CONDITIONS AND LIMITATIONS IN RESTRAN INT OF MARRIAGE

Olin Browder Jr.

University of Alabama
CONDITIONS AND LIMITATIONS IN RESTRAINT OF MARRIAGE*

Olin Browder, Jr.†

FROM ancient times it has been a practice of testators1 to provide for the termination of a devised estate upon the marriage of the devisee, or to make their gifts conditional upon a beneficiary's marrying in a prescribed manner. In this way, a parent may hope to extend beyond his death his influence over recalcitrant or irresponsible offspring. But restraints on marriage may have other purposes. More often than not, a testator, by limiting an estate until marriage or by providing for forfeiture upon marriage, may merely seek to assure the maintenance of a female beneficiary until a husband assumes that responsibility.

Almost from the beginning provisions of this kind have been declared illegal as being in restraint of marriage and contrary to public policy. Just what sort of social evil may be expected to result from these provisions has never been agreed upon. The Romans were the first to annul conditions in restraint of marriage,2 but the basis for the rule, even in this ancient origin, is doubtful. It has been said that the depleted population of that nation, resulting from the civil wars, was the cause.3 It has also been suggested that conditions restraining marriage were used as a subterfuge to escape the Roman rule against the disherison of heirs and were declared illegal for that reason.4

* This article is based upon a paper submitted in partial satisfaction of the requirements for the degree of Doctor of Juridical Science of the University of Michigan. The author wishes to express his appreciation to Professor Lewis M. Simes of that University for his counsel in the preparation of this article.

† Assistant Professor of Business Law, University of Alabama. A.B., LL.B., Illinois. Member of the Illinois bar.—Ed.

1 Most marriage restraints have been used in connection with testamentary gifts. There are a very few cases, however, where they have appeared in deeds. The same principles have been applied to both. For convenience, testamentary terms will be used in the following discussion. The use of marriage restraints in other instruments will be indicated in the footnotes when such cases are cited.

2 Dig. 28.7.14, 35.1.22, 35.1.62, 35.1.63, 35.1.64, 35.1.72; Code 6.40.1.


The Roman attitude was imported into the English law, but the nature of the public interest to be protected has for the most part either been tacitly assumed or ignored by the English courts. In one case the concern was asserted to be moral. Marriage, being a command of God, was not to be interfered with by any man. Licentiousness, it was said, would likely follow an uninhibited use of conditions which restrain marriage. On another occasion it was asserted that parental duties are violated by such conditions, which strip children of their just expectations.

In this country it has been asserted, in addition to the moral factor, that the welfare of society depends upon having well-assorted marriages, and that accordingly the freedom of choice of a mate should be protected.

The rules to achieve the end sought have been devised haphazardly. The problem has never excited sufficient interest to induce the thorough investigation necessary to get to the heart of it. Disagreements as to the nature of the public interest to be protected, conflicts and errors in the construction of these conditions and limitations, along with an undercurrent of resistance to any prohibition of marriage restraints, have produced a confusion possibly without parallel in the law.

Some attempt to clarify is desirable. New cases have come up steadily if not frequently, and perpetuation of the existing chaos would be a discredit to our tribunals. It is the purpose of this article to suggest, by a discussion of the origin and development of the marriage restraint rules in England and in this country, the reasons for the prevalent confusion in the cases, and to ascertain whether there are not possible bases for an ultimate agreement. An attempt will be made to summarize the existing state of the law in so far as any definite conclusions are warranted.

It seems desirable before discussing the cases to list the various rules governing marriage restraints which have been asserted by courts and writers to embody the law on this subject. It is disconcerting in this study to discover that what the courts take to be the law is not always made the basis of their decisions. To what extent the rules asserted do not explain the cases it is the purpose here to inquire. In

---

7 Maddox v. Maddox's Admr., 11 Grat. (52 Va.) 804 at 806 (1854). See quotation from case at note 86, infra.
no sense is the following list intended as the writer’s summary of the law.⁸

1. Conditions that a beneficiary shall not marry are contrary to public policy and illegal. (Such conditions are herein termed conditions in general restraint of marriage.)

2. Conditions restraining the remarriage of widows are exceptions to the first rule and are valid.

3. Conditions in partial restraint of marriage, i.e., those against marriage without the consent of specified persons, or against marriage before a certain age, against marriage with certain persons or classes, etc., are valid. (It is said that the partial restraint must be reasonable, otherwise it is illegal.)

4. Limitations of estates to widows so long as they remain widows (or during widowhood) or to single persons so long as they remain single are not conditions and are valid.

5. Conditions not to marry, when not accompanied by a gift over upon breach of the condition, are in terrorem and void (herein termed the in terrorem doctrine).

It will be necessary to examine in some detail the origin of these rules in the English cases. The circumstances of these origins may reveal factors which will aid in the appraisal of the worth of the rules in our system today.

I

THE ENGLISH CASES

The task of analyzing any part of early English testamentary law is made especially difficult by the unfortunate cleavage in the treatment of legacies and devises. Exclusive jurisdiction over legacies was vested

⁸It would be impracticable to cite all of the assertions in cases or texts to the effect that the rules mentioned represent the law of marriage restraints. It is not to be thought that there is complete agreement among the courts and writers upon all or any of these rules; but if the pertinent textual material and the bulk of court dicta are taken all together, the impression is left that the rules stated do represent the law. In no particular case in the following list of representative cases have all of the rules been laid down as listed by the writer here. Kennedy v. Alexander, 21 App. D. C. 424 (1903); Anderson v. Crawford, 202 Iowa 207, 207 N. W. 571 (1926); Dumey v. Schoeffler, 24 Mo. 170 (1857); Matter of Liberman, 279 N. Y. 458, 18 N. E. (2d) 658 (1939); Otis v. Prince, 10 Gray (76 Mass.) 581 (1858); Hogan v. Curtin, 88 N. Y. 162 (1882); Wooten v. House, (Tenn. Ch. App. 1895) 36 S. W. 932; Maddox v. Maddox's Admr., 11 Grat. (52 Va.) 804 (1854). ATKINSON, WILLS 352 (1937); 1 TIFFANY, REAL PROPERTY, 3d ed., § 197 (1939); 2 JARMAN, WILLS, 7th ed., 1496 (1930); 2 POMEROY, EQUITY JURISPRUDENCE, 4th ed., § 933 (1918); 2 PAGE, WILLS, 2d ed., § 1147 (1926).
in the ecclesiastical courts at about the beginning of the thirteenth century. This jurisdiction was later shared by the Court of Chancery. When devises of real estate received legal sanction in the Statute of Wills in 1540, they were administered by the common-law courts and by the Court of Chancery according to the rules of the common law.

The appearance of the marriage restraint doctrine in England is obscure. Any enlightenment upon the earliest treatment of the problem must be gathered from dicta in later cases, which unfortunately are often conflicting. It seems that the marriage restraint rules first appeared in the ecclesiastical courts. The canon law was based in great part upon the civil law, and in the treatment of marriage restraints the civil law was imported in toto. The rules of the church courts were applied also by chancery in dealing with legacies in order to maintain uniformity.

Since the ecclesiastical jurisdiction extended only to legacies, it was understood that nothing in the civil law was controlling in cases involving devises of real estate. It is difficult to ascertain, however, the attitude of the temporal judges, when unfettered by ecclesiastical precedents, toward marriage restraints. It is certain that they were not as receptive to the civil-law doctrine as their ecclesiastical brethren. Unfortunately there are few pronouncements of any common-law courts, and they are not very revealing. It is fairly well established, however,

10 3 id. 541 (1923); 1 id. 629 (1922).
14 In Low v. Peers, Wilm. 364, 97 Eng. Rep. 138 (1770), a contract in restraint of marriage was declared illegal, and in a dictum at page 375 it was indicated that there was some aversion to conditions in restraint of marriage at common law. In Long
that partial restraints at least were considered valid. Evidence as to the position taken by the English judges towards general restraints is conflicting. Perhaps no occasion ever arose for taking one position or the other. It seems probable that the marriage restraint doctrine in England was completely an importation from the civil law.

A thorough understanding of the development of the present marriage restraint doctrine requires separate treatment of the several rules.

A. General Restraints—The Condition-Limitation Distinction

It is assumed by many today that conditions in general or total restraint of marriage have always been illegal. It is surprising, therefore, to find that the English cases dealing with such conditions are conflicting and inconclusive. It is equally surprising to discover that there appears to have been but one reported decision upon the legality of general restraints until almost the middle of the nineteenth century. By the Roman law they were void in all cases. It was said that

v. Dennis, 4 Burr. 2052, 98 Eng. Rep. 69 (1767), Lord Mansfield, in a dictum at page 2055, stated that marriage restraints were odious and were to be strictly construed, and he recognized the applicability of the in terrorem doctrine under certain circumstances. In Williams v. Fry, 1 Mod. 86, 86 Eng. Rep. 752 (1760), a condition requiring consent to marry was construed to be a valid limitation. Valid limitations were also found in Page v. Hayward, 2 Salk. 570, 91 Eng. Rep. 481 (1705), and Hastings v. Douglas, Cro. Car. 343, 79 Eng. Rep. 901 (1634). In Perrin v. Lyon, 9 East 170, 103 Eng. Rep. 538 (1807), a condition against marrying a Scotchman was held valid, and not in terrorem, there being a gift over. (The great bulk of the early marriage restraint cases which have been reported were decided in chancery.)

Consider the references cited in note 8, supra. These are but representative. The cases, both English and American, are full of remarks to this effect, made more or less upon casual surveys of the problem.

v. Dennis, 4 Burr. 2052, 98 Eng. Rep. 69 (1767), Lord Mansfield, in a dictum at page 2055, stated that marriage restraints were odious and were to be strictly construed, and he recognized the applicability of the in terrorem doctrine under certain circumstances. In Williams v. Fry, 1 Mod. 86, 86 Eng. Rep. 752 (1760), a condition requiring consent to marry was construed to be a valid limitation. Valid limitations were also found in Page v. Hayward, 2 Salk. 570, 91 Eng. Rep. 481 (1705), and Hastings v. Douglas, Cro. Car. 343, 79 Eng. Rep. 901 (1634). In Perrin v. Lyon, 9 East 170, 103 Eng. Rep. 538 (1807), a condition against marrying a Scotchman was held valid, and not in terrorem, there being a gift over. (The great bulk of the early marriage restraint cases which have been reported were decided in chancery.)

16 See note 65, infra, for the common-law position as to conditions requiring consent to marry. All other partial restraints were valid by both civil and common law. (See notes 55, 56, and 57.)

17 See discussion immediately following.

18 Hastings v. Douglas, Cro. Car. 343, 79 Eng. Rep. 901 (1634), in which a gift during widowhood was construed to be a valid limitation and not a condition. In Marples v. Bainbridge, 1 Madd. 590, 56 Eng. Rep. 217 (1816), a condition against the remarriage of a widow was held to be in terrorem and void, there being no gift over.

this rule was applied by the church courts, and likewise in chancery, if
the condition were attached to a gift of a legacy.\footnote{20}

Of the early writers on the common law, only the author of Shep­
pard’s Touchstone has anything to say about marriage restraints, and a
statement appears there that general restraints were void,\footnote{21} although
it is not certain that the rule was not expressed to include legacies upon
condition. Dicta in two cases, \textit{Low v. Peers}\footnote{22} and \textit{Keily v. Monck},\footnote{23}
suggest that general restraints were void by the common law. On the
other hand, Lord Mansfield stated that conditions in restraint of mar­
riage were odious and were to be held to the utmost rigor and strict­
ness,\footnote{24} which leaves the inference that they must have been valid. In
a dictum in \textit{Hervey v. Aston},\footnote{25} it is definitely stated that there was
nothing in the English law against marriage restraints. Several dicta,
moreover, have appeared in cases since the beginning of the eighteenth
century which leave the impression that the adoption of the civil-law
rules by the church courts was responsible for any prohibitions which
might exist in England toward any kind of marriage restraint.\footnote{26} From
this conflict of opinion, no conclusive statement can be made regarding
the legality of general restraints by the early common law.

At this point, it is desirable to turn to another aspect of the prob­
lem in order that the more recent holdings on general restraints can
properly be appraised.

