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ILLEGAL CONDITIONS AND LIMITATIONS:
EFFECT OF ILLEGALITY*

Olin L. Browder, Jr.†

A. Introduction: The Problem

In earlier articles the writer undertook to explore that miscellaneous and somewhat neglected field of law in which public policy is held to nullify the efforts of persons to impose certain types of conditions and limitations on dispositions of their property.¹ Such provisions most commonly take the form either of conditions subsequent or executory limitations, but occasionally appear as conditions precedent or special limitations. Unlike provisions which run afoul of the rule against perpetuities or the rules against restraints on alienation, the provisions in question usually prescribe conduct on the part of beneficiaries which is not directly related to the use of the property conveyed or devised. In fact, a gift of property may be made merely to induce the conduct prescribed by the condition or limitation. Such a device is within the prerogatives accorded to testators and grantors, except where its effects are found to be contrary to the public interest. In the latter event the condition or limitation is held to be illegal and void.

Although provisions of this type can appear in almost infinite variety, most of those which have been held illegal fall into several definite categories. Probably nine-tenths of the conditions and limitations which have been declared illegal are one of three types: conditions of forfeiture of a beneficiary's interest under a will if he should contest the will (the so-called no-contest conditions), conditions or limitations in restraint of marriage, and provisions inducing the divorce or separation of husband and wife. For example, a testator may devise property to A, but if A should ever bring any proceeding to contest or attack the will or any of its provisions, he should forfeit all interest given him thereby; or

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property may be conveyed or devised to an unmarried woman on condition that she never marry, but remain at home and care for her mother; or a settlor may leave property in trust to pay the income to his son and to pay over the corpus to him if and when he is divorced or separated from his wife. It is beyond the purpose of this article to re-examine the circumstances under which provisions of these types are declared illegal, or to reconsider the bases of such holdings. Reference may be made to the earlier articles mentioned above in which such problems were exhaustively explored. It is sufficient for present purposes to say merely that some courts under some circumstances have invalidated provisions of these types. There are circumstances in which each of these provisions would be held illegal by practically any court.

The most vexing aspect of the problem of the illegality of conditions and limitations concerns the validity of a particular disposition of property which has been made subject to an illegal condition or limitation. Yet this age-old problem has received, with one or two notable exceptions, but scant and superficial analysis by both courts and commentators. Perhaps one reason for this is to be found in the frequent assumption that the problem simply does not exist, which usually results in a decision sustaining the gift free of the illegal condition or limitation. This certainly is the almost universal result in cases involving conditions subsequent or executory limitations, a result not without some support on principle, as will later appear.

But there is far more to the problem than a superficial analysis will reveal, especially in cases involving conditions precedent, over which most of the controversy has centered. Illegal conditions subsequent have appeared in far greater numbers than illegal conditions precedent; consequently, although the problem is of ancient origin, the effect of the latter has had to be decided in comparatively few cases. Since only one type of illegal condition appears most frequently in precedent form, the condition encouraging divorce or separation of spouses, the largest part of the cases considered here involve conditions of that type.

B. The State of Authority

According to Jarman, the common law rule applied in cases involving devises: the illegality of a condition precedent rendered the gift itself void. But in cases involving bequests of personalty, the Court of Chancery, following the ecclesiastical courts, accepted the civil law rule: a condition precedent that is illegal as *malum prohibitum* or *contra bonos*
mores was treated pro non scriptis, leaving the gift absolute. The last half of Jarman's statement finds some support in several decisions by the Court of Chancery in cases involving bequests. In this country Jarman's rule on bequests, but extended to cover devises also, has been enacted by the legislatures of four states. Several New York courts have held that the illegality of a condition precedent leaves the gift absolute, apparently recognizing the applicability of the civil law rule to bequests of personal property. The same rule was recognized by way of dicta by the courts in two other states. The rule was applied in one case to a devise of real estate; in two others to a combined gift of realty and personality; and in two other cases the courts applied it to bequests of personality, but expressly rejected any distinction in its application between bequests and devises, regarding it as applicable to both. In two cases the courts upheld gifts on illegal conditions precedent, apparently without any express consideration of the effect of illegality.

