it never had any force or validity as a will, did it revoke the will of the 20th November 1871, which was also admitted to probate by the register? It did not revoke it in express terms, for it contains no revoking clause. It did not revoke it by implication, for the contingency upon a will, it did not take effect at all, and was as powerless to revoke the

17 74 Pa. 69 (1873).
prior will as if it had never been made. But if it had contained a revoking clause it does not follow that it would have repealed the former will. The fair construction in such case would be that the clause was intended only to operate if the paper took effect as a will; but if not, then it was to have no effect: *Rudy v. Ulrich*, 19 P. F. Smith 177."

In *Bradish v. McClellan* the companion case to *Hamilton's Est., supra*, it was held that the codicil as executed by the testator did not fall with the latter will and consequently the legatees and devisees therein named were entitled to the benefits conferred upon them thereby, Mercur, J. thus explained:

"When the testator executed the codicil, he was uncertain, which of the former writings would take effect as his will. It depended on the contingency of his dying before the time specified. There, however, was no contingency stated in regard to the codicil. There was no intimation that it should not take effect in either case. The clear intent was that it should have full effect and attach itself to whichever writing became operative as a will. The codicil was to become a part of that writing, and the two constitute the whole will. Any presumption that the codicil and the writing of January 13th were both executed at the same time, is clearly rebutted by the reference in the codicil to the latter as a writing then existing.

"The conclusion to which we have come is not in conflict with the point decided in *Bradish's Appeal, supra*, properly understood. The main question there was whether effect should be given to the writing of November 1871 in regard to charitable bequests therein. They were held to be valid. No person claiming under the codicil was a party to that issue. Hence the rights of the defendant were not there discussed nor decided. There is a dictum in the opinion as to the intent of the codicil, to which we cannot agree. We cannot therefore hold that sufficient to defeat the title which we think the defendant so clearly took under the codicil, to the land in question. The learned judge correctly held that the plaintiff could not recover."

These cases merit considerable study and reflection particularly in comparison with *Hartman's Estate* where a banker who was the friend and advisor of the testatrix prepared her will using the printed form obtainable from a legal stationer and containing a printed clause of revocation of all prior wills. This will was executed July 28, 1932 and by its terms specifically revoked all prior wills. There was a prior will dated July 29, 1931 containing numerous charitable bequests. Unfortunately the testatrix died July 29, 1932, within one day after the execution of the 1932 will, thus giving rise to various questions before the auditor whether the bequests and devises in the 1932 will to the charitable and religious institutions named therein were voided as falling within the thirty-day provision of Section 6 of the Wills Act of June 7, 1917.

18 100 Pa. 607 (1882).
20 P. L. 403, 20 PS 195, supp.
As to whether a will is conditional as has already been stated is a matter of law and for the court to determine. The general rule of construction is that the condition must clearly appear from the language employed. Furthermore, a recital of the circumstances inducing the testator to execute the will is not to be so construed.\(^1\) Again, in the matter of construction, the court is at liberty to use extrinsic evidence just as is pointed out in cases establishing testamentary intent.\(^2\)

However, parol evidence is not admissible to show that a will absolute on its face was intended to be conditional.\(^3\)

In *Morrison's Estate*\(^4\) Stearne, J., *inter alia*, observed:

"Whether a will is conditional or not depends upon whether the event which constitutes the expressed contingency is construed to have been the occasion for making the will at a particular time or the reason for making it in a particular way. (Citing cases)"

"The words in the will in *In re Moore's Estate*, 332 Pa. 257, 2 A. 2d. 761, 762, and those in the present case are almost parallel. In *In re Moore's Estate*, they are ' * * * if any thing Hapins to me Before I come Home * * *'; in the present case they are ' * * * if I never see you again. * * *'. In Moore's Estate, the testatrix wrote the will in contemplation of a trip which she took to Cincinnati; she stayed three weeks, returned to her home and lived twelve years thereafter. This Court, in an unanimous opinion by Mr. Justice Linn, construed the reference to the trip as the reason for making the will at that time, and held the bequests to be absolute. Construing the words in the present case, it is clear that the possibility of never seeing the son again was the reason for making the will at that time. The words 'keep this it may be of use to you some day' would negative any presumed intention that testator intended the gift to fail if he should see his son again. Under the facts and principles stated in *Moore's Estate*, supra, such construction must prevail unless the meaning of the words was modified by the proven conditions surrounding the testator."