The origin of determinable fees and determinable life estates at
common law is somewhat obscure, but the determinable fee, at least,
was probably recognized before the thirteenth century.\footnote{27} It was under­
stood that such estates were to be distinguished from estates upon con­
dition subsequent. The distinction was observed because of the different
manner of termination of the two kinds of estates, the one ending auto­

\footnote{20} Horrell v. Waldron, 2 Freem. Ch. 83, 22 Eng. Rep. 1072 (1681); Stack­
pole v. Beaumont, 3 Ves. 89 at 96, 30 Eng. Rep. 909 (1796); Kelly v. Monck,
3 Ridg. Parl. Rep. (Ire.) 205 (1795). See also the general discussions in the cases
cited in note 12.
\footnote{21} SHEPPARD, TOUCHSTONE 132 (1648).
\footnote{22} Wilm. 364 at 375, 97 Eng. Rep. 138 (1770).
\footnote{24} Long v. Dennis, 4 Burr. 2052 at 2055, 98 Eng. Rep. 69 (1767).
\footnote{26} Stackpole v. Beaumont, 3 Ves. 89 at 97, 30 Eng. Rep. 909 (1796); Hervey
v. Aston, West T. Hard. 350 at 413, 25 Eng. Rep. 975 (1737); Re Dickson,
1 Sim. (N. S.) 37 at 44, 61 Eng. Rep. 14 (1850); Jones v. Jones, 1 Q. B. Div. 279 at
it is stated that a condition against marriage, attached to a fee simple estate, is valid.
\footnote{27} I SIMES, FUTURE INTERESTS, § 17 (1936).
matically, the other requiring re-entry for condition broken. The determinable estate was sometimes spoken of as an estate upon limitation, and the language defining the limitation came to be spoken of merely as a "limitation," in order to contrast it with language imposing the proviso or defeasance in an estate on condition subsequent, which was called a "condition." 28

It was natural that both were used in creating estates intended to terminate upon the marriage of the beneficiary. In the one case the dispositive instrument would contain the clause, "so long as he (or she) remains unmarried"; in the other it would be, "if he (or she) does not marry" or "in case he should marry" or "provided he does not marry." It may be difficult to understand how the distinction observed is relevant to the legality of these two kinds of clauses. Yet as early as the middle of the seventeenth century a bequest to a widow during her widowhood was held to create a limitation, the validity of which could not be questioned, since any policy which might exist against marriage restraints had to do with conditions. 29

Although this distinction was definitely of common-law origin, it came to be generally accepted and has been applied wherever possible both as to legacies and as to devises. 31 Only a few dissenting voices have been raised to question its substantiality. 32 Its application down to

28 See discussion in 2 BLACKSTONE, COMMENTS 155-157 (1756), and SHEPPARD, TOUCHSTONE 118 (1648).
30 The writer is not prepared to say whether there was anything in the Roman law comparable to this distinction or not; but it was never used, in so far as available materials show, as a basis for determining the legality of marriage restraints, either in the Roman or canon law. In Low v. Peers, Wilm. 364, 97 Eng. Rep. 138 (1770), the court at page 376 said that the Roman "modus" was comparable to the English limitation.
the present has placed a severe limitation upon the operation of the rules against marriage restraints.

A few efforts were made to give some substance to the distinction. In *Morley v. Rennoldson* the court said,

"where property was limited to a person until she married, and when she married then over, the limitation was good. It is difficult to see how this could be otherwise, for in such a case there is nothing to give an interest beyond marriage."

Less technical and more significant statements appear in two other earlier cases. In *Scott v. Tyler* this dictum appears,

"according to Godolphin, the use of a thing may be given during celibacy; for the purpose of intermediate maintenance, will not be interpreted maliciously to a charge of restraining marriage."

A similar but more elaborate justification for the distinction is offered in *Low v. Peers*, to the effect that a condition imports an intention to restrain marriage while the use of a limitation evidences only a desire to supply maintenance until marriage.

One suspects that the application of this distinction is an indication of the attitude of the English judges toward the Roman rule, and represents an effort to escape from it in all cases where the distinction could be applied. Color is added to this supposition by several cases where language which would normally import conditions was construed to create valid limitations.

In *Evans v. Rosser* there was a gift to the testator's son-in-law "during his natural life or marriage again," with a gift over "after the decease or marriage again" of the son-in-law. This ambiguous language was held to create a valid limitation. The court said,

"in all cases where you do not find the words of the precise kind which would import a strict condition, you are able to escape the difficulties which have sometimes been the occasion of embarrassment."
Webb v. Grace\textsuperscript{39} involved a contract to pay an annuity to a single woman subject to a proviso which declared that if the annuitant should marry, her annuity should be reduced by half. The court, making no distinction in this respect between a contract and a testamentary provision, found the provision to be a valid limitation. The explanation is given,

"There can be no doubt that marriage may be made the ground of a limitation ceasing or commencing. . . . There is [not] an unqualified grant of an annuity . . . for life, and an attempt to defeat the gift by an illegal condition subsequent. The contract and obligation is not absolute and unqualified, but explained, qualified, and bound by the proviso, and must be construed precisely in the same manner as if the terms of the proviso had been introduced into and made part of the contract and obligation."\textsuperscript{40}

By reasoning of this sort, conditions in restraint of marriage may be construed out of existence. First, a distinction is drawn between void conditions and valid limitations; then conditions are construed to be limitations.

From this point discussion of general restraints can be continued. The more recent cases upon general restraints fall roughly into two categories.

In Morley v. Rennoldson,\textsuperscript{41} a condition against marriage attached to a bequest of personal property was held void. The decision was made regretfully, since the court believed that the rule was imported from the Roman law and was not well adapted to English society. The court did not question, however, that the rule applied was the law of England at that time, although no authorities were cited. Three other cases were decided by the same rule, all involving personal bequests.\textsuperscript{42} In Bellairs v. Bellairs\textsuperscript{43} the gift was of income from a fund created by the sale of real and personal property. The court found that in such a case the rule applicable to personal legacies is to be applied, which, it was said, is the rule originating in the civil law, and according to which the condition was void.

If limitations are to be upheld because they evidence an intention

\textsuperscript{39} 2 Phil. 701, 41 Eng. Rep. 1114 (1848).
\textsuperscript{40} Id. 2 Phil. at 702, 703.
\textsuperscript{41} 2 Hare 570, 67 Eng. Rep. 235 (1843).
\textsuperscript{42} Lloyd v. Lloyd, 2 Sim. (N. S.) 255, 61 Eng. Rep. 338 (1852); Bellairs v. Bellairs, L. R. 18 Eq. Cas. 510 (1874); Re Bellamy, 48 L. T. 212 (1883).
\textsuperscript{43} L. R. 18 Eq. Cas. 510 (1874).
only to provide maintenance until marriage, then it is an easy step to
the proposition that conditions likewise should be enforced where it
appears that testators, in using them, do not intend to restrain marriage.
The second category of cases exemplifies this proposition.44

_Potter v. Richards_45 and _In re Hewett_46 both dealt with gifts to
single women by whom the respective testators had had illegitimate
children, forfeiture in whole or in part being provided for in case the
beneficiaries should marry. In the latter case, the latest English decision
on general restraints, the court construed the language to be a limita­
tion, upon the authority of _Webb v. Grace_. The court, however, was
not willing to place its decision upon that ground alone, and in fact
disparaged the condition-limitation distinction with the remark that a
wanton restraint on marriage could be accomplished as easily by one
form of words as the other. The court added that a condition in re­
straint of marriage is prima facie void, but concluded,

_"The real question seems to be whether the testator intended to
restrain marriage or not."_47

The presumption of illegality was overcome, very easily it seems, by
the finding that no intention to restrain existed. _Potter v. Richards_
was cited as authority.

_In Potter v. Richards_ the testator stated in his will that, if the
mother married, their child would likely be neglected. The court de­
cided that, since the child’s welfare prompted the use of the condition,
this was no wanton restraint of marriage, and was valid. Most assuredly
the testator here intended to restrain the marriage of his child’s mother.
The decision, then, must have been based upon the fact that behind
the intention was a motive, based on parental obligation, which seemed
to make the restraint justified.

_Jones v. Jones_48 contained an ordinary condition against the mar­
riage of a single woman. Here, too, the condition was enforced. The
condition was attached to a devise of real property, and the court de­
clared that the rules pertaining to legacies had no application. It was
decided that by the common law, which is applicable to devises, the
condition is against public policy only when the object is to promote

44 Potter v. Richards, 24 L. J. (N. S.) (Ch.) 488 (1855); Jones v. Jones, 1
Q. B. Div. 279 (1876); In re Hewett, [1918] 1 Ch. 458.
45 24 L. J. (N. S.) (Ch.) 488 (1855).
46 [1918] 1 Ch. 458.
47 Id. at 467, quoting Jones v. Jones, 1 Q. B. Div. 279 at 281 (1876).
48 1 Q. B. Div. 279 (1876).
celibacy. No such object was found, and so the situation was said to be the same as though the testator had used a limitation. There is nothing in the report of the case to suggest upon what this conclusion was based. There seems to be something in the nature of a presumption in these cases against the presence of the unlawful intention.

B. Conditions Against Remarriage

Although conditions restraining the remarriage of widows are general restraints, they have always received separate treatment. The Romans exempted the case of widows from their rule against general restraints, and the English decisions, with one exception, have done the same. The position taken in several of these cases is that the testators had the interests of their children foremost in their minds, that a remarriage of their widows would prejudice those interests, and so the restraint in such cases is justified. It seems to have been overlooked that if the forfeited property is given over to a third person when such a condition is enforced, the result is hardly the best provision for the needs of the children.

In Allen v. Jackson the rule was extended to the case of a surviving husband. The reason given for enforcing the condition was that if the husband remarried he would likely neglect his first family.

Suppose there are no children with interests to be protected by restraining the widow's remarriage. Probably the condition would still be upheld. In Newton v. Marsden the court did not place its decision primarily upon the ground of protecting the children. Rather the court said that there was no authority in the common law, independently of the civil law, for finding such a condition void. (In fact, such conditions were not void even by the civil law.) The court then said that it was not anxious to carry the rule against marriage restraints beyond the old authorities. No objection was found to the condition upon principle since, it was said, a widow always has the option of marrying and giving up the bounty. The latter argument is significant, for it may be

---

49 Code 6.40.1; 1 ROBY, ROMAN PRIVATE LAW 317 (1902); WOOD, A NEW INSTITUTE OF THE IMPERIAL OR CIVIL LAW 26 (1704).


51 1 Ch. Div. 399 (1874).

applied to any kind of marriage restraint. It has, in fact, been adopted by several American courts to sustain all marriage conditions.\textsuperscript{58}

\textit{Marples v. Bainbridge}\textsuperscript{54} is the only case contra. It represents the only backwash upon the persistent current in the English cases away from the original civil-law marriage-restraint rules. A condition upon a gift to a widow that she remain unmarried was held void, in the absence of a gift over on breach of the condition. The condition-limitation distinction was repudiated as being “too refined.” This is the only English case in which the \textit{in terrorem} doctrine was applied to a general restraint. It stands alone, and is likely to remain so; it has not been referred to in any other case.

\textbf{C. Partial Restraints—The \textit{In Terrorem} Doctrine}

It seems to have been of much concern to the families of the English nobility that their children make suitable matches. The great majority of the English marriage-restraint cases have dealt with conditions requiring beneficiaries to obtain consent to marry. The results in these cases can be understood only by considering that remarkable rule now referred to as the \textit{in terrorem} doctrine. Apart from it, the courts have been favorably disposed toward partial restraints, of whatever character. Conditions against marrying a particular person or into a particular class were not uncommon, and were enforced upon several occasions.\textsuperscript{55} In one case the court held valid a condition against marrying before the age of twenty-one.\textsuperscript{56} In two cases, one recent, involving conditions requiring consent to marry, it was held that if a breach imposes only a partial forfeiture upon the beneficiary, that is, if he is provided for in either event, the condition is valid.\textsuperscript{57} Only in one case has a partial restraint been held void upon grounds of public policy. In that case, \textit{In re Lanyon},\textsuperscript{58} the condition was against marriage with a blood relation. Since the court believed that it would be almost impossible to know who was not one’s blood relation, the condition was found to impose a probable prohibition of marriage, a total re-

\textsuperscript{58} Cf. note 99, infra.
\textsuperscript{54} I Madd. 590, 56 Eng. Rep. 217 (1816).
\textsuperscript{57} Gillet v. Wray, 1 P. Wms. 284, 24 Eng. Rep. 390 (1715); In re Nourse, [1899] 1 Ch. 63.
\textsuperscript{58} [1927] 2 Ch. 264.
constraint, which was void. It is interesting to note that none of the cases which have enforced total restraints were cited. Possibly they were overlooked, for the court assumed that total restraints were illegal. Probably they were not thought pertinent, as they would not have been, since it could not be asserted here either that the provision was a limitation or that the testator did not intend to restrain marriage.

In two cases gifts were made in remainder to beneficiaries upon condition that they be unmarried at the time of the death of the life tenants. The conditions were upheld, but not upon the courts' determination of their legality. In one case the condition was sustained because it was a condition precedent, and, in the court's belief, subject to different requirements from a condition subsequent. In other words, a condition precedent must be performed if the beneficiary is to take, without regard to its legality. The other case seems to go on the same basis, although the court spoke of the provision as a limitation. Although one of the cases cited involved a bequest of personal property, this rule is of common-law origin, and represents the attitude of the common-law courts toward conditions precedent generally.