No English cases have been found which substantiate Jarman's statement that in cases involving devises the illegality of a condition precedent defeats the gift also. In one case in this country, however,

2 2 Jarman, Wills, 7th ed., 1443 (1930); see also 1 Story, Equity Jurisprudence, 14th ed., § 403, (1918); 1 Roper, Legacies, 1st Am. ed., 507 (1829).
3 Tennant v. Braie, Toth. 77, 21 Eng. Rep. 128 (1608); Brown v. Peck, 1 Eden. 140, 28 Eng. Rep. 637 (1758); Wren v. Bradley, 2 De G. & S. 49, 64 Eng. Rep. 23 (1848). In In re Borwick, [1933] 1 Ch. 657, a condition which appears to be precedent was held to be a void condition subsequent, leaving the gift absolute.
4 Cal. Civ. Code (Deering, 1941) § 709 provides: "If a condition precedent requires the performance of an act wrong of itself, the instrument containing it is so far void and the right cannot exist. If it requires the performance of an act not wrong of itself, but otherwise unlawful, the instrument takes effect and the condition is void."

The same section has been enacted in 3 Rev. Code Mont. (1935) § 6702; N.D. Rev. Code (1943) § 47-0224; S.D. Code (1939) § 51.0225.

5 In re Farmer's Will, 99 Misc. 437, 163 N.Y.S. 1089 (1917); In re Haight's Will, 51 App. Div. 310, 64 N.Y.S. 1029 (1900); Potter v. McAlpine, 3 Dem. Surr. 108 (N.Y. 1885); see O'Brien v. Barkley, 78 Hun (85 N.Y.) 609, 28 N.Y.S. 1049 at 1054 (1894).
8 Davidson v. Wilmington Trust Co., 23 Del. Ch. 1, 12 A. (2d) 285 (1938); Hawke v. Euyart, 30 Neb. 149, 46 N.W. 422 (1890).
9 Dwyer v. Kuchler, 116 N.J. Eq. 426, 174 A. 154 (1934); In re Liberman, 279 N.Y. 458, 18 N.E. (2d) 658 (1939); accord, 4 Property Restatement § 424, comment d (1944).
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Jarman's rule respecting devises was applied to a bequest of personal property, and both the illegal condition precedent and the gift were held void. The same rule has been accepted by the Illinois court as applicable both to legacies and devises. It was approved by way of dictum in a recent New Jersey case, with the further observation that it is the rule generally accepted in this country. A variation of this rule has appeared in several American cases to the effect that in respect to devises a condition precedent must be performed if the devisee is to take, apparently without regard to its validity. Such a rule is quite different from Jarman's, which provides that the illegality of a condition precedent defeats the devise, whether the condition is performed or not.

C. Suggested Solutions to the Problem

In none of the cases involving the effect of illegality has there been brought to bear on the problem the searching analysis required for a solution supportable on principle and policy. Jarman's dual-aspect rule is derived entirely from historical circumstance—the division of jurisdiction in the early English courts between bequests and devises—which has produced more than one anomaly in our law. The proposition that a condition precedent must be performed if the beneficiary is to take, when applied to illegal conditions, may be merely a distortion of Jarman's rule on devises; but in any case it reflects a failure to understand that public policy requires a different treatment of illegal conditions precedent from conditions precedent generally. Since the question of the effect of illegality can be regarded as settled in only a few jurisdictions, analysis of the problem on principle is indicated. Such analysis is undertaken here by way of a statement and discussion of the several rules which have been or which with reason may be offered for the solution.

