WILLS-LEGACY ON CONDITION PRECEDENT IMPOSSIBLE DUE TO OPERATION OF LAW

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Estates and Trusts Commons

Recommended Citation
WILLS-LEGACY ON CONDITION PRECEDENT IMPOSSIBLE DUE TO OPERATION OF LAW, 29 MICH. L. REV. 652 (1931).
Available at: https://repository.law.umich.edu/mlr/vol29/iss5/41

This Recent Important Decisions is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
Action was brought to determine the rights of a legatee under a will executed in 1928 creating a trust fund for the legatee, son, upon the condition that he pursue successfully a suit instituted by the testator in Chancery in 1922 to establish his claim as a tenant in fee tail to a certain piece of property. The Law of Property Act, passed in 1925, precluded the right to such suit, thus rendering the condition impossible prior to its creation. Held, where a testator makes a gift of personalty subject to a condition precedent, the fulfillment of which is rendered impossible by operation of law before the date of the will, the condition is void and the gift remains. *In re Thomas's Will Trusts. Powell v. Thomas,* [1930] 2 Ch. 67.

Where a condition precedent to a legacy of personalty is originally impossible as involving *malum prohibitum* (not *malum in se*) the bequest is absolute just as if the condition had been subsequent, unless the motivating purpose of
RECENT IMPORTANT DECISIONS

the bequest was to procure the performance of the condition. This exception
to the usual doctrines of conditions precedent is not found in connection with
legacies involving reality. 2 Jarman, Wills 1469; 1 Roper, Legacies 755;
2 Williams, Executors 1008. The specific question raised in this case has,
apparently, never been squarely raised in American jurisdiction. The anal­
ogous point of a condition which is void because it conflicts with some­
thing malum prohibitum or is against the policy of the law has been passed
upon in several jurisdictions and the same result reached there as in Eng­
land. In Haight v. Haight, 51 App. Div. 310, 64 N. Y. S. 1029, the ques­
tion was raised as to a condition which attempted to separate a son from
his wife, and it was held that the condition was void but the gift was
good. The court there said that an impossible condition precedent stood
upon the same grounds, citing Jarman on Wills, Roper on Legacies, and
Williams on Executors. The question raised in the New York case has been
raised and a similar result reached in Snorgrass v. Thomas, 166 Mo. App.
603, 150 S.W. 106, 38 Am. Dec. 160; Hawke v. Euyart, 3 Neb. 149, 46 N.W.
and Conrad v. Long, 33 Mich. 78. The doctrine is a clear innovation from
the civil law which in turn took its principles from the Roman law. Jarman,
Wills, supra. Various reasons have been assigned for the doctrine, all of
them ex post facto. The first of these was put forth by Voet stating that in
bilateral transactions the illegality or impossibility was the work of the two
parties but in the will only the testator was at fault and the legatee should
not be made to suffer. This doctrine is thoroughly examined and exposed by
Dean Roscoe Pound in 3 Ill. L. Rev. 1. The most lasting reason is that ex­
pressed by Savigny that there is a possibility of separating the gift from the
condition which does not exist in contracts or other transactions inter vivos.
This, too, is set forth and examined by Dean Pound in the above cited article.
A third reason is suggested from the equitable doctrine of cy pres. This
doctrine is given weight from the fact that one of the exceptions to the rule
is that if the primary intention of the testator was to procure performance
of the condition, both the condition and the gift are void. Whatever the rea­
sions may be, the principles stated from Jarman are clearly the law of Eng­
land, and some of those doctrines have been adopted by some jurisdictions in
the United States. Quaere, should America recognize this purely historical dif­
ferentiation between conditions precedent to legacies of personalty and to devises
of realty?