The origin of the in terrorem doctrine was discussed by this writer on a previous occasion. A summary of that discussion will suffice for the present purposes.

By the civil law all conditions requiring consent to marry were considered as mere evasions of the rule forbidding general restraints, and were accordingly held void. On the other hand, the English judges were disposed to enforce that due regard for parental dictates in the choice of mates upon which the English social structure of that day depended, and accordingly looked with favor upon such conditions. The Court of Chancery came to deal with conditions requiring

64 Dig. 35.I.72(4).
65 There are no reported cases in which the legality of these conditions was expressly passed upon by the common-law courts. But see the cases cited in note 14, supra, in which these conditions were declared to be valid limitations by common-law courts. Also in several chancery cases, involving devises of real estate, the conditions were enforced. [In one of these cases, Fry v. Porter, 1 Mod. 300, 86 Eng. Rep. 898 (1671), the condition was expressly declared to be valid.] In these chancery cases, Sheriff v. Morlock, W. Kel. 23, 25 Eng. Rep. 476 (1731), and Long v. Ricketts, 2
consent to marry in cases involving both legacies and devises. In dealing with legacies, it felt obliged to apply the civil or canon-law rule, in order to maintain uniformity of treatment. It was generally recognized, however, that the canon law was not controlling in dealing with devises, and the chancery judges, favoring consent-to-marry conditions, were not disposed to make an exception of them. But this left the court in an embarrassing predicament, in which it might be necessary to declare the same condition both legal and illegal in the same case, if that case involved both a legacy and a devise upon a condition requiring consent to marry. The way the court took out of this difficulty is very interesting, to say the least.

It appears that the church courts sometimes enforced consent-to-marry conditions when the property was given over, upon breach, to "pious uses." Perhaps this exception to the prohibition imposed by the church courts stimulated the imagination of the judges of the Court of Chancery. At any rate, it finally came about that this condition was enforced when dealing with devises; but in dealing with legacies, attention was diverted from the problem of legality by converting it into a problem of construction. If the condition requiring consent to marry were not followed by a gift over on breach, it would be presumed that the testator intended the condition to operate only in terrorem, that is, to be inoperative except in its ability to induce performance by a beneficiary who might not know that it was void.

Sim. & St. 179, 57 Eng. Rep. 313 (1824), it was held that the devises did not vest because of breaches of conditions precedent. The validity of the conditions was assumed, for the courts were aware that if personality had been involved and the civil-law rules had been applicable, the conditions would have been void (in the absence of gifts over). Long v. Dennis, 4 Burr. 2052, 98 Eng. Rep. 69 (1767), a King's Bench case, involved a devise upon a consent-to-marry condition. Lord Mansfield stated that it was a condition precedent and must have been performed before the devisee could take; but the court found that the condition had not been breached. Strangely enough, Lord Mansfield, in a dictum at 2055, stated that if the condition had been subsequent, it would have been void under the in terrorem doctrine. This is the only case in which that doctrine was recognized as being applicable to devises of real estate.


But if a gift over were added, it was felt necessary to conclude that the testator meant what he said, and the condition was enforced. A testator's real intention was, of course, never sought; and the violence of the presumption led some to say that the court was merely applying the civil-law rule in dealing with legacies except in those cases when to do so would defeat the interest of the legatee over. Actually the presumption about the testator's intention was merely a device to preserve some semblance of consistency between cases where the common-law and cases where the civil-law rules were applied.

It is not to be thought that this fantastic rule was ever recognized as a satisfactory solution of the conflict over the legality of consent-to-marry conditions. Several cryptic comments were dropped by early judges who, nevertheless, did not find that their views warranted


overthrowing the precedents. Limitations, however, were placed upon the doctrine. It did not apply, of course, to devises. In a number of cases it was held inapplicable to conditions precedent. This result was probably reached by an application of the common-law principle that a condition precedent must be performed if the beneficiary is to take, regardless of the validity of the condition, and probably was adopted in cases involving legacies as a means to escape from the in terrorem doctrine. In two cases the doctrine was repudiated.

The vicious nature of the rule, apart from its irrationality, is that, being a rule of construction on its face, it can find its way into cases not involving marriage restraints. This has, in fact, happened. More attention has been paid to it by the American courts in dealing with conditions restraining the contest of wills than in marriage restraint cases.

The activity in England over the in terrorem doctrine occurred in the seventeenth and eighteenth centuries. There have been no cases which applied it since the beginning of the nineteenth century. Four cases since then, however, have recognized it as applicable under proper

---

10 "I do not find it was ever seriously supposed to have been the testator's intention to hold out the terror of that which he never meant should happen." Scott v. Tyler, Dick. 712 at 718-719, 21 Eng. Rep. 448 (1788).

11 "... a clause can carry very little terror which is judged to be of no effect." Lord Mansfield in Long v. Dennis, 4 Burr. 2052 at 2055, 98 Eng. Rep. 69 (1767).

12 "... It [the in terrorem doctrine] is one of the points, that occurred to the Judges sitting here to deliver them from the difficulty arising from the rule of the civil law, adopted without seeing the ground and the reason of applying it to this country under different circumstances." Stackpole v. Beaumont, 3 Ves. 89 at 98, 30 Eng. Rep. 909 (1796).

13 "... The old notion of the condition of consent being annexed in terrorem only where there is not a bequest over seems not reconcilable to any sound principle of Equity." Kelly v. Monck, 3 Ridg. Parl. Rep. 205 at 247 (1795).

14 The cases cited in notes 65 and 66, supra, may be cited for this proposition.


16 See p. 1300, supra.


circumstances. It is doubtful what attitude would be taken toward it today.

D. Conclusion

Can it be said, upon the basis of the above considerations, that conditions in restraint of marriage are illegal in England? The conflicts in the cases at many points make conclusions insecure. The courts are not unaware of these conflicts. One court went so far as to say,

"The authorities stand so well ranged, that the Court would not appear to act too boldly, whichever side of the proposition they should adopt. . . ."

Keeping this appraisal of the cases in mind, some conclusions may be ventured.

Legality seems to be the rule, in fact; illegality the exception. Little heed should be paid to the frequent lip-service to the rule that all conditions in general restraint of marriage are illegal. Partial restraints are legal, except in rare cases where in operation the restraint is general, and excluding the effect of the in terrorem doctrine, which is not founded upon public policy. General restraints in the form of limitations, rather than conditions, are valid. It can be expected, upon occasion, that general restraints in the form of conditions will be construed to be valid limitations. Marriage restraints in the form of conditions precedent are operative to defeat the estate given unless they are observed, whether they are legal or illegal. General restraints upon widows or widowers are valid. General restraints in the form of conditions subsequent upon single persons are subject to two conflicting rules. Under one, the condition is illegal; but it is doubtful whether this rule applies to devises of real estate, and it is likely to be supplanted entirely by the second rule, under which the most recent cases have been decided. Under the second rule, applicable to both legacies and devises, the condition is valid if the testator did not intend to restrain marriage. It would seem, moreover, that there is almost a presumption in such a case that the testator did not so intend. Even where he did, if his motive was the protection of the interests of his children, the condition may be upheld. In short, assuming that a condition will be construed to be a condition and that an intention to restrain will be

76 Re Dickson, 1 Sim. (N. S.) 37, 61 Eng. Rep. 14 (1850); Duddy v. Gresham, 39 L. T. 48 (1878); In re Nourse, [1899] 1 Ch. 63; In re Hanlon, [1933] Ch. 254.

found only where the evidence warrants it, no condition in general
restraint of marriage will be illegal unless it is imposed upon a single
person, is in the form of a condition subsequent, and perhaps not then
unless the testator intended to restrain marriage.

II

THE AMERICAN CASES

The influence of the English law in the American cases is unmistakable. Constant reference is made to the English cases themselves, and
the rules applied bear too close a resemblance to their English counter­
parts to be mere coincidence. A striking feature of the American cases
is the scarcity of any independent analyses of the problem.

It is unnecessary to remind anyone who is familiar with the com­
plexities of the English rules that if an American court undertook to
make much use of the English precedents, it would have to tread cau­
tiously through the maze. The English cases can be used to advantage
only after rather thorough analysis. It is equally obvious that few
courts are in a position to afford such an analysis. One approaches the
American cases, therefore, with misgivings. If any consistency can be
found in the English cases, it is in their resistance to the civil-law rules
and in their ingenious efforts to depart from them. But no partial
analysis will reveal this tendency. The American courts, often without
the benefit of an independent attitude toward restraints of marriage,
have in many cases taken whatever English precedents were most
convenient, and have reached unsatisfactory results.

The crying need today is for a re-examination of the problem upon
principle, to ascertain just what the public interest in this country
demands.

In undertaking a study of the American rules, one is faced at the
outset with the existence of hundreds of cases involving marriage con­
ditions and limitations about which no question of legality was raised.
In all of them decisions were reached or statements made which took
the legality of the conditions or limitations for granted. Most of these
cases involved limitations to widows so long as they remained widows,
or the equivalent; but many involved conditions against the remar­
riage of widows and even conditions and limitations upon gifts to single

78 In Mann v. Jackson, 84 Me. 400 at 403, 24 A. 886 (1892), the court said,
"The more we read, unless we are very careful to distinguish, the more we shall be
confounded."
persons. These cases must be accorded some weight, at least in jurisdic-
tions where the legality of marriage restraints has not yet been passed
upon. It would be impracticable to cite them all in this article; 79 but
one should take note of their existence; and in those states which do
not have cases dealing expressly with the marriage-restraint problem,
one should consider their possible effect before concluding that the
question is still open.

A. General Restraints

The American decisions upon conditions in general restraint of
marriage are as inconclusive as the English. The categorical statement
often made that such conditions are illegal 80 is not warranted.

Several unqualified decisions holding the conditions illegal have,
however, been made. 81 Two of these cases cannot now be accorded much
weight, since other decisions in those jurisdictions have taken a differ-
ent turn. 82 A condition was struck out in a Kentucky case, but the court
in an abstract opinion gave no explanation of the reason why. 83 Only in
one state, Missouri, has any assessment been taken of the public in-
terest which demands this result. In the leading case in that state,
Williams v. Cowden, 84 the court declared,

79 The following cases are only representative: Gifts to widows upon limitation—
Wiltfang v. Dirksen, 295 Ill. 362, 129 N. E. 159 (1920); In re Schriever's Estate,
227 N. Y. 268, 116 N. E. 995 (1917); Inman v. Inman, 125 N. J. Eq. 160, 4 A.
(2d) 1 (1938); Kidd's Estate, 293 Pa. 21, 141 A. 644 (1928); Haab v. Schnee-
berger, 147 Mich. 583, 111 N. W. 185 (1907). Gifts to widows upon condition—
 Vaughn v. Converse, 184 Iowa 891, 169 N. W. 144 (1918); Hutter v. Crawford,
225 Ky. 215, 7 S. W. (2d) 1043 (1928); Cummings v. Lohr, 246 Ill. 577, 92
N. E. 970 (1910); Ostrander v. Muskegon Finance Co., 230 Mich. 310, 202 N. W.
951 (1925); Fidelity Trust Co. v. Bobloski, 228 Pa. 52, 76 A. 720 (1910). Gifts
to single persons upon limitation—Miller v. Wall, 216 Ala. 448, 113 So. 501 (1926);
Furbee v. Furbee, 49 W. Va. 191, 38 S. E. 511 (1901); Thornquist v. Oglethorpe
Lodge, 140 Ga. 297, 78 S. E. 1086 (1913). Gifts to single persons upon condition:
Denfield, Petitioner, 156 Mass. 265, 30 N. E. 1018 (1892); Fawver v. Fawver, 6
Grat. (47 Va.) 236 (1849).

80 See cases and texts cited in note 8, supra, for representative statements.

81 Crawford v. Thompson, 91 Ind. 266 (1883); Williams v. Cowden, 13 Mo.
211 (1850); Knost v. Knost, 229 Mo. 170, 129 S. W. 665 (1910); Sullivan v.
Garesche, 229 Mo. 496, 129 S. W. 949 (1910); In re Catlin, 97 Misc. 223, 160
N. Y. S. 1034 (1916); Middleton v. Rice, 4 Clark (Pa.) 7 (1845); Goffe v. Goffe,
37 R. I. 542, 94 A. 2 (1915).

82 Cf. Robinson v. Martin, 200 N. Y. 159, 93 N. E. 488 (1910), infra at note
94, with In re Catlin, 97 Misc. 223, 160 N. Y. S. 1034 (1916); and cf. Common-
wealth v. Stauffer, 10 Pa. 350 (1849), infra, p. 1310, with Middleton v. Rice, 4 Clark
(Pa.) 7 (1845).