12 Carter's Heirs v. Carter's Adm'rs, 39 Ala. 579 (1865).
15 Conant v. Stone, 176 Mich. 654, 143 N.W. 39 (1913); Phillips v. Ferguson, 85 Va. 509, 8 S.E. 241 (1888); see Randsell v. Boston, 172 Ill. 439, 447, 50 N.E. 111 (1898); Crawford v. Thompson, 91 Ind. 266, 273 (1883); Knost v. Knost, 229 Mo. 170, 176, 129 S.W. 665 (1910); Maddox v. Maddox's Adm'rs, 11 Gratt. (52 Va.) 804, 816 (1854).
16 The origin of the rule is not clear. Perhaps it comes from a failure of these courts to distinguish between the effect of an illegal condition precedent and the effect of a valid condition precedent. With respect to the latter, of course, the rule is perfectly proper. In several of the cases cited in the preceding note the courts relied on the unsupported statements of such a rule by Pomeroy and Story. See 2 Pomeroy, EQUITY JURISPRUDENCE, 3rd ed., § 933 (1905); 1 Story, EQUITY JURISPRUDENCE, 14th ed., § 403 (1918).
of this difficult problem. It is undertaken both with diffidence and with deference to the eminent authorities of whose views the writer may be critical.

Rule 1. A condition precedent must be performed before the gift can be enjoyed, without regard to its legality.

Such a rule cannot be justified on any basis whatever. It can serve only to evade the problem of the legality of the condition, and in effect renders all conditions precedent immune from the requirements of public policy.

Rule 2. The illegality of either a condition precedent or a condition subsequent renders the gift absolute.

This is the rule adopted by the American Law Institute.¹⁷ No voice has been raised against it when applied to conditions subsequent. The justification offered by the Institute for applying it to conditions precedent also is that if the condition, although illegal, must nevertheless be performed before the gift can be enjoyed, the public policy rendering the condition void is vitiated. If the rule that any condition precedent must be performed before the beneficiary can take (rule 1) were the only alternative to the instant rule, this argument would be an obvious and conclusive answer to it. But there are other alternatives. According to Jarman's rule on devises, for example, both the condition and the gift are void. Obviously no justification exists today for treating bequests differently from devises in this respect, and any rule must be accepted or rejected for both. It cannot be charged, however, that a general application of Jarman's rule making both the illegal condition precedent and the gift void would give effect indirectly to the condition. The antisocial consequences of a void condition are no more legally cognizable than any other legally ineffective expression of a donor's desires; a beneficiary in such a case would not be penalized for failure to perform an illegal condition, for the gift would be void \textit{ab initio}, and his performance of the condition would avail him nothing.

It may be argued that the gift must be upheld free of the condition to discourage testators from imposing illegal conditions. No such sanction can be effective, however, unless the testator has made the gift for

¹⁷ 4 Property Restatement, § 424 comment d (1944), § 425 comment h, § 426 comment e, § 427 comment f, § 428 comment l, § 429 comment j; § 433 comment f.
the sole or principal purpose of influencing conduct by means of the condition. If his main purpose is to confer a benefit on the beneficiary, and the imposition of the condition is merely incidental thereto, rule 2 has the opposite effect from that intended; in other words, the testator in such a case has nothing to lose by inserting the condition because of the *in terrorem* effect it might have on a beneficiary who did not know it was illegal or who was unable or unwilling to contest it. In fact, there is no rule of uniform applicability which will serve to discourage the use of illegal conditions in all cases. The application of rule 2 to cases involving conditions precedent is not required, therefore, in order to prevent nullification of the public policy on the basis of which the condition is held void, and the effect of illegality must be determined on other grounds.

**Rule 3.** The illegality of a condition subsequent leaves the gift absolute; but the illegality of a condition precedent defeats the gift also.

This rule received its strongest endorsement in an early article by Dean Pound, the main burden of his argument being in support of that part of the rule which would defeat gifts on illegal conditions precedent. He contended that the rule by which the gift in such a case would be upheld (rule 2) was derived from the Roman policy of *favor testamenti*, which no longer obtains, and that to sustain a gift simply by deleting a condition precedent is, in effect, to remake the will of the testator. In other words, the condition and the disposition are not properly separable, but the testator is to be regarded as having directed his bounty to an unlawful result, and his disposition must, therefore, fail, "unless there is some policy . . . which requires us to uphold them *cy pres* whenever possible. . . ." It is further stated "that while legal policy requires that the condition be thwarted, it does not necessarily require that such thwarting take the form of making a disposition which the testator did not intend." It was conceded that where the condition is subsequent the disposition cannot be defeated because the fact which is to have that effect cannot be given legal efficacy.

