

Michigan Law Review

Volume 54 | Issue 2

1955

Wills - Religious Conditions in Restraint of Marriage - Validity at Common Law and Effect of *Shelley v. Kraemer*

Jack G. Armstrong S.Ed.
University of Michigan Law School

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



Part of the [Constitutional Law Commons](#), [Estates and Trusts Commons](#), [Family Law Commons](#), [First Amendment Commons](#), [Fourteenth Amendment Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Jack G. Armstrong S.Ed., *Wills - Religious Conditions in Restraint of Marriage - Validity at Common Law and Effect of Shelley v. Kraemer*, 54 MICH. L. REV. 297 (1955).

Available at: <https://repository.law.umich.edu/mlr/vol54/iss2/16>

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.

WILLS—RELIGIOUS CONDITIONS IN RESTRAINT OF MARRIAGE—VALIDITY AT COMMON LAW AND EFFECT OF *SHELLEY V. KRAEMER*—Testator devised and bequeathed his property to his children, but with a proviso that the gift to any child who should marry a person not born in the Hebrew faith should lapse. Subsequent to the testator's death, the defendant married a woman who had been born a Roman Catholic. The other beneficiaries brought a proceeding to declare that the defendant had lost his rights under the will by reason of his marriage. The probate court granted a decree substantially as sought by the plaintiffs. On appeal, *held*, affirmed. This partial restraint on marriage is not so unreasonable as to render it invalid and the judicial enforcement of it does not contravene the First Amendment guaranties of religious liberty, as applied to the states by the Fourteenth Amendment. *Gordon v. Gordon*, (Mass. 1955) 124 N.E. (2d) 228, cert. den. 349 U.S. 947, 75 S.Ct. 875 (1955).

From the time of the Romans down to the present day, testators have imposed restraints on marriage.¹ A great many of these restraints have involved religious issues.² A partial restraint that limits marriage by the beneficiary to a spouse of a certain religion has generally been upheld as reasonable.³ On the constitutional issue the situation is not as clear. Prior to *Shelley v. Kraemer*,⁴ the courts summarily dismissed the constitutional question on the grounds that the Fourteenth Amendment was merely a restriction on state action and was wholly inapplicable to acts by individuals, such as private contracts or wills.⁵ While *Shelley v. Kraemer* arose in a different context⁶ the Court there held that state court enforcement of a private agreement was state action within the meaning of the Fourteenth Amendment. The court in the principal case did not deal at length with the effect of this holding; it merely stated that it seemed "to involve quite different considerations from the right to dispose of property by will."⁷ It is submitted that this decision and the similar holding of the Oregon court in *United States National Bank v. Snodgrass*⁸ are correct. There are at

¹ See Browder, "Conditions and Limitations in Restraint of Marriage," 39 MICH. L. REV. 1288 (1941).

² See 122 A.L.R. 7 at 29, n. 3 (1939).

³ There is authority in Pennsylvania and Virginia that religious conditions are void as against the public policy of the state. It is not clear whether this policy applies to religious limitations on marriage. See *Drace v. Klinedinst*, 275 Pa. 266, 118 A. 907 (1922); *Devlin's Trust Estate*, 284 Pa. 11, 130 A. 238 (1925); *Maddox v. Maddox's Admr.*, 11 Gratt. (Va.) 804 (1854). Cf. *Clayton's Estate*, 13 Pa. D. & C. 413 (1930). Except for these two jurisdictions, religious conditions and limitations have been universally sustained. See 6 AMERICAN LAW OF PROPERTY §27.20 (1952); Browder, "Illegal Conditions and Limitations: Miscellaneous Provisions," 1 OKLA. L. REV. 237 at 248 (1948).

⁴ 334 U.S. 1, 68 S.Ct. 836 (1948).

⁵ *Matter of Kempf*, 252 App. Div. 28 at 32, 297 N.Y.S. 307 (1937), affd. 278 N.Y. 613, 16 N.E. (2d) 123 (1938); *Magee v. O'Neill*, 19 S.C. 170 at 186 (1882).

⁶ The case held that state action is involved when a state court enforces a restrictive covenant in a deed. 334 U.S. 1 at 18, 68 S.Ct. 836 (1948).

⁷ Principal case at 235.

⁸ 202 Ore. 530, 275 P. (2d) 860 (1954). In this case the testator's daughter was to get the corpus of a trust at age 32, provided she was not then a Roman Catholic or had not married a Roman Catholic. The court held that a religious condition in partial restraint

least three reasons for not extending the reasoning of *Shelley v. Kraemer* into this area of the law. First, these cases involve gifts and not ordinary business transactions. It is questionable whether a person should be allowed to argue that his religious liberty is being restricted when he is merely given a choice between complete freedom to choose a mate and receiving a gift.⁹ Secondly, the testator also has religious rights. While alive, he has the right to support any religion he chooses, and, to this end, he can donate his money with practically any condition that he desires to attach.¹⁰ Since the law permits the "dead hand" to control property for a limited period, it is arguable that the testator has a right to provide that his estate should go to a person who would remain faithful to his beliefs and raise the testator's descendants in accordance with them.¹¹ Thirdly, and perhaps most important of all, is the fact that this is a relatively private matter and not one of general public importance. A discriminatory restrictive covenant, such as was involved in *Shelley v. Kraemer*, operates in a manner similar to a local ordinance. Because they are effective only when they cover a fairly large tract of land, these discriminatory covenants deny minority groups equal protection of the laws in that they deprive them of a right to acquire and own property in such a large area. Religious restrictions on marriage do not have this widespread effect. They are generally aimed only at the testator's own family and not at religious or racial groups in general. The distinction between these two situations can be likened to the difference between a local ordinance prohibiting or restricting house-to-house religious solicitation¹² and a sign on private property that prohibits solicitors from entering the premises.¹³

Jack G. Armstrong, S.Ed.

of marriage was valid at common law and did not violate the Fourteenth Amendment of the Constitution. The court's brief discussion of the constitutional argument is found at 543-544.

⁹ See Browder, "Illegal Conditions and Limitations: Miscellaneous Provisions," 1 OKLA. L. REV. 237 at 248 (1948).

¹⁰ This argument was recognized by the court in *United States National Bank v. Snodgrass*, 202 Ore. 530 at 536-540, 275 P. (2d) 860 (1954).

¹¹ See 25 A.L.R. 1523 at 1524 (1923).

¹² These ordinances are void when applied to religious solicitation. *Martin v. Struthers*, 319 U.S. 141, 63 S.Ct. 862 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870 (1943). See also Peterman, "Municipal Control of Peddlers, Solicitors and Distributors," 22 TULANE L. REV. 284 at 288 (1947).

¹³ There is every indication that this is a perfectly valid restraint on religious solicitation. See the language of the Court in *Martin v. Struthers*, supra note 12, at 147-148.