83 Shelby County Trust Co. v. Howell, 16 Ky. L. Rep. 30 (1894).

84 13 Mo. 211 at 213 (1850).
"Upon the general proposition, the preservation of domestic happiness, the security of private virtue, and the rearing of families in habits of sound morality and filial obedience and reverence, are deemed to be objects too important to society, to be weighed in the scale against individual or personal will. In this case, it need scarcely be more specifically intimated, that the clause in question, however well intended, virtually presented and held up a continued reward for that species of immorality to avert which the institution of marriage was so divinely ordained and has been so wisely upheld."

More recent decisions in that state have followed this decision. 85

It is interesting to compare the above quotation with a statement made in an early Virginia case, *Maddox v. Maddox's Administrator.* 88

The decision there was not upon the legality of general restraints, but the language quoted below was uttered by way of dictum.

"It will not be questioned that marriages of a suitable and proper character, founded on the mutual affection of the parties, and made upon free choice, are of the greatest importance to the best interests of society, and should be by all proper means promoted and encouraged. The purity of the marriage relation and the happiness of the parties will, to a great extent, depend upon their suitableness the one for the other, and the entire freedom of choice which has led to their union; and upon these, in their turn, in a great degree must depend the successful rearing of their children, and the proper formation and development of their character and principles. Hence not only should all positive prohibitions of marriage be rendered nugatory, but all unjust and improper restrictions upon it should be removed, and all undue influence in determining the choice of the parties should be carefully suppressed."

Along with these cases must be considered others which have subjected the rule against general restraints to qualifications or have rejected it altogether.

It was inevitable that the *in terrorem* doctrine would come into the American law. It recommends itself too well to courts who wish to avoid or postpone consideration of the trying problem of legality of marriage restraints. It has, in fact, been applied in this country as fre-


88 *II Grat. (52 Va.)* 804 at 806-807 (1854).
quently as in England, usually in cases involving general restraints. The extension of the doctrine in this country will not receive separate or extended treatment here. It will suffice merely to refer to it where it has intruded to confuse the issues of the problem under discussion.

Accordingly, attention must be called to decisions in several states in which the *in terrorem* doctrine has been applied in cases involving general restraints where the testators provided no gifts over to take effect upon breach of the conditions. In one case the doctrine was applied strictly as a rule of construction, the absence of a gift over showing, in the court's belief, an intention that no forfeiture should occur. Similarly, in dicta in two other cases the courts merely declared that the condition is valid if there is a gift over, but invalid if not. Some American courts, however, have associated the words "*in terrorem*" with the illegality of a condition, and have used the words merely to designate an illegal condition without any thought of the technical aspects of the doctrine. Others, with something of the same idea in mind, and yet perceiving the significance of the gift over in the connotation of the term as used in the English cases, have declared that general restraints are illegal, subject, however, to the exception that even an illegal condition cannot be relieved against if there is a gift over to another upon breach. It is not observed by any of the American courts that the doctrine was not applied by the English courts to general restraints. This exception to the rule against general restraints is a very material limitation upon it; in more cases than not, gifts over will be found.

A more significant qualification of the rule against general restraint conditions is the acceptance by some courts of the principle, discussed above in connection with the English cases, that the condition is not

67 Randall v. Marble, 69 Me. 310 (1879) (deed); Otis v. Prince, 10 Gray (76 Mass.) 581 (1858); Gard v. Mason, 169 N. C. 507, 86 S. E. 302 (1915) (deed); Cook's Estate, 3 Phila. 60 (1858). The beneficiaries in these cases were single persons. The application of the *in terrorem* doctrine to conditions against the remarriage of widows is considered below at pp. 1312-1313.

68 Randall v. Marble, 69 Me. 310 (1879) (deed).

69 Crawford v. Thompson, 91 Ind. 266 at 275 (1883); Chapin v. Cooke, 73 Conn. 72 at 78, 46 A. 282 (1900).

70 Bennett v. Packer, 70 Conn. 357, 39 A. 739 (1898); Holmes v. Field, 12 Ill. 424 (1851); Harmon v. Brown, 58 Ind. 207 (1877); Anderson v. Crawford, 202 Iowa 207, 207 N. W. 571 (1926).

71 Otis v. Prince, 10 Gray (76 Mass.) 581 (1858); In re Miller's Will, 159 N. C. 123, 74 S. E. 888 (1912); Gard v. Mason, 169 N. C. 507, 86 S. E. 302 (1915) (deed); Griffin v. Doggett, 199 N. C. 706, 155 S. E. 605 (1930); Cook's Estate, 3 Phila. 60 (1858). Cf. Selden v. Keen, 27 Grat. (68 Va.) 576 (1876).
illegal if the testator did not intend to restrain marriage. In one of these cases the court took the interesting position that the omission of a gift over showed the absence of an intention to restrain marriage. Another unusual position was taken in the New York case, *Robinson v. Martin,* involving a gift to the testatrix's "unmarried daughters." The court said that no condition was involved and that there was no evidence of any intention to restrain marriage. The testatrix merely made a distinction, it was said, between her daughters as conditions existed at the time the gift took effect; and, no intention to restrain being present, no attention was to be paid to the possible effect of the gift upon the daughters' conduct.

Several Pennsylvania cases have held that the rule against marriage restraints has no application where devises of real estate are involved, following the English decision, *Jones v. Jones.*

A few courts, by way of dicta, have asserted that a condition precedent will prevent vesting of a gift unless observed, whether the condition is illegal or not. This position is discussed at more length below.

Last in order in this survey of general restraints are those cases in which the courts have declared that conditions in general restraint of marriage are not illegal.

In two cases the position was taken that a condition against marriage imposes no obligation upon the beneficiary, such as in a contract not to marry, and since the beneficiary is left free to do as he pleases,

---

92 Mann v. Jackson, 84 Me. 400, 24 A. 886 (1892); Harlow v. Bailey, 189 Mass. 208, 75 N. E. 259 (1905); Graydon's Exrs. v. Graydon, 23 N. J. Eq. 229 (1872); Trenton Trust & Safe Deposit Co. v. Armstrong, 70 N. J. Eq. 572, 62 A. 456 (1905); Robinson v. Martin, 200 N. Y. 159, 93 N. E. 488 (1910); Holbrook's Estate, 213 Pa. 93, 62 A. 368 (1905); Selden v. Keen, 27 Grat. (68 Va.) 576 (1876). In Meek v. Fox, 118 Va. 774, 88 S. E. 161 (1916), the condition was declared void, but the court indicated that the decision would have been otherwise if the testator had not intended to restrain marriage. The court declared that there is a presumption that one using a condition in restraint of marriage intends to restrain marriage, and the burden is upon the one who asserts the contrary to prove it.


94 200 N. Y. 159, 93 N. E. 488 (1910).

95 McCullough's Appeal, 12 Pa. 197 (1849); Cornell v. Lovett's Exr., 35 Pa. 100 (1860); Lancaster v. Flowers, 9 Pa. Dist. 241 (1900).

96 1 Q. B. Div. 279 (1876). See supra, at note 48.

97 Crawford v. Thompson, 91 Ind. 266 (1883); Phillips v. Ferguson, 85 Va. 509, 8 S. E. 241 (1888); Maddox v. Maddox's Admr., 11 Grat. (52 Va.) 804 (1854).

98 See discussion of the effect of illegality at p. 1331 ff., infra.
the policy against restrictions upon marriage cannot be violated.\textsuperscript{99} In the words of one court,

"but a gift on condition not to marry leaves the donee free as air
to do anything, at pleasure, but to divert it to uses for which it
was not intended."\textsuperscript{100}

In the case just quoted from, \textit{Commonwealth v. Stauffer}, the court
did not confine its position to the proposition quoted, but declared that
public policy does not require the nullification of conditions in restraint
of marriage. This is one of the leading cases, and one of the earliest,
and has been referred to many times, usually however, as standing for
the validity of conditions against the remarriage of widows. The case
did involve a remarriage condition, but the court did not place its de-
cision upon any distinction between such conditions and others; and
the case must be taken to stand for the proposition that no condition
should be defeated because it is restrictive of marriage. In this case is
to be found one of the few inquiries that have been made in this coun-
try into the origin of the marriage-restraints rules. The court per-
ceived that those rules were of Roman origin and found them to be
unnecessary in modern society. It must have taken some imagination
for a court in 1849 to declare that overpopulation might become as
great an evil in this country as depopulation was in ancient Rome. No
moral principle was discussed, and apparently none was perceived. The
\textit{in terrorem} doctrine was not mentioned, the condition-limitation dis-
tinction was repudiated; hence the decision rests upon policy considera-
tions alone.\textsuperscript{101}

\textbf{B. Conditions Against Remarriage}

The largest part of the American cases deal with conditions against
remarriage, usually of widows, sometimes of widowers. Apart from the
effect of several statutes, there is more agreement here than elsewhere.
These conditions have been generally upheld,\textsuperscript{102} the only significant

\textsuperscript{99} Chapin v. Cooke, 73 Conn. 72, 46 A. 282 (1900); Commonwealth v. Stauffer, 10 Pa. 350 (1849).
\textsuperscript{100} Commonwealth v. Stauffer, 10 Pa. 350 at 355 (1849).
\textsuperscript{101} This decision was followed in McCullough's Appeal, 12 Pa. 197 (1849). Dictum in Holbrook's Estate, 213 Pa. 93 at 95; 62 A. 368 (1905), recommends the complete abandonment of any marriage restraint prohibition.
\textsuperscript{102} Vaughn v. Lovejoy, 34 Ala. 437 (1859); Helm v. Leggett, 66 Ark. 23, 48 S. W. 675 (1898); Jones v. Jones, 1 Colo. App. 28, 27 P. 85 (1891); Chapin v. Cooke, 73 Conn. 72, 46 A. 282 (1900); Wilmington Trust Co. v. Houlehan, 15 Del. Ch. 84, 131 A. 529 (1925); McGinnis v. Foster, 4 Ga. 377 (1848); Snider
divergence being in the application of the *in terrorem* doctrine. The position generally taken is that any policy against marriage restraints, if it exists, does not extend to the second marriage. Several reasons have been given for this. Some courts have spoken of a husband’s having an interest in his wife’s viduity;¹⁰⁸ but the nature of such an unusual interest is not explained. One court declared that “widows are praiseworthy that content themselves with one husband, as being a pattern of chastity and modesty.”¹⁰⁴ In a recent case, the court said,

“If there be any element of public policy involved in such an imagined instance, it is against the encouragement of the marriage of a widow and another who would be affected by the circumstances of an imminent loss of the property.”¹⁰⁵

This would make a forceful argument for the support of any kind of marriage condition. A somewhat different justification was offered bluntly in *Commonwealth v. Stauffer*,¹⁰⁶

“It would be extremely difficult to say, why a husband should not be at liberty to leave a homestead to his wife, without being compelled to let her share it with a successor to his bed, and to use it as a nest to hatch a brood of strangers to his blood.”

The interests of a testator’s children, and the likelihood that they might not be so well cared for after their mother’s remarriage, have been influential factors in upholding conditions of this type; but


¹⁰⁸ Vaughn v. Lovejoy, 34 Ala. 437 (1859); Wilmington Trust Co. v. Houlehan, 15 Del. Ch. 84, 131 A. 529 (1925).

¹⁰⁶ Dumey v. Schoeffler, 24 Mo. 170 at 173 (1857).


¹⁰⁶ 10 Pa. 350 at 355 (1849).
there is nothing to indicate that the rule depends upon the presence of children. Probably in this country, as in England, the position was taken because of the absence of authority for invalidating marriage conditions when applied to widows.

In several cases the distinction between restraints upon the marriage of single persons and of widows was repudiated and the remarriage conditions were held void. In one case the court refused to enforce the condition, without giving reasons. In another case the court based its decision in part upon the fact that the condition was imposed upon one not the testator's widow. This is the only case in which such a distinction has been made. If a remarriage condition is to be sustained merely because of the interests of a widow's children, this distinction may have some basis. Of course, it might be argued that a testator who was not the husband of the beneficiary might justifiably wish to benefit the latter only if the interests of her children were not sacrificed thereby. At any rate, the general belief is that there never has been any objection to restraining the second marriage. In this view, it is of no consequence that the testator and beneficiary are not husband and wife.

Statutory limitations upon the use of restraints upon marriage are discussed below.

In a number of cases the influence of the *in terrorem* doctrine can be observed. In several of these cases the distinction between widows and single persons was ignored and the condition found to be illegal, with the admission, however, that an exception would be made if a gift over were present. This parallels the treatment given the doc-

107 Crawford v. Thompson, 91 Ind. 266 (1883); Kennedy v. Alexander, 21 App. D. C. 424 (1903); Binnerman v. Weaver, 8 Md. 517 (1855); Waters v. Tazewell, 9 Md. 291 (1856), involving a condition in a deed; Middleton v. Rice, 4 Clark (Pa.) 7 (1845); Stroud v. Bailey, 3 Grant's Cases (Pa.) 310 (1861).