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19 Testamentary terminology is used generally throughout this article for the sake of convenience and because most dispositions involving illegal conditions are of that nature. No reason is seen, however, why the rules and principles discussed here are not equally applicable to inter vivos dispositions. See Pound, supra, note 18, at 8.
20 Pound, supra, note 18, at 8.
21 Ibid.
If the public policy which invalidates a condition does not dictate the effect to be given to such invalidity (as required by rule 2), neither should the effect of illegality be determined by the logical imperatives of property concepts, and the above argument in support of rule 3 in its application to conditions precedent would seem to apply as well to conditions subsequent. A gift to A subject to defeasance if he ever marries, is no less qualified than a gift to A on condition precedent that he divorce his wife. If public policy does not permit A to take on the terms imposed, is there any reason why a ruling which allowed A to take absolutely might not violate the testator’s intention as much in the one case as in the other? If not, consistency would require that the gift be void in either case; that is, whether the condition be precedent or subsequent.

More significant, however, is the argument that to apply rule 2 to conditions precedent is to remake the testator’s will and thwart his intention. Whether this is so, and whether rule 3 is any less vulnerable on this score, is discussed further below under rule 4.

Rule 4. *The effect of illegality, with respect both to conditions precedent and subsequent, is to be regarded as a problem of construction so as to give effect to the testator’s intent to the extent public policy allows.*

All accepted and appropriate tenets of construction will be applied for the purpose of ascertaining and giving effect to the testamentary intention; if the testamentary intention cannot be determined in this manner, it will be inferred from the precedent or subsequent form of the condition, in the manner provided under rule 3.

a. *Justification for rule 4.*

Some authorities have argued in support of rule 2 that the effect of illegality which it prescribes is required to prevent an indirect nullification of the policy which invalidates the condition. It has been shown that such an argument is not sound. It is submitted that the validity of a gift which has been made on forbidden terms should be governed wherever possible solely by the intention of the testator. If a testator should expressly provide for the disposition of his property in the event his condition is illegal, is there any reason his directions should not be carried out, unless they too are illegal? Usually, however, no such directions will be found, and it may be that the thought of illegality never entered his mind. Must the gift fail in such a case if the condition is
precedent, as required by rule 3? Would a ruling which upheld the gift free of the condition necessarily thwart the testator’s intention?

If the testator’s intention really is to be the focal point of concern, a rule which would defeat the gift in all cases is as objectionable as one which would make the gift absolute. It is possible that he made the gift for the sole purpose of inducing the conduct prescribed by the condition; or, if this were not his purpose, the performance of the condition may still have been regarded as of such importance that he would not have made the gift without it. In either case the gift should fail if the condition is illegal. But is it not quite as likely that his primary purpose was to provide for the beneficiary, and that he would have made an absolute gift if he had known of the illegality of the condition? If so, the gift should not fail. Is it not legitimate to inquire into such matters? There may not be a policy which requires us to uphold a testator’s dispositions “cy pres whenever possible,” but there is at least a judicial inclination to give as complete effect to a testator’s wishes as is consistent with public policy; and, although there may be no modern favor testamenti, most courts are disposed to construe wills so as to avoid partial intestacy whenever this is possible within the limits of other rules. Cannot the instant problem, therefore, be regarded as one of construction, in which the testamentary intention is sought by resort to the language of the whole will, the circumstances attending its making, and such rules of construction as may be appropriate?

This is no license to reach for the moon, nor to remake the will to any greater extent than is customary where a testator has failed to provide for every contingency and where construction in fact amounts to inferring what the testator would have done had he anticipated the events which occurred. Examples of such a technique need not be cited here, except the one which is probably most closely analogous to the instant problem: that involving the effect of the impossibility of conditions. It is also beyond the scope of this article to define the limits of permissible construction; but when the testamentary intention can be ascertained within those limits, no reason is seen why it should not be given effect as readily as an express direction in the will respecting the effect of illegality.