The last sentence in the above quotation would indicate that the language of this will might be "modified" by certain proven facts and this is evidently what was in the mind of the learned court below, but in the opinion just quoted had not been "proven" but was merely a matter of surmise or conjecture. It is suggested that the same rule in reference to the admission of any evidence on what the testator meant in the language used must be confined as above indicated in


\(^2\) Testamentary Character and Intent, 48 D.L.R. 22 (1943).

\(^3\) Gardner on Wills, 2d. Ed. 61; Sowel v. Slingluff, 57 Md. 537 (1882); Cf. Clark v. Hugo, 130 Va. 99 (1921) 107 S. E. 730; also Lister v. Smith, 3 Swabey & T. 282 (1863) 364 Eng. Reprint 1282, where Sid J. P. Wilde admitted parol evidence showing codicil was executed without serious intention when such evidence "is very cogent and conclusive." But quere. The general rule is better, unless the purpose is to show lack of testamentary character and intent. Evidence of conditions surrounding testator at the time of execution is admissible.

\(^4\) 361 Pa. 419 (April 11, 1949) 65 A. 2d. 384.
this article in the same way as in ascertaining the testamentary character and intent of a written instrument.26

As the language appears in the Morrison case there is no condition and if any is read into such language it would have to be by judicial interpolation.

Wills with Conditions

Instead of a will being conditional which, if found by the court, will render it totally inoperative, it may contain conditions attached to the several bequests or devises. In this instance the will is probative and the questions later arise on distribution as to the conditions that may be attached to the several gifts. The subject, therefore, comes up properly under the head of distribution of estates, but by reason of its connection with the topic of conditional wills, a few of the principles will now be illustrated.

Conditions may be either precedent or subsequent and although it was remarked in Alexander's Estate26 that the distinction between conditions precedent and conditions subsequent under certain situations is somewhat tenuous and technical, yet under other circumstances the distinction is quite important, as appears in Thompson's Estate27 where the testator bequeathed in equal joint ownership to three persons certain property conditioned upon the formation by them of a partnership within one year after the death of the testator and stipulating further some of the terms of the agreement of the required partnership. One of the legatees was a minor and his guardian refused to enter into the proposed partnership. In affirming the decree of the orphans' court, Walling, J. explained:

"This may be a hard case, but we agree with the conclusion of the orphans' court. Whether a condition shall be construed as precedent or subsequent depends upon the intention of the testator as expressed in the will. 40 Cyc. 1689. Here the primary intent was to have the business continued in the name of Thompson Brothers, with some member of his family interested therein. As to this, we adopt the language of the orphans' court: 'An examination of the entire will satisfies us that Mr. Thompson's prime purpose was to see that his business should continue under the trade name which he had used in his lifetime, and that one person of his own family should be a member of the partnership contemplated. To make certain that this relationship should be brought about, he designated, first of all, the partners and the share of each in the assets and profits of 'their firm' and then when he had provided for this and for the purpose of assuring its future, he devised his business property to those beneficiaries, if, and only if, the partnership should be formed within one year from his death. It seems clear, therefore, that this condition was inseparably annexed to the gift and not a limitation upon its enjoyment. It is, therefore, a condition precedent." It was optional with the legatees whether they would accept the bequest, subject

25 See note 22, supra.
27 305 Pa. 349 (1931) 155 A. 925.
to the condition, but they could not take it otherwise. The intent of the testator could be carried out only by forming the partnership and taking over the property as such. The time for performance of the condition here being definitely limited to one year is a circumstance indicating that it is a condition precedent. Whereas, the fact that the time of performance is indefinite leads to the opposite conclusion. See *Finlay v. King's Lessee*, 3 Pet. 346 8 Curtis Dec. 438, 44, 7 L. Ed. 710; 28 R.C.L. p. 312. A devise to a son to be void if he is living with his divorced wife is a condition precedent and if he is not living with her at testator's death the estate vests. *McKinley v. Martin*, 226 Pa. 550, 75 A. 734, 134 Am. St. Rep. 1076. There seems to be no case in Pennsylvania directly in point, but it is stated in 40 Cyc. 1 1698, citing *McCallum v. Riddel*, 23 Ont. 537, that a bequest may be made upon condition that a partnership should be formed. A legacy given, provided the legatee appears and establishes his identity within a specified time, is on a condition precedent (*Stover's Appeal* 77 P. 282; *Campbell v. McDonald*, 10 Watts, 179; 40 Cyc. 1692) and the principle is not different where a bequest is given on a condition that a partnership be formed within a stated time. Each is a necessary qualification to a receipt of the gift. A gift to A if he marry B within a year after testator's death would be a condition precedent, and there is no essential difference between marrying within a year and forming a partnership within that time."