109 Crawford v. Thompson, 91 Ind. 266 (1883).

110 In the following cases such conditions were upheld: Anderson v. Crawford, 202 Iowa 207, 207 N. W. 571 (1926); Wise v. Crandall, (Mo. 1919) 215 S. W. 245; Herd v. Catron, 97 Tenn. 662, 37 S. W. 551 (1896); Overton v. Lea, 108 Tenn. 505, 68 S. W. 250 (1902); Nunn v. Justice, 278 Ky. 811, 129 S. W. (2d) 564 (1939); Stauffer v. Kessler, 81 Ind. App. 436, 130 N. E. 651 (1924). In the English case, Newton v. Marsden, 2 J. & H. 356, 70 Eng. Rep. 1094 (1862), the matter was discussed at some length and the court concluded that the condition should be valid even though the beneficiary was not the testator's widow.

111 P. 1319 ff., infra.

112 Kennedy v. Alexander, 21 App. D. C. 424 (1903); Binnerman v. Weaver, 8 Md. 517 (1855); Waters v. Tazewell, 9 Md. 291 (1856) (deed); Stroud v. Bailey, 3 Grant's Cases (Pa.) 310 (1861).
trine as applied to general restraints upon single persons, noted in the section above. Similarly, three other cases took no position with reference to the remarriage condition other than to hold that the condition could not be enforced in the absence of a gift over.\textsuperscript{118} In a number of cases the condition was enforced, but the \textit{in terrorem} doctrine was recognized, several of the courts declaring that the decision would have been otherwise if there had been no gift over,\textsuperscript{114} and others referring to the presence of gifts over as one ground for upholding the conditions in the particular cases.\textsuperscript{115}

C. The Condition-Limitation Distinction

By the great preponderance of American authority, the distinction between conditions and limitations has been adopted, to the end, of course, that limitations of estates until marriage are valid, with respect to both widows and single persons.\textsuperscript{116} It has been said that no clause in

\textsuperscript{118} Parsons v. Winslow, 6 Mass. 169 (1810); M'Ilvaine v. Gethen, 3 Whart. (Pa.) 575 (1838); Hoopes v. Dundas, 10 Pa. 75 (1849).

\textsuperscript{114} Pringle v. Dunkley, 22 Miss. 16 (1850); Hickman v. Gethen, 46 Pa. 337 (1863); Estate of Hough, 13 Phila. 279 (1879); Kromer v. Estate, 22 Pa. Co. Ct. 327 (1899); Estate of Griffiths, 1 Lack. Leg. N. (Pa.) 311 (1895); McCloskey v. Gleason, 65 Vt. 264 (1883).

\textsuperscript{115} Wilmington Trust Co. v. Houlehan, 15 Del. Ch. 84, 131 A. 529 (1925); Snider v. Newsom, 24 Ga. 139 (1858); Gough v. Gough, 26 Md. 347 (1866); Cornwell v. Lovett's Exr., 35 Pa. 100 (1860); Langfeld's Estate, 4 Pa. Co. Ct. 84 (1886); Hughes v. Boyd, 34 Tenn. 511 (1855). In Crawford v. Thompson, 91 Ind. 266 (1883), the absence of a gift over was offered as one ground for holding the condition void.

\textsuperscript{116} Vaughan v. Lovejoy, 34 Ala. 437 (1859); Bradford v. Culbreth, (Del. 1939) 10 A. (2d) 534; Doyal v. Smith, 28 Ga. 262 (1859); Logan v. Hammond, 155 Ga. 514, 117 S. E. 428 (1923); Bruce v. Fogarty, 53 Ga. App. 443, 186 S. E. 463 (1936); Harmon v. Brown, 58 Ind. 207 (1877); Tate v. McLain, 74 Ind. 493 (1881); O'Harrow v. Whitney, 85 Ind. 140 (1882); Hibbits v. Jack, 91 Ind. 570 (1884); Wood v. Beasley, 107 Ind. 37, 7 N. E. 331 (1886); Sims v. Gay, 109 Ind. 501, 9 N. E. 120 (1886); Summit v. Yount, 109 Ind. 506, 9 N. E. 582 (1886); Beshore v. Lytle, 114 Ind. 8, 16 N. E. 499 (1887); Levengood v. Hoople, 124 Ind. 27, 24 N. E. 373 (1890); Nagle v. Hirsch, 59 Ind. App. 282, 108 N. E. 9 (1915); Thompson v. Patten, 70 Ind. App. 490, 123 N. E. 705 (1917); Anderson v. Crawford, 202 Iowa 207, 207 N. W. 571 (1926); Vance v. Campbell's Heirs, 31 Ky. 229 (1833); Coppage v. Alexander's Heirs, 41 Ky. 313 (1842); Charles v. Shortridge, 277 Ky. 183, 126 S. W. (2d) 139 (1939); Arthur v. Cole, 56 Md. 100 (1880) (deed); Maddox v. Yoe, 121 Md. 288, 88 A. 225 (1913); Ilams v. Shapiro, 138 Md. 16, 113 A. 343 (1921); Fuller v. Wilbur, 170 Mass. 506, 49 N. E. 916 (1898); Harlow v. Bailey, 189 Mass. 208, 75 N. E. 259 (1905); Ruggles v. Jewett, 213 Mass. 167, 99 N. E. 1002 (1912); Pringle v. Dunkley, 22 Miss. 16 (1850); Winget v. Gay, 325 Mo. 368, 28 S. W. (2d) 999 (1930); Trenton Trust & Safe Deposit Co. v. Armstrong, 70 N. J. Eq. 572, 62 A. 456 (1905); Irwin v. Irwin,
a will is of more frequent occurrence than a provision for widows during widowhood.\textsuperscript{117} The validity of the clauses has been so much assumed that in a majority of cases where they have appeared no question of legality has been mentioned.\textsuperscript{118} In most cases where a problem of legality was perceived, the courts accepted the distinction as a sufficient basis for decision without going behind it to reason why. One suspects that in many cases the distinction serves, like the \textit{in terrorem} doctrine, as a release from the embarrassing problem of legality. At the same time, the idea persists that a limitation expresses a purpose merely to provide for the beneficiary until marriage, and that therefore the distinction between a limitation and a condition is substantially related to any determination of legality. A group of cases have expressly taken this position.\textsuperscript{119} The courts in another group of cases, however, have declared that the distinction is purely technical and is irrelevant to any policy determinations.\textsuperscript{120} It is the opinion of these courts that marriage is as much restrained in the one case as in the other, and to hold otherwise would permit a testator to escape from the dictates of public policy by a mere choice of words.\textsuperscript{121}

\textsuperscript{117} McGinnis \textit{v.} Foster, 4 Ga. 377 at 379 (1848).
\textsuperscript{118} See note 79, supra.
\textsuperscript{119} Hibbits \textit{v.} Jack, 97 Ind. 570 (1884); Arthur \textit{v.} Cole, 56 Md. 100 (1880) (deed); Maddox \textit{v.} Yoe, 121 Md. 288, 88 A. 225 (1913); Ruggles \textit{v.} Jewett, 213 Mass. 167, 99 N. E. 1092 (1912); Winget \textit{v.} Gay, 325 Mo. 368, 28 S. W. (2d) 999 (1930); Trenton Trust & Safe Deposit Co. \textit{v.} Armstrong, 70 N. J. Eq. 572, 62 A. 456 (1905); Irwin \textit{v.} Irwin, 179 App. Div. 871, 167 N. Y. S. 76 (1917). See dicta to the same effect in Mann \textit{v.} Jackson, 84 Me. 400, 24 A. 886 at 888 (1892); Graydon's Exrs. \textit{v.} Graydon, 23 N. J. Eq. 229 at 237 (1872).
\textsuperscript{120} Snider \textit{v.} Newsom, 24 Ga. 139 (1858); Commonwealth \textit{v.} Stauffer, 10 Pa. 350 (1849); Langfeld's Estate, 4 Pa. Co. Ct. 82 (1886); Holbrook's Estate, 213 Pa. 93, 62 A. 368 (1905). The condition-limitation distinction was repudiated without comment in Dumey \textit{v.} Schoeffler, 24 Mo. 170 (1857); Herd \textit{v.} Catron, 97 Tenn. 662, 37 S. W. 551 (1876); Wooten \textit{v.} House, (Tenn. Ch. App. 1895) 36 S. W. 932.
\textsuperscript{121} In Langfeld's Estate, 4 Pa. Co. Ct. 82 at 84 (1886), the court said, "It is mere casuistry to say that a gift is immoral which is to cease if the legatee marries, and not immoral if it is to continue so long as she remains single, and a rule which is founded upon such casuistry is itself immoral, because it is false."

In Commonwealth \textit{v.} Stauffer, 10 Pa. 350 at 357 (1886), the court said,
The issue presented by this difference of opinion might have been fought out with some hope of an ultimate solution if the courts had been meticulous in drawing the distinction between a condition and a limitation.

Paralleling the construction tendencies in England, words appropriate to describe conditions have been construed to be limitations. In some instances nothing is said to reveal whether such misconstructions were deliberate or not. In others the basis of the error is apparent. Since the use of a limitation is often thought to express a purpose not to restrain marriage, but merely to give support until marriage, courts have brought themselves to the point of seeking the intention first and then attaching the label without regard to the form of the words. It is said that the substance and not the form of the language must be decisive. It is certainly desirable that the legality of clauses be determined upon their substance and not their form. But it would have been much better if these courts had gone the whole way and thrown aside the condition-limitation distinction and looked solely to the differences in a testator's intention which the distinction is said to represent. The distinction, as normally used, is purely formal. Only confusion can be wrought by construing language normally importing a condition to be a limitation because of the effect it was intended to have upon the conduct of the beneficiary.

The nadir of chaos is reached in those cases where it has been held that the presence of a gift over turns a condition into a limitation. This, too, probably can be explained. It probably goes back to Blackstone, who stated that a condition subsequent becomes a limitation by limitation or condition, is, in a vast majority of cases, the effect of accident, depending on the turn of expression habitual to the scrivener, who seldom knows anything of the technical difference between them.

But, whether the restraint be by limitation or condition, is, in a vast majority of cases, the effect of accident, depending on the turn of expression habitual to the scrivener, who seldom knows anything of the technical difference between them.

Raymond v. Packer, 70 Conn. 357, 39 A. 739 (1898); Nunn v. Justice, 278 Ky. 811, 129 S. W. (2d) 564 (1939) (deed); Appleby v. Appleby, 100 Minn. 408, 111 N. W. 305 (1907), involving a contract; Kromer Estate, 22 Pa. Co. Ct. 327 (1899).

Estate of Fitzgerald, 161 Cal. 319, 119 P. 96 (1911); Mann v. Jackson, 84 Me. 400, 24 A. 886 (1892); In re Miller's Will, 159 N. C. 123, 74 S. E. 888 (1912); Griffin v. Doggett, 199 N. C. 706, 155 S. E. 605 (1930); Schaeffer v. Messersmith, 10 Pa. Co. Ct. 366 (1890).


Bennett v. Packer, 70 Conn. 357, 39 A. 739 (1898); Snider v. Newsom, 24 Ga. 139 (1858); Eastham v. Eastham, 191 Ky. 617, 231 S. W. 221 (1921); In re Miller's Will, 159 N. C. 123, 74 S. E. 888 (1912); Griffin v. Doggett, 199 N. C. 706, 155 S. E. 605 (1930); Kromer Estate, 22 Pa. Co. Ct. 327 (1899).
when it is followed by a gift over. But the limitations Blackstone was talking about were conditional limitations, i.e., executory interests, which are to be distinguished from conditions subsequent by the presence of gifts over and by the absence of rights of re-entry for conditions broken. For the purposes of the present distinction, a conditional limitation is a condition. The limitation spoken of in connection with marriage restraints definitely is not a conditional limitation. This has not been understood in the cases mentioned; hence the confusion.

To bring the wheel full circle, a group of cases has appeared in which limitations have been held to be conditions. In a reverse application of the above principle, it has been held that the absence of a gift over makes a condition of what would otherwise be a limitation. In one case the decision in effect seems to be a tacit repudiation of the condition-limitation distinction and an attempt to bring both conditions and limitations within the ambit of the rule forbidding general restraints of marriage. Most of these decisions, however, are based upon the construction of a statute in Indiana, presumably passed in an effort to settle one aspect of the marriage-restraint problem. This statute is considered here because, in construing it, the courts have turned the decisions upon an application of the condition-limitation distinction. The Indiana statute provides,

"A devise or bequest to a wife with a condition in restraint of marriage shall stand, but the condition shall be void."