It should be remembered that in all these cases the will expressly provides for the gift, the validity of which is in question, although on

\[22\text{Simes, "The Effect of Impossibility Upon Conditions in Wills," 34 Mich. L. Rev. 909, 935 (1936); 4 Property Restatement, § 438 (1944).}\]
terms which cannot be enforced, and no suggestion is intended that a
court should pull something out of its hat. Special safeguards to fit
unique aspects of this problem, of course, would have to be observed.
For example, if property were given to A in fee on condition that he not
marry, and if the condition were held illegal, it should not be permissible
to show that the testator, in such event, would have intended the prop-
erty to go to B, nor that he would have intended A to take but a life
estate. In other words, the area of permissible construction should be
limited to those alternatives which are directly related to the illegality
of the condition.

b. Where intent of testator is not clear.

Suppose that it cannot be inferred in the manner indicated what the
testator would have done if he had known of the illegality of his condi-
tion. As stated in the discussion of rule 3 above, the distinction which
that rule makes between conditions precedent and subsequent cannot
properly be given conclusive effect in all cases. It is believed, however,
that this distinction does have some presumptive or inferential value.
Generally, the performance of a condition precedent is necessary before
the gift can be enjoyed; a condition in this form raises an inference that
nothing short of full performance was intended, and that if the gift can-
not be taken on such terms, it should fail altogether. On the other hand,
the making of a present gift subject to defeasance by non-compliance
with a condition subsequent tends to indicate an intention that the gift
may be enjoyed free of the condition if public policy prevents the condi-
tion’s enforcement. Only when the testamentary intention cannot be
ascertained by other permissible factors of construction will these infer-
ences become conclusive.

Cs. 4 Property Restatement, § 438 comment h (1944).

Otherwise conditions precedent and subsequent will be treated alike. It must be
conceded that the authorities generally support only the rule which makes the gift absolute
when a condition subsequent is declared void. Rarely, however, has the soundness of such a
rule been questioned or the intricacies of the problem of the effect of illegality been brought
to a court’s attention. In re Cohen [1911] 1 Ch. 37, is an interesting case which suggests
that the courts may not be unalterably committed to any rule of thumb in the disposition of
these problems. There the donee of a power to appoint in trust for his children appointed
to his wife in trust for the benefit of his children, but with the further provision that a
portion of an annuity appointed to her should be taken on condition that she apply a certain
part of it annually to the payment of the donee’s debts, so long as such debts remained unpaid.
The court held that the condition was a fraud on the power and void, and that, although the
condition was subsequent, the appointment itself was void since it could not be separated
from the condition. The court asserted further that the appointment would never have been
made except for the expectation that it would be used for the payment of the donee’s debts.
Is not this in substance an application of rule 4, although the condition was declared void
on grounds other than those of public policy?
Effects of gifts over and alternative gifts.

In most cases involving the effect of illegal conditions, the provisions in question do not appear simply in the form of a single gift subject to an illegal condition precedent or subsequent. They usually involve gifts over or alternative gifts on illegal conditions. It should be obvious that the problem is more complicated in such cases than in the simple case; but the courts have not perceived this, probably because none of the rules of thumb thus far accepted by the courts is likely to suggest many of the ramifications of the problem. Indeed, their main virtue is the simplicity of their application. On the other hand, rule 4 has virtue in that, by requiring a more searching analysis, it offers a better chance of reaching a result which does least violence to a testator’s wishes.

Suppose, for example, that property is given to A on condition that he not marry, but if he should marry, then to B. Here, while the condition is subsequent to A’s interest, it is precedent to B’s. The problem is further complicated because, although the condition subsequent to A’s interest may be held illegal, there seems to be no basis for attacking the legality of the condition precedent to B’s interest, for a simple gift to B in the event of A’s marriage, of itself, could impose no restraint on A. Under rule 2, presumably A’s gift would become absolute. But what about B’s interest? It would be necessary to recognize in such a case that it would be impossible to separate the effect of the condition as to A and B, since B could take only on an event which would also serve to divest A’s interest unlawfully. B’s gift, therefore, would fail, even though the condition in respect to that gift, if separately considered, would be valid. The same result would be required by rule 3, since the illegality of the condition subsequent would leave A’s gift absolute. The same result could also be reached under rule 4 if, in the absence of other construction factors, it were inferred that the illegality of the condition subsequent should make A’s gift absolute. Suppose, in the construction of the will as provided by rule 4, it were determined that A’s gift should fail. Should B’s gift then be valid, and if so, on what terms? Since the