In *Alexander's Estate*28 it was held that where testator after bequests to his wife and others provided that the residue of his estate should be retained and the income divided among three sons on condition that, if the widow contested the will or was not wholly satisfied with it, then the widow's son by testator should receive only $5.00; the condition was a valid condition precedent and was not invalid as a condition subsequent, "in terrorem". It was further explained that the rule "in terrorem" was derived from the civil law and is that a condition subsequent which is against public policy, public decency or good manners, will be treated as in terrorem unless there is a specific devise over. Parker, J. declared:

"The appellant's assertion that the testator intended that the provision we are considering should operate as a condition subsequent to the vesting of *Arthur's Estate* is equally untenable. The distinction between conditions precedent and conditions subsequent as used in a statement of the doctrine relied upon is, at best, tenuous and technical. In *Holbrook's Estate*, 213 Pa. 93, 96, 62 A. 368, 369, 2 L.R.A., N.S., 545, 110 Am. St. Rep. 537, 5 Ann. Cas. 137, we said: 'It is a reproach to the law that, of two donors intending to do exactly the same thing, one shall succeed and the other fail; as a violator of law, merely because one scrivener knew what he was about, and wrote 'so long as the donee remains unmarried', and the other was ignorant or careless, and wrote 'for life, if so long the donee remains unmarried.' While the will of the testator in this case was not precise in the use of legal expressions and was ineartistic, it is manifest that he intended, as we have heretofore said, to make alternative provisions for Arthur in order to avoid what he considered an inequitable

28 See note 26 supra.
division between the two groups in his family. Until the widow made her
election it could not be determined which would be operative. It is clear,
however, that no interest was intended to vest in Arthur and no distribu-
tion could be made to him until the widow had made her election. Her
election to take under the will was a condition precedent to his participa-
tion in the remainder along with his brothers. Arthur was entitled to five
dollars and nothing more."

In *Kauffman v. Burgert*²⁹ a testator devised to his son a fee simple estate in
land, and then directed that the estate should not be liable for his son’s debts, and
further that his son should not sell and dispose of any part of the land and that
the same should go and vest in his heirs unless the son should devise the same
by his last will and testament which the testator authorized and empowered him
to do. It was held per Green, C.J. that the condition against alienation was void
and that the son took an absolute estate in fee simple and that the devise in fee
with the condition that it shall not be liable for the debts of the devisee was as
repugnant to the estate as the condition not to alien.³⁰

In *M’Cullough’s Heirs v. Gilmore*³¹ a testator, after directing that “all his
worldly substance shall be disposed of”—proceeds to say that it is his will and
desire that a certain farm “fall into the possession of W., laying this injunction
and prohibition, not to leave the same to any but the legitimate heirs of W’s
father’s family at his, W’s, decease.” It was held that this evinces a general intent
to give the fee to W., with an apparent particular intent in relation to the power
of alienation, which particular intent is void, because inconsistent with a reason-
able enjoyment of the fee, and also for uncertainty. Coulter, J. observed:

“A general restraint upon the alienation of a fee would be void.
A partial restraint has been allowed, when it was not inconsistent with a
reasonable enjoyment of the fee; as that the devisee shall not alien to a
particular person or in mortmain. Coke Litt. 223 a. And in the case of
*M’Williams v. Neely*, 2 S. & R. 513, Chief Justice Tilghman, in assert-
ing the general doctrine, that, when an estate is given, any restraint upon
it which destroys its character is void, acknowledges that doctrine of the
case in Leonard, that a partial restriction not inconsistent with a reason-
able enjoyment of the fee is good. In his case, however, the restriction is
uncertain. Whom did the testator mean by the heirs of his father’s
family? A man’s family may be considered as his household at a particular
period; or, as his race or generation. There is nothing in the will to desig-
nate or describe what the testator meant by his father’s family.”³³

In *Hotz’s Estates*³³ it was stated that though a bequest to which a condition
is appended in restraint of marriage is void, as against public policy, yet a testator