It might be asked why conditions upon gifts to widows are singled

---


127 Most of the courts which have reached this result have had the interrorem doctrine in mind, where the existence of a gift over is the controlling factor, and have confused that doctrine with the condition-limitation distinction.


131 Other statutory attempts at codification are treated together below at page 1319, infra.

out to be void; but more remarkable is the construction given to the provision.

In several cases conditions were held void. In a considerable number of cases gifts to widows during widowhood or so long as they remained unmarried were held not to involve conditions, and so the restrictions were not void under the statute. In startling contrast to this position, it has been held that a gift to a widow during her life “or widowhood,” or for life “or so long as she remains unmarried,” is a gift upon a void condition subsequent. It has been reasoned that such a provision amounts to giving a widow a life estate and then cutting it down in a manner forbidden by the statute. This would seem to deal a final blow to any hopes that a rational solution of the marriage-restraint problem can be reached as long as the condition-limitation distinction is made. The words “for life or widowhood” differ from the words “during widowhood” only in that the former more expressly define the kind of estate which would normally be implied from the latter. If it is urged that in the latter some sort of fee is intended, the former can serve only to negative that intention. If the one limits an estate and does not condition it, neither does the other.

D. Partial Restraints

In contrast to the situation in England, there are few American cases dealing with partial restraints. It is usually taken for granted that partial restraints are valid unless they are unreasonable. Choice of that term is unfortunate, since it may leave the impression that a restriction may be defeated if it is harsh. Public policy should be the only criterion, and a test of reasonableness should have reference only to that. Wherever no policy is found against general restraints, presumably all partial restraints would be upheld.

188 Mack v. Mulcahy, 47 Ind. 68 (1874); Van Gorder v. Smith, 99 Ind. 404 (1885).
184 Harmon v. Brown, 58 Ind. 207 (1877); Tate v. McLain, 74 Ind. 493 (1881); O’Harrow v. Whitney, 85 Ind. 140 (1882); Hibbits v. Jack, 97 Ind. 570 (1884); Wood v. Beasley, 107 Ind. 37, 7 N. E. 331 (1886); Sims v. Gay, 109 Ind. 501, 9 N. E. 120 (1886); Beshore v. Lyttle, 114 Ind. 8, 16 N. E. 499 (1887); Summit v. Youn, 109 Ind. 506, 9 N. E. 582 (1886); Levengood v. Hoople, 124 Ind. 27, 24 N. E. 373 (1890); Nagle v. Hirsch, 59 Ind. App. 282, 108 N. E. 9 (1915); Thompson v. Patten, 70 Ind. App. 490, 123 N. E. 705 (1917).
188 Spurgeon v. Scheible, 43 Ind. 216 (1873); Coon v. Bean, 69 Ind. 474 (1880); Stilwell v. Knapper, 69 Ind. 558 (1880); Beatty v. Irwin, 35 Ind. App. 238, 73 N. E. 926 (1904); Newton v. Wyatt, 98 Ind. App. 177, 188 N. E. 697 (1934).
186 It is so stated in practically all of the cases cited in this section.
In two cases restrictions upon a beneficiary's marrying under twenty-one were upheld.\(^{187}\) In several cases conditions against marrying a particular person or into a particular class have been approved.\(^{188}\) Only five cases have involved a condition restraining the marriage of a person without the consent of some other person. In three of them it was upheld; \(^{189}\) but in one of the three, a New York case,\(^{190}\) the court declared that if personal property instead of real estate had been involved, the in terrorem doctrine would have applied, since there was no gift over. A similar statement was made in an early Illinois case involving a condition against marrying under twenty-one.\(^{141}\) In two other of the cases cited in this paragraph the in terrorem doctrine was recognized, but not applied, because the courts found it inapplicable to conditions precedent.\(^{142}\) In one other the doctrine was repudiated.\(^{143}\) In the Illinois case referred to,\(^{144}\) the condition, while valid, was not enforced against the devisee because it was not brought to his attention, which the court thought was necessary since he was the testator's heir.

In only three cases have partial restraints been held void.\(^{145}\) In Maddox v. Maddox's Administrator,\(^{146}\) the condition did not restrain marriage as such, but enjoined the beneficiary always to remain a member of the Friends Society. She married a man who was not a member of the society and ceased to be a member herself. The court found the condition to be an unreasonable partial restraint, meaning that the

\(^{137}\) Shackelford v. Hall, 19 Ill. 211 (1857); Reuff v. Coleman, 30 W. Va. 171, 3 S. E. 597 (1887).


\(^{141}\) Shackelford v. Hall, 19 Ill. 211 (1857).

\(^{142}\) Phillips v. Ferguson, 85 Va. 509, 8 S. E. 241 (1888); Reuff v. Coleman, 30 W. Va. 171, 3 S. E. 597 (1887).

\(^{143}\) Pacholder v. Rosenheim, 129 Md. 455, 99 A. 672 (1916).

\(^{144}\) Shackelford v. Hall, 19 Ill. 211 (1857).

\(^{145}\) Bayeaux v. Bayeaux, 8 Paige (N. Y.) 333 (1840); Matter of Liberman, 279 N. Y. 458, 18 N. E. (2d) 658 (1939); Maddox v. Maddox's Admir., 11 Grat. (52 Va.) 804 (1854).

\(^{146}\) 11 Grat. (52 Va.) 804 (1854).
restriction was a virtual prohibition of marriage, since there were but five or six marriageable members of the association. It was assumed, of course, that if a woman marries a man not a member of the Friends Society she will cease to be a member herself.

In *Matter of Liberman*,\(^ {147}\) the most recent marriage-restraint case, income from a trust fund was given to an adult son of the testator during his life after his marriage with the consent of the testator’s executors and trustees. If the legatee married without consent, the principal of the fund was to go to his brother and sister, who were named trustees. The legatee sued to compel these trustees and legatees over to give consent to a contemplated marriage. The court held that the condition requiring consent was unreasonable and void. A criterion of reasonableness was not suggested except such as can be taken from the decision here that this condition was unreasonable, since the power to give consent was vested in those persons to whom the property was to be given if consent were withheld and the condition broken.

It should be of no concern to a court, as far as the marriage restraint problem is concerned, that a testator has made it possible for one beneficiary to cheat another. If this decision is based upon the severity or unfairness of the testator’s provisions, it is open to criticism for confusing such an issue with the marriage-restraint problem. It is possible, however, that in calling the condition unreasonable, the court meant that it was practically a general restraint, because of the inducement offered to the trustees to withhold consent.\(^ {148}\)

**E. Statutory Treatment**

In three states statutory treatment of the marriage-restraint problem has been attempted. The Indiana provision, discussed above,\(^ {149}\) purports to forbid conditions against the remarriage of widows. The courts, in construing it, have excluded limitations from its scope; however, it has been observed that they have drawn the distinction between limitations and conditions in a very irregular manner.

---

\(^ {147}\) 279 N. Y. 458, 18 N. E. (2d) 658 (1939).

\(^ {148}\) In Bayeaux v. Bayeaux, 8 Paige (N. Y.) 333 (1840), a consent-to-marry condition was declared illegal upon the same principle as that applied in the Liberman case. A mother was given property from which she was to advance the best interests of her children, except that if any child married without consent, he was to have nothing. This was said to hold out an inducement to the mother to withhold consent.

\(^ {149}\) Supra, at note 132 et seq.
A section of the California Civil Code provides:

"Conditions imposing restraints upon marriage, except upon the marriage of a minor, are void; but this does not affect limitations where the intent was not to forbid marriage, but only to give the use until marriage." 150

It is not clear from the language itself whether the condition-limitation distinction is sanctioned or whether it was the purpose to permit only limitations used without an intention to restrain marriage. Literally construed, the statute forbids partial as well as general restraints, except conditions which forbid marriage during minority.

In *Estate of Fitzgerald* 151 the testator's estate was given to his wife subject to the proviso that in the event of her remarriage, two-thirds of her estate should go over to her son. Such language clearly imposed a condition, but it was construed to be a limitation, following a decision in another state which also misconstrued the condition-limitation distinction. The reason given for this construction was that no intention to restrain marriage was found. By this interpretation of the statute, any provision is valid, whether condition or limitation, if there were no intention to restrain marriage; for if such intention is absent, the provision will be called a limitation.

In *Estate of Scott* 152 all the testator's property was given to his wife with the provision that if she should remarry, seventy-five per cent of the estate should go to his children. This is similar to the case above, but no inquiry into the testator's intention was made. The court either assumed that there was an intention to restrain marriage or else construed the provision according to the normal import of the words; for the language was found to impose a condition, which was held void.

An unusual construction was placed upon a condition against remarriage in *Estate of Alexander*. 153 The court held that the condition requiring the beneficiary to remain unmarried referred only to the time of the testator's death, and was not operative after that. The court added, however, that if the condition had been construed to apply after the testator's death, it would have been void under the statute.

151 161 Cal. 319, 119 P. 96 (1911).
152 170 Cal. 65, 148 P. 221 (1915).
153 149 Cal. 146, 86 P. 308 (1906).
Three sections of the Georgia Code are pertinent. One may be dismissed briefly. It provides:

“A condition in terrorem shall be void, unless there is a limitation over to some other person; in which case the latter shall take.”

If it is difficult to understand why courts perpetuate the in terrorem doctrine, more puzzling is this effort to codify it. The section is open to further criticism for not suggesting what a condition in terrorem is. Many courts recognize that it has to do with marriage restraints. Others have applied it to conditions against the contest of wills. Some courts appear to think that the doctrine applies to any kind of condition as a rule of construction whenever there is a gift over. This does not seem to have been the intention in the above section. There are no cases construing this section.

Two other sections of the Georgia Code deserve comment. One provides,

“Marriage is encouraged by the law, and every effort to restrain or discourage marriage by contract, condition, limitation, or otherwise, shall be invalid and void. Prohibiting marriage to a particular person or persons, or before a certain reasonable age, or other prudential provisions looking only to the interest of the person to be benefited, and not in general restraint of marriage, will be allowed and held valid.”

This section is not free of ambiguity. Partial restraints, clearly, are to be permitted, or at least those relating to marriage with certain persons or before a certain age, if the age is reasonable. The only other partial restraint which has ever been imposed is that requiring consent to marry. Presumably this, too, would be valid if it could be construed as a prudential provision looking only to the interest of the beneficiary. Such a condition can be used to impose practically a general restraint, and under this section such a condition would probably be void.

Are all general restraints prohibited? Suppose a testator gives property subject to a general marriage restraint, but intends merely to provide for the support of the beneficiary while single. Would such an arrangement be construed to be a permissible “prudential provision”? The words “and not in general restraint of marriage” seem to confine “prudential provisions” to partial restraints and exclude such a pro-

vision for support. On the other hand, the words “effort to restrain or discourage marriage” might be construed to prohibit only those restraints imposed with an intention to restrain, and thus authorize a provision intended merely to provide support while single. The section is to be commended for not codifying the condition-limitation distinction.

Another section of the Georgia Code provides,

“Limitations over upon the marriage of a widow shall be valid, unless such limitations are manifestly intended to operate as a restraint upon the free action of such widow in respect to marriage, and are not simply prudential provisions for the protection of the interest of children or others in such event; in such cases they are void.”

Usually it is impossible to ascertain an intention to restrain or not to restrain marriage from the language of the will itself. Perhaps those provisions are illegal in which the testator expresses a desire to restrain marriage. If no such intention is expressed, probably the gift over would have to be examined to ascertain whether it is a prudential provision for the donees over. It is difficult to know just what provisions could be brought within that term. Perhaps the donees would need to be dependent in part at least upon the testator for support. In Logan v. Hammond a testator gave real estate to his wife so long as she remained single. Applying the code section relative to widows, the court declared that if the provision must be “manifestly intended” to restrain marriage before it is illegal, the burden must be upon him who asserts the restraint to prove that such an intention exists. Since this burden was not borne here, the provision was upheld.

F. Conclusion

By way of summary, a few generalizations upon the legality of marriage restraints are warranted. Beyond them is a welter of irreconcilable propositions which have been made the basis of decision in one or more cases, none of which are sufficiently prevalent, however, to justify more than a prediction that they may be followed in those jurisdictions where they have already been applied and possibly in other jurisdictions. It does not seem that any final judgment can be

made now upon the question, "Are conditions (or limitations) in re­
straint of marriage illegal?" Certainly no conclusive answer is avail­
able in so far as conditions in general restraint of marriage are con­
cerned. It is generally conceded that the policy of the law is against
such provisions, but the qualifications which have been imposed upon
the prohibition of general restraints leaves that prohibition with but
dubious force. Thus the policy is accepted upon principle, but often
rejected in fact.