26 Restraints on will contests: In re Friend’s Estate, 209 Pa. 442, 58 A. 583 (1904); Rouse v. Branch, 91 S.C. 111, 74 S.E. 133 (1912); In re Chappell’s Estate, 127 Wash. 638, 221 P. 336 (1923). Restraints on marriage: 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). Conditions inducing separation: Conrad v. Long, 33 Mich. 78 (1875); Whiton v. Snyder, 54 Hun 552, 8 N.Y.S. 119 (1889); O’Brien v. Barkley, 78 Hun 609, 28 N.Y.S. 1049 (1894). In most of these cases the indicated result was reached without any express ruling by the courts on the effect of illegality.

26 Such was the effect of the decisions in all of the cases cited in the preceding note.
condition as to B's gift would be valid, it might be held that he could take only if A married. Construction of the will, however, might reveal that the testator, in these circumstances, would have intended B's gift to be absolute; if so, a court might be willing to rule that B's gift be accelerated and become immediate. It should not be considered an unwarranted extension of the policy of rule 4 to hold that B's gift, as well as A's, should fail, if, in the construction of the will, such were found to have been the testator's intention.

A variation of the same problem would arise in the case of a gift to A, but if B should divorce his wife, then to B. Here it would seem that the condition subsequent to A's interest would be valid, even if the condition precedent to B's interest were held illegal. Rule 2, which presumably would require that B's gift become absolute, would be unworkable, unless a court were willing not only to defeat A's gift (although subject to a valid condition), but also to accelerate B's gift. Under rule 3, B's gift would be void. This presumably would leave A's gift in effect, but still subject to defeasance in the event of B's divorce. In the construction of the will under rule 4 in the manner described in the preceding paragraph, the following possible alternatives are indicated: declare B's gift absolute and accelerate it, which would involve defeating A's gift; declare B's gift void and A's valid but subject to defeasance on B's divorce; declare B's gift void and A's valid and absolute; or defeat both gifts.

A similar problem appeared in the leading New York case, In re Liberman. There in substance part of the testator's estate was given to A in trust to pay the income to B on his marriage, if such marriage were with the consent of A, and until such marriage, the income was to be enjoyed by A. On B's death, the principal was bequeathed to the issue of such marriage, but if there were no such issue, or if B should have married without consent, the principal was to go to A. It is not clear from the opinions of the Court of Appeals or of the lower courts exactly what relief was sought, but the court declared that the condition requiring consent was illegal because it was to A's personal advantage to withhold his consent. The court also held that the gift of income to B must be

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27 The language, of course, does not describe a strict condition subsequent, but that term as used in respect to the present problem must be taken to include executory limitations as well.
upheld free of the condition, apparently vesting on his marriage, whether or not such marriage were with the consent of A. To hold otherwise, the court said, would allow the testator indirectly to accomplish a result which had been found to be against public policy. The error of such a view is explained above in the discussion of rule 2. The problem of disposing of A's interest, as well as the need to accelerate B's was avoided in this case, partly because A made no claim to the income, having paid it over to B since the testator's death, and also because the court apparently split the condition to allow B to take on his marriage, but free of the illegal requirement of consent. It is possible, of course, that the same result might have been justified by a construction of the will as provided in rule 4. From the facts mentioned in the opinion, however, it appears that the testator, an orthodox Jew, was concerned about the conduct of B, his son, who had been married on two previous occasions to women of a different faith, of which the testator had strongly disapproved. Fearing another such marriage, which in fact occurred, it seems probable that the testator's purpose was not to provide for B in the event of his marriage, for immediate gifts of income had been made to other children; but rather to deny him any share in the estate unless and until B complied with his wishes. In the absence of other pertinent factors, the gift to B at least might well have been held void.