³¹ 11 Pa. 370 (1849).
³² But see Pattin v. Scott, 270 Pa. 49 (1921) 112 A. 911 that a restraint on alienation for
25 years is void; also discussion 46 D.L.R. 265-7 (1942) Rood on Wills, 2nd. Ed. sec. 607; Yost
may, by proper words of limitation, restrict the enjoyment of a bequest to the period during which his legatee shall remain unmarried. Thus, where a testator gave to his executors the sum of $5000, in trust to invest the same, after the death of his wife, and pay the interest "unto my daughter-in-law, Mary H. Hotz, wife of my son Peter, if she shall be living and the wife and widow of my son, for her sole and separate use, upon her own receipt, and for and during all the term she shall continue the wife or widow of my son," with a limitation over for life to another, and a further disposition, in case of the death of the second cestui que trust, if she should marry; the bequest was not upon a condition in terrorem, but it terminated, upon her marriage, and passed into the residue of the estate, to be disposed of under the will.

In McCullough's Appeal\textsuperscript{34} it was also observed that a devise over is not essential to render a condition annexed to land and in restraint of marriage valid. The per curiam statement is as follows:

"The provision for the wife, in this case, is a devise of the profits and consequently of the land to her for life, in the first instance; but coupled with a condition, or a conditional limitation, no matter which, that she do not marry. Whether it be the one or the other, a limitation over is unnecessary to give it effect, for it is a familiar principle that devises of land, whether to a widow or any one else, are governed, not by the civil, but by the common law, which knows nothing of a condition in terrorem: as was determined in Commonwealth v. Stouffer, 10 Barr 350. At her marriage, therefore, the wife's interest in the demised premises ceased, but the interest of the children, her co-tenants, survived."

Likewise in Redding v. Rice\textsuperscript{35} where the testator gave his entire estate to his wife "as long as she shall remain my widow and if she should get married then she shall only be entitled to one-third in said property", there being a provision for the balance to go over to certain heirs, it was held that the widow took a fee in the entire estate, defeasible as to two-thirds upon her marriage, and the widow not having remarried a conveyance by her in her lifetime gave, after her death, an indefeasible estate to her grantee.

Again in Holbrook's Estate\textsuperscript{36} it was held that where a beneficiary is given the income of a fund "during the term of her natural life, or so long as she shall remain unmarried," with a gift over "in case of her death or marriage", the gift is upon a limitation in favor of the beneficiary during the period she remains unmarried and is valid. Such a provision is not to be construed as an unlawful condition in restraint of marriage. Mitchell, C.J., pertinently observed:

"Distinctions and exceptions one after another sustained prohibitions which went merely against time or place, or particular persons, conditions with a gift over on breach, conditions in a gift of land, and

\textsuperscript{34} 12 Pa. 197 (1849).
\textsuperscript{35} 171 Pa. 301 (1895) 33 A. 330.
finally the distinction between conditions subsequent, working a divestiture, and conditions limiting the estate given. This last distinction is logical enough, for where there is an estate given and the condition is held void there is still the estate which may continue, while where the estate itself is to last only so long as the condition is fulfilled there is nothing left after the breach. But while this distinction is logical it is dry technical logic with no basis of substantial reason for application in the affairs of life. It is a reproach to the law that of two donors intending to do exactly the same thing one shall succeed and the other fail as a violator of law merely because one scrivener knew what he was about and wrote "so long as the donee remains unmarried," and the other was ignorant or careless and wrote "for life if so long the donee remains unmarried." *Hoopes v. Dundas*, 10 Pa. 75."

In *Gunning's Estate* (No. 1)*87 testatrix, after directing the sale of her real estate, gave certain legacies from the proceeds and then provided:

"The income of the balance to be given to K.M., provided he is not living with the woman he married in 1899—one J.W., should she die, or he is divorced from her—that is finally divorced—he is to be given absolutely one half of the principal, and the interest of the other half as long as he lives. If he marries again he can by will leave all to his second wife and children. If he dies unmarried a second time without children the one half—or all his share—is to be equally divided between the children of W.G., C.G., and J.B. In no case is the present wife of K.M. to benefit by anything I leave him either in personal or real estate."