The general conclusions which may be safely asserted are as fol­
lows:

1. Apart from statute, conditions in restraint of the remarriage of
widows or widowers are legal.

2. Apart from statute, limitations until marriage, or the equivalent,
will almost invariably be sustained.

3. Conditions in partial restraint of marriage are legal, except
when in operation they are found to restrain marriage unreasonably.
(An unreasonable restraint may be one which amounts in effect to a
total restraint, or perhaps it may be merely a restraint which is harsh
or arbitrary.)

In cases where the above propositions are not applicable, a court
may decide that:

1. A condition in general restraint of marriage of a previously
unmarried person is illegal.

2. A condition in general or partial restraint of marriage is void
if no gift over is provided to take effect upon breach. (Conversely, a
court which accepts the first proposition may confine its application to
cases where there is no gift over, and enforce the condition where there
is a gift over.)

3. A condition in general restraint of marriage is legal if the testa­
tor did not intend to restrain marriage.

4. Language which is normally construed to be a condition in
restraint of marriage is really a limitation, which is valid.

5. A condition in partial restraint of marriage must be observed
if it is a condition precedent, without regard to its legality.

6. A condition in restraint of marriage is legal if it is attached to a
devise of real estate.

7. Any condition in restraint of marriage is legal, because (a)
there is no public policy against such conditions, or (b) a condition
imposes no obligation and, therefore, cannot effectively restrain mar­
riage.
The relative influence of the propositions of this second group upon various courts will not be assessed in this summary. The decisions in the respective states should be consulted if one is interested in determining which of these propositions will be made the basis of future decision in any particular case. For the purposes of this more general discussion, any more definite statements of the law than those given above would be mere guesswork.

If such divergent results as those noted above can be reached in fixing the requirements of public policy in the marriage-restraint problem, it seems desirable to examine the problem upon principle, to ascertain what the public interest really demands and how it can best be achieved.

III

THE POLICY EXAMINED

If a testator should give property to an unmarried woman "upon condition that she remain unmarried," most courts would not hesitate to pronounce such a condition illegal as being contrary to public policy. It is unlikely, however, that any court would give a very definite explanation why the condition was against public policy. It would probably be said that marriage is favored by the law and that the public interest requires that it be fostered and protected, and therefore, that restraints upon marriage are not to be permitted. A few courts might be more specific and say that marriage restraints tend to encourage depopulation, immorality, and perhaps the contracting of undesirable marriages because of the restraint which is put upon the law of natural selection.

Suppose, on the other hand, that a testator gives property to a person "so long as she remains single (or unmarried)." The same courts which would defeat the condition mentioned in the preceding paragraph would, almost without exception, sustain this provision. It would be said that this is not a condition at all, but a limitation. Many courts would find the statement of the distinction alone sufficient, without further explanation. Others would declare that a testator should be able to fix the limits of an estate given at any point that he wishes, whether it be at the beneficiary's death or marriage or any other time; and furthermore, that when a testator limits an estate until marriage he does not intend to restrain marriage but to provide support until marriage.
Regardless of these arguments, the condition-limitation distinction cannot be approved in so far as it relates to the legality of restraints of marriage. It is doubtful that it represents any difference in testamentary intention at all. If the legal distinction is unknown to the testator, he is as likely to use one form of words as the other, whether his intention be to restrain marriage or not. A more serious objection is that if he is aware of the legal distinction, he will avoid the condition and use the limitation in order to escape the charge of violating public policy. In such a manner any marriage-restraint doctrine can be effectively nullified. If a condition in restraint of marriage is against public policy, a limitation of an estate until marriage is against public policy also.

Some courts have approached the problem more realistically and have concluded that if a testator's intention is an important factor in the legality of marriage restraints, it would be preferable to seek the intention directly. These courts have declared that conditions in restraint of marriage are illegal only when imposed with an intention to restrain marriage.

If the basis for the marriage-restraint doctrine is as explained in the first paragraph above, it may be asked, of what relevance is the intention of the testator? Conditions are said to be illegal when they restrain marriage, that is, when they encourage beneficiaries to remain single. A beneficiary may be expected to remain single when by doing so she may retain a pecuniary benefit which she must otherwise lose. It is doubtful whether a mere expression of a desire by the testator that she not marry would have much influence upon her. Thus it would seem that if a testator places a premium upon the beneficiary's remaining single, he will have violated public policy whether he intended to restrain marriage or not.

It seems doubtful that the courts which have imposed the intention rule have proceeded upon the belief that the testator's intention is relevant in determining whether a restraint of marriage really has been imposed. It is probable that when a testator does not intend to restrain marriage, he intends some other result which the courts are loathe to prevent despite an incidental restraint of marriage. It is common for a testator who imposes a condition or limitation in restraint of marriage to intend merely to provide support for a female beneficiary until, at her marriage, such support presumably will no longer be needed. This has been thought to be a perfectly reasonable testamentary pur-
pose which ought to be given effect. As early as Scott v. Tyler\footnote{Dick. 712 at 722, 21 Eng. Rep. 448 (1788).} it was said,

"According to Godolphin the use of a thing may be given during celibacy, for the purpose of intermediate maintenance will not be interpreted maliciously to a charge of restraining marriage."

A similar argument was given in Low v. Peers\footnote{Wilm. 364, 97 Eng. Rep. 138 (1770).} to support the distinction between a condition and a limitation, a limitation representing, it was said, only an attempt to give support until marriage.

It is understandable why courts are reluctant to thwart such a reasonable testamentary desire. But can it be given effect consistently with public policy? If the public interest requires the prohibition of marriage restraints, it would seem that exceptions should be permitted only upon one of two grounds: either that in the exceptional case no harm will result from the restraint, or that there is some counter-policy which supports the imposition of the restraint in certain circumstances. It would be difficult to sustain a provision intended for support until marriage upon either of these grounds. It has already been suggested that a condition against marriage is as likely to induce celibacy where the intention is to provide support as where the intention is to restrain marriage. Nor can it be urged that there is any sort of public policy which requires that a testator be permitted to terminate an estate when it is no longer needed for the support of the beneficiary. The best that can be said of an effort of this kind is that it represents a natural testamentary desire. But once a requirement is fixed in the furtherance of public policy, it would seem that exceptions should not be made in order to effectuate purposes which, apart from public policy, would seem to be altogether natural and reasonable.

We have concluded, then, that the condition-limitation distinction and the intention rule are not consistent with the acceptance of a policy against marriage restraints, and do not, therefore, constitute justifiable exceptions to any general prohibition of marriage restraints. The almost complete acceptance by the courts of the condition-limitation distinction and the growing approval of the intention rule, therefore, raise suspicions of a dissatisfaction with the marriage-restraint doctrine and perhaps represent efforts to escape from it whenever a plausible means appears. It is worthy of note in this connection that there are many more limitations than conditions and undoubtedly many more conditions
imposed without an intention to restrain marriage than with such an intention. Thus in adopting these rules most marriage restraints can be sustained. It seems appropriate, therefore, to examine the policy which is asserted to forbid marriage restraints and to ask whether any condition or limitation in restraint of marriage should be declared illegal.

It is not enough to say that marriage is fostered and protected by the law. More specifically it should be asked, what harm to society may be expected, to result from the use of conditions and limitations in restraint of marriage? Immorality, depopulation, the weakening of the family, and other consequent evils, it may be said. When marriage is effectively prevented, some of these results may tend to follow, although it would be impossible to make any positive assertions without the benefit of sociological data which is not available. But is a conditional or limited gift of property really capable of restraining marriage? A condition or limitation has not the force of law or of contractual obligation; it can be effective only by inducement, and the ability of a pecuniary inducement effectively to restrain marriage seems doubtful. It is probable, moreover, that, in a large majority of cases which involve gifts to female beneficiaries, the support expected upon marriage counteracts the effect of an anticipated loss of a testamentary gift. It is worthy of note that the courts, in applying the condition-limitation distinction and in permitting restraints upon remarriage, have freed more testamentary clauses from the charge of illegality than they have retained within the prohibition; and yet no instance has been reported of such a provision's having deterred a beneficiary from marriage. The social evil resulting from conditions and limitations in restraint of marriage is doubtful to say the least; and it may be urged with some force that a testator's intentions should not be thwarted when the evil thereby prevented is not certain. A contention that all marriage restraints should be permitted would not be unsupportable. Nor would it be novel. The English courts have deprecated the Roman rule from the time of its adoption, have adhered to it because they believed themselves bound by precedent, and have designed several effective means of escaping from it. One American court of last resort has expressly repudiated it.160

Such a conclusion, however, would undoubtedly meet with resistance from most quarters. However far the courts may be willing to go

---

in sustaining provisions which seem to be restrictive of marriage, few would concede that no opposition should be made whatever. Nor can such a position be recommended. Conceding that a condition or a limitation does not impose an effective restraint of marriage, there is yet a basis for refusing to approve any and every condition or limitation terminating an estate at marriage, and for adopting a rule which effectuates reasonable testamentary desires without approving attempts to restrain marriage.

The above discussion has proceeded upon the assumption that if marriage restraints are to be opposed, it is because they tend to produce harmful social consequences in their effect upon the conduct of beneficiaries. It is only natural to assume that if such consequences do not follow, there is no basis for imposing any sort of prohibition. Such an assumption may not be altogether warranted. Perhaps an illustration would serve best to explain this position.

Suppose a testator gives property to A upon condition that he kill B. No one would doubt that such a condition would be illegal, not so much because A would be likely to kill B, however, but because the court would find it offensive to enforce the condition upon A's failure to commit a crime. The analogy between this and a condition in restraint of marriage is not complete, but it suggests a possible solution to our problem. We may not believe that marriage restraints, in effect, produce harmful consequences; but our belief relates to the capacity of a testamentary provision to impose an effective restraint, and does not imply an approval of any effective prevention of marriage. We may take the position, therefore, that when a testator imposes a marriage restraint to accomplish some reasonable testamentary purpose, such as to provide support while single, his intention will be given effect; but when he intends to restrain marriage, his intention will be defeated, not because we believe that the beneficiary will be induced not to marry, but because we are unwilling to divest the property given for his failure to respect a testamentary desire which we deem to be unnatural and unreasonable.

Thus the intention rule, which was rejected as an exception to a general prohibition of marriage restraints, can be recommended as a preferable alternative to a complete abrogation of any prohibition. It will probably stand more chance of general recognition than any other rule now applied. A number of courts have already adopted it; and it seems, indeed, that it provides the solution which most courts have long striven for. The courts have always sought to discourage restraints
of marriage and, at the same time, to sustain efforts to provide support until marriage, but they were long unable to make these desires articulate in an acceptable rule. Now Godolphin’s dictum that the use of a thing may be given during celibacy finds a rationale—the offense is not an incidental inducement to celibacy but an intention to induce celibacy. Godolphin would offer this principle to sustain all limitations until marriage. The principle finds more rational embodiment in the intention rule.

It should be understood that the proposed rule is to be applied in place of and not in addition to the condition-limitation distinction. The latter, for the reasons previously mentioned, cannot be justified. In so far as it has represented an effort to sustain provisions for support, that effort can be better made by applying the intention rule.

A testator who does not intend to restrain marriage may not always intend merely to provide support while single. He may impose the condition or limitation in an effort to keep his property in his own family and out of the hands of a beneficiary’s future spouse. The testator cannot be charged with an effort to restrain marriage in such a case, and the provision should be sustained.

Courts have rather generally sustained restraints of remarriage. It is believed that the intention to restrain the remarriage of a surviving spouse is not censurable, but may be commendable, especially if there are minor children left. It is difficult to charge that a desire that one’s widow not remarry is unnatural or unreasonable. To sustain all restraints of remarriage, therefore, and to confine the intention rule to restraints of the first marriage, seems unobjectionable.

It should be noted that, whatever reasons a testator may have for not wanting his beneficiary to keep the property given after marriage, the desire to prevent marriage is not at all common. It may be expected, therefore, that comparatively few cases will arise in which the condition or limitation should be declared illegal. This is not to say, of course, that the prohibited intention is never entertained. It is not unlikely that a testator may desire that a daughter remain at home and care for her mother or some other member of her family. He may want his daughter to enter some religious order in which marriage is impossible. It is possible that he may seek to impose a celibate life upon a beneficiary for no good reason at all. In any of these cases the condition or limitation would be void.

Considerable latitude must be left to the courts in applying the proposed rule. An intention to restrain marriage may be evidenced in
innumerable ways, and the language of the will and all the surrounding circumstances should be considered. Statements by a testator at the time of making his will indicating an intention to restrain or not to restrain marriage should be admissible.\textsuperscript{161} Such statements could take innumerable forms, of varying probative value. Attempts by a testator to discourage or control his beneficiary's marital desires should be considered. Care would have to be taken with a clause in which the testator expressed an intention not to restrain marriage. Such a statement, of course, should not be disregarded; but one should be permitted to prove that it is only a disguise. An intention not to restrain marriage would not be sufficiently proved by showing that the testator intended to provide for or contribute to the beneficiary's support, unless it appeared that he did not intend the gift as an inducement to remain single.