One further variation should be considered. Suppose property is given to A on condition that within ten years after the testator's death he shall have divorced his wife, but if such event shall not have occurred, then to B. This would seem to involve alternative gifts on conditions precedent: to A if he should have divorced his wife, to B if A should not have divorced his wife. Again, although the condition to A's gift may be illegal, the condition to B's gift, if considered separately, would not be illegal, unless perhaps A and B were members of the same family, for it could not hold out an inducement to A to seek a divorce, nor penalize him for failure to do so. Under rule 2, A's gift would be absolute, vesting either at the end of the ten-year period, or perhaps immediately if it were found that the only reason the testator deferred the gift was to give effect to the illegal condition.30 In either event, since the gifts are

30 The following cases involved similar facts, except that the beneficiary was given the period of his lifetime in which to separate from or divorce his spouse, with a gift over if he should die without having complied with the condition precedent: Davidson v. Wilmington Trust Co., 23 Del. Ch. 1, 2 A. (2d) 285 (1938); Hawke v. Euyart, 30 Neb. 149, 46 N.W. 422 (1890); Dwyer v. Kuchler, 116 N.J. Eq. 426, 174 A. 154 (1934). In each of these cases the condition was held illegal and the gift absolute and immediate, with no discussion of the problem.
in the alternative, B's gift would have to fail, regardless of whether the condition to B's gift, if separately considered, would not be illegal. Unless so modified, rule 2 could provide no satisfactory solution to the problem. Rule 3, of course, would require that A's gift be defeated. It might then be possible to treat the condition to B's gift separately and allow B to take if, at the end of the ten-year period, A had not divorced his wife, since, under such circumstances, the condition could impose no restraint on A. Under rule 4, the following possible alternatives are indicated: hold A's gift absolute, with or without acceleration, and defeat B's gift; defeat A's gift and uphold B's, either subject to the condition that A shall have divorced his wife, or absolutely (with or without acceleration); or defeat both gifts.

A similar problem, but complicated by other factors, appeared in Winterland v. Winterland. There a testamentary gift was made in remainder to be divided equally between the testator's children. By codicil it was provided that the gift to one of the sons, A, should be held in trust to pay the income to A so long as he lived or until his then wife died or was separated from him by divorce. If either event occurred in A's lifetime, he was to receive the principal absolutely, but if he died before the occurrence of either event, the principal was to go to the testator's other children then surviving (herein referred to as B). A died, survived by his wife, from whom he had not been divorced. A's wife and child claimed that the condition pertaining to divorce was illegal and that such illegality infected the whole codicil, making it void, with the effect that A should be held to have taken absolutely with the testator's other children as provided in the will. The court held, however, that, although the condition inducing divorce was illegal and such illegality would prevent the estate from vesting if only the single condition had been imposed (rule 3), there was the further condition that A survive his wife, which was valid, and since that condition had not been met, the property should go over as provided in the codicil. The dissenting justices accepted the contentions of the widow and child, believing that the illegality of the one condition so upset the scheme of the trust as to invalidate the whole codicil. It would seem, on the contrary, that the testator's scheme was not upset at all by the illegality of the one condition, provided his further directions were not also overthrown. No one alleged that the other condition respecting A's surviving his wife was, of

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31 Such was the effect of the decisions in each of the cases cited in the preceding note.
32 389 Ill. 384, 59 N.E. (2d) 661 (1945).
itself, illegal. Was it not proper, therefore, to hold the condition as to
divorce illegal and sustain the gift, provided the condition of survival
were performed? Since that condition was not performed, should not
the property have gone over as provided in that event (and as held by
the majority of the court)? It is assumed that, at least in the application
of rule 4, if a testator expressly provides for the disposition of a gift in
the event of the illegality of the condition on which it was made, his
directions should be carried out, unless they too are illegal. It is submit-
ted that in the instant case the testator so provided. Probably he did not
think about the illegality of his condition as such; but he made it quite
clear that he did not wish A to take any interest that would inure to the
benefit of his wife after his death. To the extent that the testator sought
to carry out his wishes by inducing A to obtain a divorce, his efforts must
fail, with the result that A's failure to obtain a divorce could, alone, have
no effect on his rights. By the same token, A could not have claimed his
interest by divorcing his wife. But no reason is seen why A could not
be denied his gift unless he survived her. To have defeated the whole
codicil so as to make A's interest absolute would have been to reach the
very result which it was the sole purpose of the codicil to prevent, and a
result not required to effectuate the public against inducements to di-
vorce. The decision of the majority of the court, therefore, seems
correct.