At the time of testatrix's death K.M. was living with his wife, J.W., referred to in the will. Held, that the condition annexed to the gift to K.M. was precedent, was not originally either impossible or illegal, and that as he was living with his wife, J.W., at testatrix's death, the condition annexed to his legacy was not fulfilled and he was not entitled to take. Potter, J. declared:

"The rule which makes void gifts based upon a future separation of husband and wife, would not therefore apply to this case. Then, too, the fulfillment of the condition precedent was not originally impossible or illegal; that is, as noted above, the death of the wife through natural causes, or a separation uninfluenced by the knowledge of the contents of the will prior to the death of testatrix, would have made it possible to meet the conditions. It is therefore unnecessary to take into consideration any difference between the rule of the common law and that of the civil law, which it is urged governs in the distribution of legacies as distinguished from devises. The point here urged being, that the condition only is void, and that the gift should be held to be absolute."

In *Friend's Estate*88 the will contained this clause:

"If any of my children or grandchildren, or any of the *cestuis que trust* under this will, shall contest the validity of this my will, or attempt to vacate the same, or alter or change any of the provisions thereof, he or she, or they, shall be thereby deprived of any beneficial interest under

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*87 234 Pa. 139 (1912) 83 A. 60, 49 L.R.A. ns 637.*

this will and of any share of my estate, and the share or shares of such person or persons, shall be divided equally between my said sons, James W. Friend and Harry T. Friend, discharged from any trust."

A son appealed from decree of probate and petitioned for an issue on the ground that the execution of the will had been procured by undue influence. The petition was dismissed by the court and on appeal the decree was affirmed.\textsuperscript{89} It was contended that in view of the litigation, the son had forfeited his interest in the estate but this contention was not sustained by the court below which held the son had probable cause for instituting the contest and therefore he had not forfeited the interest which his mother had given him. This determination was approved by the Supreme Court and in dismissing the appeal, Brown, J. explained:

"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, 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, enforcible 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—an 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 accomplish results that no rational testator would ever contemplate."

In Hickman's Estate\textsuperscript{40} a will contained this clause: "Should anyone express dissatisfaction with the provisions of this will, he or she shall forfeit his or her interest." It was held that a testator may impose a condition of forfeiture of an interest in an estate if the beneficiary contests the will by which it is given, unless the condition is against public policy or the law, and the above provision declared valid. Furthermore, where a legatee had accepted his legacy, under the will and had executed a release in full satisfaction and payment of all sum or sums of money, legacies and bequests given and bequeathed, to him by the testator, such legatee was not in a position to contest any provision of the will, particularly as no effort or offer had been made to return the legacy. The observation was further made concerning the release that it is well settled that where a beneficiary accepts a legacy it is an election to stand by the provisions of a will.

In Berlin's Estate\textsuperscript{41} the will provided that any legatee presenting a claim against the estate of the testator, should thereby forfeit his or her legacy, and it

\textsuperscript{89} 46 D.L.R. 263 (1942); 125 A.L.R. 1136 N. 1139 N.
\textsuperscript{40} 308 Pa. 230 (1932) 162 A. 168.
\textsuperscript{41} 74 Pa. Super. Ct. 455 (1920).
was held that such a condition is lawful upon which the testator had a right to annex in a disposition of his own property. The legatee is not bound to accept the bequest, but if it is accepted it must be subject to the condition annexed. It must be taken with this burden or not at all. Sometimes a question has arisen whether the particular condition has been broken and in McCahan's Estate (no. 2)\(^2\) it was stated that where a will directed that any of the legatees contesting or attempting to contest its provisions, should lose their legacies, a mere caveat will not be construed as a contest of the will. It appeared in this case that although the caveat was filed it was not pursued and did not ripen into a will contest, howbeit there were some questions in dispute brought forward at the time of the adjudication of the account. Likewise, in Mitchell's Estate, Stearne, J. decided that a clause of a will providing for the forfeiture of the estate of any beneficiary who shall interfere with the executors or trustees in the settlement of the estate or make any claim or demand upon the estate otherwise than as provided by the will, has no application to the action of a guardian ad litem for minor beneficiaries, and trustee ad litem for their unborn children, in questioning the executors' administration of the estate and in seeking a surcharge in respect to certain items of the account, observing:

"The insertion of the in terrorem clause in the will reflects testator's apprehension that some individual might contest the probate of the will, or make some claim which might frustrate his testamentary provisions. As we read this will from its four corners, we can discover no evidence of an intent to permit the settlement and distribution of this estate to rest solely and exclusively in the hands of the testator's executors and trustee, without accountability to any of the interested parties or the supervision of the orphans' court. It is one thing to attempt to circumvent testamentary provisions and quite another to seek to enforce their legal execution. If excessive counsel fee, commission, or other charges are sought, or if the executors have unlawfully incurred losses in selling or retaining the securities, or (merely for argument) suppose the executors were guilty of an actual devastavit, the parties in interest must necessarily be afforded the opportunity of seeking relief. Such effort is not against testamentary directions but in furtherance thereof. Upon the probate of a will and the qualification of the executor, the assets of the estate are in gremio legis. The administration of the estate has always been held to be open to the fullest scrutiny of the interested parties and of the orphans' court. It would require extraordinarily strong and unequivocal language (which does not exist here) to prohibit and preclude an orderly judicial examination and adjudication of the executors' administration of the estate. We are of the opinion, and so decide, that in the circumstances of this case there is no express or implied direction of forfeiture where the ad litem guardian and trustee proceeds with his obvious duty."

\(^2\) 121 Pa. 188 (1908) 70 A. 711.
\(^4\) 21 D. & C. 225 (1952).
A devise may be expressed upon the condition that the devisee pay money to another and such expressions have been the subject of construction by the courts. In *Hamilton v. Porter* a devise was made to Hamilton who was to take 100 acres of land and pay $700.00 to each of certain specified persons. It was held that the legacies were not charged on the land and that Hamilton having accepted the devise became personally liable for the legacies, and in *Kennedy's Appeal* the testamentary provisions read:

"I bequeath the said house to D, J and L, but subject to a ground rent of $500 per annum to be paid in perpetuity . . . if they will not consent to pay the ground rent . . . then this devise shall become null and void and said property shall return to my estate and for the uses hereinafter specified."

It was held that the devisees took a fee and that the charge of the ground rent was not a precedent condition. The operative words of the devise were held to be present and vesting an immediate estate, while the words imposing the forfeiture for refusing consent to pay the rent imported a consequence taking effect after the devise, and the devise is then to become null and void and the property to return to the estate of the testatrix. Had testatrix intended the estate not to vest until consent had been first given by a ground rent covenant, her evident knowledge of the subject would have led her to say no. She had a clear apprehension of her own purposes and a ready command of language to express them as was pointed out in an opinion by Agnew, J.

*In Re McKallip's Estate*

There may be an odd situation where a will partakes of both a conditional feature as well as the feature of some of the terms being made on condition. The situation is illustrated by the *McKallip* case where a testatrix provided by codicil as follows:

"I leave Ida Crum Campbell authority to change my will according to personal dictation—Boat sailing

Margaret J. McKallip

Nov. 15, 1922."

In the opinion by Drew, J., it was declared:

"The codicil clearly represents in lay fashion an intention to give a collateral power of appointment—"an authority to deal with an estate, no interest in which is vested in the donee of the power." *Dickinson v. Teasdale*, 1 DeGex J. & S. 52, 60. When the intention to create a power is plain, it should be given effect: no technical form of words is necessary. *Graeff v. De Turk*, 44 Pa. 527.

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44 63 Pa. 332 (1869).
45 60 Pa. 511 (1869).
46 324 Pa. 458 (1936) 188 A. 343.
"Such a collateral power, broad as it is, does not violate our Wills Act (20 PS. section 181 et seq.), which prescribes exclusive methods for the revocation of wills. This has been held in other jurisdictions with similar statutory limitations. Dudley v. Weinbart, 93 Ky. 401, 20 S. W. 308; Cf. Goods of John Smith, L.R. 1 P. & D. 717. Apparently Illinois stands alone in an opposite view. Zierau v. Zierau, 347 Ill. 82. 179 N.E. 432, with critical comment in 27 Ill. L. Rev. 297."

Statutory Conditions

In Section 7 of the Wills Act of 1947 are set forth a number of situations in wills called "Modification By Circumstances", indicating that in addition to the matter already covered in this article explaining how a will may be affected either conditionally or by conditions inserted by the testator himself, there are also situations as pointed out in Section 7 of the Wills Act where a will as made is affected by extraneous circumstances notably in matters of religious and charitable gifts, divorce, marriage, and birth or adoption of children.

It is not within the scope of this article to discuss in detail such statutory conditions, but they are mentioned for the consideration of the reader.