Cases will arise in which nothing will appear to indicate sufficiently the intention with which a particular condition or limitation was inserted. In such a case it will be necessary to presume either an intention to restrain marriage or its absence. In the one case, the burden would be upon the one seeking to sustain the provision to convince the court that the testator did not intend to restrain marriage. In the other case, the burden would be upon the one charging illegality to prove that the testator intended to restrain marriage. Either presumption is acceptable; but, in view of the fact that an intention to restrain marriage is relatively uncommon, the latter presumption is probably more appropriate.

So far the discussion has dealt with general restraints. Something should be said also about the so-called partial restraints. Usually they are imposed with an intention to restrict marriage to a certain extent, but they are not necessarily to be declared void for this reason. When

\textsuperscript{161} There is nothing in the cases dealing with the admissibility of such a statement. The circumstances here seem sufficiently different from any others in which oral statements by a testator may have been excluded so as not to be controlled by those decisions. A testator's intention to restrain marriage rarely appears in the will itself, and if all of the circumstances surrounding the execution of a will, including statements by the testator himself, are not admissible, it may be impossible to base a finding of illegality upon anything better than a presumption. Of course, if a will gives property to \( A \), it would not be proper to prove later that the testator orally said that he wanted the property to go to \( B \). But here we are not seeking the testator's intention in order to give effect to it, but merely as a preliminary to a determination whether part of his will is illegal. It would seem that no rule of evidence nor anything in any wills statute is violated by admitting an oral statement by a testator regarding his intention to restrain marriage.
a testator attempts to prevent marriage with certain persons or into certain classes, or before a certain age, or without the consent of certain persons, the restraint is thought to be justified. It has been said, however, that the restraint must not be unreasonable. Care should be taken in applying that test, for a condition should not be declared illegal merely because it is harsh or arbitrary. A partial restraint should be illegal when, in operation under the particular circumstances, it approaches the character of a general restraint. Thus a condition that a beneficiary not marry a red-haired person would in a sense be unreasonable. Certainly it would be arbitrary. But it should not be held to restrain marriage unreasonably. If, on the other hand, a condition required that the beneficiary should marry a red-haired person and none other, it would seem to be an unreasonable partial restraint. A condition that a beneficiary marry only in the month of June would be senseless, but it should not be illegal. A condition requiring the beneficiary to marry within a certain class would be unreasonable if the class were so small that the field of choice would be extremely limited. A condition against marrying before the age of fifty or some other unreasonable age would be invalid. So with a condition requiring consent to marry when the consent is to be sought from those who would be likely to withhold it. In other words, an unreasonable partial restraint, not different in kind from a reasonable partial restraint, is illegal because it increases the probability that marriage cannot take place without breaching the condition, increases it to a point which seems unreasonable.

IV

EFFECT OF ILLEGALITY

If a court declares a condition in restraint of marriage illegal, it is faced with the further problem of what disposition to make of the gift to which the condition was attached. When the condition is subsequent, it is everywhere agreed that the gift shall be taken free of the condition.162 In dealing with conditions precedent, however, the cases are in conflict. The English common-law courts developed the rule that,

162 The authorities for this proposition are legion. The following few cases are selected at random in support of the proposition: Morley v. Rennoldson, 2 Hare 570, 67 Eng. Rep. 235 (1843); Sullivan v. Garesche, 229 Mo. 496, 129 S. W. 949 (1910); Gard v. Mason, 169 N. C. 507, 86 S. E. 302 (1915); Watts v. Griffin, 137 N. C. 572, 50 S. E. 218 (1905); Meek v. Fox, 118 Va. 774, 88 S. E. 161 (1916); Middleton v. Rice, 4 Clark (Pa.) 7 (1845). See 2 JARMAN, WILLS, 7th ed., 1443 (1930).
in a case involving a devise of real estate, the beneficiary must observe the condition if he is to take the gift, without regard to the legality of the condition. This rule has been applied in one American marriage-restraint case; and it has been approved in dicta in several other cases, some of which involved legacies. A different rule was developed in England in dealing with legacies. If a condition is illegal because it is against public policy, the condition is void and the gift is absolute, as in the case of conditions subsequent. This rule has been applied in a number of American cases, most of which, however, did not involve marriage restraints.

In a recent New York case, Matter of Liberman, the Court of Appeals applied the latter rule to an illegal partial restraint of marriage. The court asserted that this rule was supported by principle and by the weight of American authority. The court said,

"To give the rule less force; to declare the condition void without at the same time giving effect to the gift made upon the void condition, would be a mockery of the beneficiary and by indirection would permit a testator to accomplish a result which we hold contrary to the 'common weal.'"

In an article published in 1908 on the effect of illegality of conditions precedent, Professor Pound contended that when a condition precedent is declared illegal, both the condition and the gift should be

---

165 Maddox v. Maddox's Admr., 11 Grat. (52 Va.) 804 at 816 (1854); Crawford v. Thompson, 91 Ind. 266 at 273 (1883); Parsons v. Winslow, 6 Mass. 169 at 178 (1810); Knost v. Knost, 229 Mo. 170, 129 S. W. 665 at 667 (1910). All but the last case involved legacies.
168 Matter of Liberman, 279 N. Y. 458, 18 N. E. (2d) 658 (1939), is the only case involving a marriage restraint.
170 Id., 279 N. Y. 458 at 469.
void. To let the gift stand, he contended, is to go further than public policy requires, and defeats the intention of the testator, expressed by putting the condition in precedent form, that nothing should vest unless the condition were observed. The rule thus criticized, he pointed out, originated in the civil law in a misapplication of the Roman *favor testamenti*, or policy against intestacy.

Would the rule suggested by Professor Pound indirectly give effect to the illegal condition, as held in *Matter of Liberman*? The court in that case apparently overlooked the fact that when both the condition precedent and gift are void, the performance of the condition by the beneficiary will avail him nothing; and it cannot be said, therefore, that it is the breach of the condition by the beneficiary which defeats the gift, which would be true if the condition were actually being given effect. The true basis of the rule is that, since the only way in which the gift can vest is upon observance of an illegal condition, it cannot vest at all, and is void *ab initio*. There would seem to be no policy to prevent a testator, who cannot successfully make his gift upon the terms he desires, from withholding it altogether; and if an intention to withhold it in such a case appears, the intention should be given effect.

In discussing the effect of impossibility of conditions, Professor Simes has contended that a court should attempt to discover what the testator would have intended had he known of the impossibility. He suggested that if a court can infer that the testator would have wished to give effect to the condition in spite of the impossibility, then the court should give effect to it, whether it be precedent or subsequent; but if the testator would not have wished to give effect to the condition under such circumstances, then it should be excused.

In Professor Simes' arguments can be found a possible objection to Professor Pound's rule as to illegal conditions precedent. By imposing a condition precedent, does a testator intend that the gift should not vest without observance of the condition even when the illegality of the condition makes enforcement of it unlawful? Is it not possible that when the testator imposed the condition he assumed that it was valid and binding, and that if he had known that it was illegal he would have made the gift without the condition? It is suggested that this possibility be taken account of, and that a court, after declaring the condition illegal, should uphold the gift where it can reasonably be

---

inferred that the testator, if he had known of the illegality, would have made the gift without the condition. If this inference cannot be made, then both the condition and the gift should be void.

Consistency would demand that the same method be followed with conditions subsequent. A testator's intention may be as much violated by permitting a beneficiary to retain a gift upon breach of a condition subsequent as by permitting him to take the gift without observance of a condition precedent; and if a testator's intention is to be sought in determining the effect of an illegal condition in one case it should also be sought in the other. Where different rules have been applied to the two types of conditions, moreover, courts have been known to draw the distinction between conditions precedent and conditions subsequent so as to reach a desired result, in seeming disregard of the form of the words. It seems desirable, therefore, to treat the two types of conditions in the same way. Although this method may seem to be a startling departure from the orthodox method of dealing with conditions subsequent, it is to be preferred if the arguments presented in the above paragraphs are valid. Nor can any objection be raised to its practicability. If a testator is informed that he may not divest a proposed gift at the beneficiary's marriage, only two rational alternatives are open to him, and they are the same as in the case of a condition precedent. He may either withhold the gift altogether or he may give it without the condition. Therefore, in any case, if it is determined that he would have made the gift without the condition, the beneficiary should be permitted to retain it notwithstanding a breach of the condition. On the other hand, it is possible, although rarely perhaps, that the observance of the condition was the principal motive for making the gift. If the testator would not have made the gift had he known that it could not be divested at marriage, the gift should be void ab initio, as in the case of a condition precedent.

The writer is aware that the prevailing rule that a condition subsequent shall be defeated and the gift left to stand in every case is so deeply rooted that any other rule would seem to have little chance of acceptance. For the reasons given, however, the suggested rule seems preferable on principle.

1 Id. at 932. A classic example of this is in the English case, Egerton v. Brownlow, 4 H. L. Cas. 1, 10 Eng. Rep. 359 (1853), involving a gift upon condition that the beneficiary secure a certain title. The condition was held void, but the court was divided (fifteen judges assisting). All of the judges declaring the condition void construed it to be a condition subsequent; all of the judges declaring the condition valid construed it to be a condition precedent.
The rule that both illegal conditions precedent and conditions subsequent should be striken and the gifts upheld can be commended for its simplicity. Something can be said, too, for holding that when a testator presumes to attach an illegal condition to his gift he should take the consequences of having his gift sustained without the condition. By means of such a penalty, it may be said, testators will be discouraged from disposing of their property unlawfully.

It seems to the writer, however, that penalties are somewhat out of place in the construction of wills, and that a court should strive to effectuate a testator’s intentions except in so far as they are directed to unlawful ends. It is admitted that it may seem like reaching for the moon to seek for a testator’s wishes in a matter which was not in his mind; and it may be desirable to discourage courts from speculating about what those wishes might be. But the important thing is to keep the door open so that if his wishes in the matter can be found they may be given effect. And in those cases where no sufficient evidence can be found as to what a testator would have wished had he thought about the illegality of his condition, it is suggested that the court adopt a set of presumptions based upon the form of the condition. If the condition is precedent, it would be presumed that the testator intended that nothing should vest unless the condition could be and were observed. But if the condition is subsequent, it would be presumed that the testator, knowing of the illegality of the condition, would have made the gift without the condition. Thus Professor Pound’s rule as to conditions precedent and the prevalent rule as to conditions subsequent would be applied in all cases except where, upon the evidence, their application clearly would defeat rather than effectuate a testator’s intentions.

The discussion thus far has dealt with the effect of the illegality of conditions. Suppose a limitation is found to impose an unlawful restraint of marriage. Two alternatives are possible, as in the case of a condition. If the testator would not have made the limited gift if he had known that it could not be terminated as he intended, then the gift and limitation would be held void. The other alternative presents more difficulty. Suppose the testator would have made the gift without the limitation. What sort of interest would he have given? A fee, a life estate, or something else? He has not defined the interest given and made it conditional; he has made the limitation the measure of his gift.

When property is given to a woman as long as she remains unmarried, and she never marries, the question arises as to the duration of
her estate. This problem has arisen in many cases, and an answer to it will furnish an answer to the present question. But the cases are in conflict. Some say the widow takes a life estate; some say a fee.\textsuperscript{174} It is beyond the scope of this article to seek an answer to that problem. It will be sufficient for the present purposes to say that where a court finds that a determinable life estate is given, the illegality of the limitation will leave an absolute life estate; and where a determinable fee is given, an absolute fee will be left.

A presumption would be needed here also if there were nothing to indicate the testator's wishes. Since a limitation resembles a condition subsequent more than a condition precedent, termination of the estate following an original vesting, it would seem better to presume that the testator would have made the gift without limitation.

In conclusion, the expressed intention of a testator is necessarily defeated by the invalidation of an imposed condition or limitation in restraint of marriage. His intention, however, should be defeated to no greater extent than public policy requires, and should be effectuated to the limits of the prohibition. Gifts which have been freed of illegal restrictions are not necessarily to be taken absolutely, for a condition or a limitation should not be treated merely as a form of words, which can be stricken to permit another form of words, the gift, to stand unqualified. In disposing of gifts thus shorn, it is necessary to seek for an intention not expressed. With the aid of presumptions, the wishes which the testator would have expressed had he known of the illegality of his restrictions must be sought and given effect. The result may be that the gift will stand or it may be that the gift, along with the condition or limitation, will be void.

\textsuperscript{174} 122 A. L. R. 7 at 75 (1939).