One would least expect such a decision, however, in a jurisdiction
such as Illinois, where rule 3 has been adopted. Under that rule, if
strictly applied, the illegality of the condition as to divorce would defeat
the gift and leave nothing on which the second condition (pertaining to
survival) could operate. On the other hand, a decision like that in the
Winterland case could be reached in a jurisdiction which accepts rule 2,
for the illegality of the condition as to divorce should make the gift abso-
lute only in respect to that condition, but subject to the condition of

33 In re Dunbar’s Will, 189 Misc. 687, 71 N.Y.S. (2d) 287 (1947), cited infra, note 34.
34 The decision in In re Dunbar’s Will, supra, note 33, is substantially in accord with
the Winterland decision, but with the factual difference that the legatee was still alive, had
divorced her husband, and was claiming the principal of the trust fund set up for her benefit.
It should also be noted that the court in effect, although not expressly, applied rule 4.
35 Compare the Winterland case with the earlier case, Tripp v. Payne, 339 Ill. 178, 171
N.E. 131 (1930), which involved similar facts, except that the beneficiary had not died, but
brought suit attacking the clause of the will respecting his divorce. The court held that the
condition precedent was illegal, that the gift also was void, and that since it was an essential
part of the testator's scheme, the whole will failed. This case did not arise in a manner which
was likely to bring to the court's attention the factors which it later considered in the Winter-
land case; nevertheless, there is no basic factual distinction between them.
survivorship, which is not illegal. Oddly enough, however, several courts in dealing with the Winterland type of case, which seems to be a recurring one, applied rule 2, yet reached results inconsistent with the Winterland decision by holding the gift absolute and immediate because made on a condition inducing divorce, ignoring altogether the condition of survival.86

A final word about special limitations: only one case has been found in which the effect of illegality of a restraint in such form was expressly considered.87 This dearth of authority is probably due to the general acceptance of the condition-limitation distinction, by which a restraint in the form of a limitation escapes the taint of illegality. The determination of the legality of any provision on such a basis is without justification in principle; and the problem must be faced as to what must be done with a gift which has been made on an illegal limitation. In the one case mentioned the court held both gift and limitation void, rejecting as inapplicable Jarman’s rule governing bequests on illegal conditions precedent, but without further analysis of the problem on principle. It would seem that rule 4 could be applied quite as well to provisions of this type as to gifts on conditions precedent or subsequent. Since a special limitation resembles a condition subsequent more than a condition precedent, termination of the estate following an initial vesting, it can be inferred in the absence of other factors of construction that the testator would have made the gift without limitation if he had known the limitation was illegal. In such a case the gift would be upheld. But a further problem arises in such cases. The testator has not defined the estate given and made it subject to a condition, precedent or subsequent; formally at least, he has made the limitation the measure of his gift. This formal distinction, however, should make no difference here. The illegality of the limitation should render the defeasible estate absolute in the same manner as if the estate were defeasible by virtue of a condition subsequent.

D. Conclusion

The possible variations of the problem of the effect of illegal conditions and limitations are innumerable, and to a certain extent, unforesee-

87 In re Moore, 39 Ch. D. 116 (1888).
able. The complicating factors inherent in such present and possible future variations demonstrate the inadequacies of either rule 2 or rule 3. It is believed that rule 4 offers the greatest flexibility for the disposition of cases with unforeseen ramifications, as well as the best guarantee, even in the simpler cases, that testamentary desires will be thwarted only to the extent necessary to protect the public interest.