

February 1961

Contracts--Conditions--Restraint of Remarriage

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Recommended Citation

William W. Upton, *Contracts--Conditions--Restraint of Remarriage*, 63 W. Va. L. Rev. (1961).
Available at: <https://researchrepository.wvu.edu/wvlr/vol63/iss2/11>

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fixing in the milk industry violates the right of the individual's freedom of contract which is protected by both the federal and state constitutions. The court, in overruling prior decisions sustaining the validity of the price fixing statute, held that the legislature can only fix prices where business is "affected with a public interest." The milk industry, according to the court, is not so affected.

Both the Georgia case and the case under comment represent the minority view. For the most part the courts seem inclined to follow the *Nebbia* case, which is the law today at least so far as an interpretation of federal due process is concerned. Mr. Justice McReynolds, speaking for the minority in the *Nebbia* case, expressed the fear that by allowing the fixing of milk prices, price control would extend to other goods. *Nebbia v. New York, supra* at 551. However, since that decision over twenty-five years ago, there have been relatively few extensions of price fixing to other goods and services. That courts are going to be cautious in extending the doctrine is shown by two fairly recent cases. In *State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners*, 40 Cal.2d 436, 254 P.2d 29 (1953), the court held unconstitutional a statute authorizing the fixing of minimum prices for dry cleaning. In *Edwards v. State Bd. of Barber Examiners*, 72 Ariz. 108, 231 P.2d 450 (1951), a state law fixing minimum prices for barbering services was declared invalid. These statutes were held to be beyond the scope of the police power as their purpose was not primarily the promotion of public welfare.

Nevertheless, the fixing of prices is not in itself unconstitutional. The test, as stated previously, is whether a statute allowing price control, has as its purpose a legitimate end, and seeks to attain such end in a reasonable manner. If it meets these requirements it should not be violative of due process.

Peter Uriah Hook

Contracts — Conditions — Restraint of Remarriage

P's brothers entered into a contract with *D* in which *D* promised to pay royalties (on the sale of corn husking machines) to *P*'s mother during her life and upon her death to pay like royalties to *P* "provided she shall not have theretofore remarried; such royalties to be paid to her until her death or remarriage." *P* remarried in 1944 and her mother died in 1945. *P* alleges that the condition

in restraint of remarriage is void and seeks specific performance of the contract and an accounting. The district court granted specific performance of the contract. *Held*, in affirming the lower court, that the condition in the contract was a condition subsequent, and that under Illinois law a condition in restraint of remarriage is void. *Shackleton v. Food Mach. & Chem. Corp.*, 279 F.2d 919 (7th Cir. 1960).

Jurisdiction in this cause rests on diversity of citizenship and the law of Illinois is determinative of substantive rights. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Before discussing the status of the condition in the instant case, it is necessary to discuss conditions as applied to contracts in general. In contract law, conditions precedent qualify or limit the duty of immediate performance. 3 WILLISTON, CONTRACTS § 666 (rev. ed. 1936). In other words, a condition precedent is a fact, (other than mere lapse of time), which must exist or occur before a duty of immediate performance of a promise arises. RESTATEMENT, CONTRACTS § 250 (1932). West Virginia is in accord with this definition. W. VA. ANNOT., RESTATEMENT, CONTRACTS § 250 (1938).

If *A* and *B* enter into a contract in which *A* promises to buy *B*'s horse if it wins the derby, *A* has made the winning of the derby a condition precedent to his duty to pay for the horse. There is no duty of immediate performance of a conditional promise until the condition occurs. 12 AM. JUR. CONTRACTS § 328 (1938).

In the law of contracts the term condition subsequent means subsequent to a duty of immediate performance, that is, a condition which does not require further performance of the immediate duty which has once accrued under the contract. 3 WILLISTON, CONTRACTS § 667 (rev. ed. 1936), cited with approval in *Hoffman v. Employer's Liab. Assur. Corp.*, 146 Ore. 66, 29 P.2d 557 (1934). In other words, a fact which unless excused will extinguish a duty to make compensation for breach of contract after the breach has occurred, is a condition subsequent. RESTATEMENT, CONTRACTS § 250 (1932).

Thus, a condition in a fire insurance policy which provides that after proof of loss a suit must be brought within twelve months is a true condition subsequent. Without a discussion as to when the twelve-month period begins to run, the courts hold that failure

of the insured to bring his suit within twelve months absolves the insurer of all liability under the policy. In *Kirk v. Fireman's Ins. Co.*, 107 W. Va. 666, 150 S.E. 2 (1929) this situation was before the court and was treated as a condition subsequent although not so denominated. In contract law it is difficult to find an example of a condition subsequent because, as is stated in 3 WILLISTON, CONTRACTS § 667 (rev. ed. 1936), "Such conditions are very rare."

One problem arises because many conditions which are precedent in effect are stated in subsequent form. In fire insurance policies it is stated that if notice, or proof of loss, is not given within thirty days the policy is void. This condition although stated in subsequent form is in reality and effect a condition precedent. Proof of loss must be presented by the insured before there is an immediate duty on the part of the insurer to pay the indemnity provided for in the policy. *Morris v. Dutchess Ins. Co.*, 67 W. Va. 368, 68 S.E. 22 (1910). This was also held to be true in relation to a waiver of premium clause because of disability, in a life insurance policy. The court stated that proof of disability was a condition precedent to the duty of the insurer to waive the premium. *Iannarelli v. Kansas City Life Ins. Co.*, 114 W. Va. 88, 171 S.E. 748 (1933). The classic example in this area is *Gray v. Gardner*, 17 Mass. 188 (1821), in which *A* in a sealed writing promised to pay *B* \$1,000. The writing continued: "this obligation shall be void if the ship 'Lady Adams' arrives by October 1." The failure of the ship to arrive by October 1 is a condition precedent to *A*'s duty of immediate performance. There can be no right of action before that day. 3A CORBIN, CONTRACTS § 741 (1960), RESTATEMENT, CONTRACTS § 259 (1932).

In order to determine whether a condition is precedent or subsequent some courts erroneously state that this will be determined merely by the intent of the parties or the intent that can be implied from looking at the contract as a whole. This was the view taken in the instant case when it was in the lower court. *Shackleton v. Food Mach. & Chem. Corp.*, 166 F. Supp. 636 (E.D. Ill. 1958). The circuit court accepted this view without discussion. Many other courts take this same view. This result is reached by the failure to distinguish between a condition which relates to the formation of the contract and one which relates to the duty of performance. It may also, in some instances, be the result of confusing contract law with property law. In *Mereminsky v. Mere-*

minsky, 188 N.Y.S.2d 771 (1959), the court seems to have failed to make this distinction and used the intent of the parties to determine whether a condition was precedent or subsequent.

By another view, mere intent is not enough to create a condition subsequent. The duty of immediate performance must be looked at to determine whether a condition be precedent or subsequent. A condition subsequent under this view cannot be considered as such unless the fact is an occurrence that can consistently within the terms of the promise take place after a duty of immediate performance has arisen, and an intention is clearly manifested that the occurrence shall be a condition subsequent. RESTATEMENT, CONTRACTS § 259 (1932). This seems to be the better view and West Virginia seems to be in accord. W. VA. ANNOT., RESTATEMENT, CONTRACTS §§ 250, 259 (1938).

To determine in the instant case whether the condition was precedent or subsequent, it is necessary to analyze the contract step by step. The contract was entered into by *D* and *P*'s brothers. The contract was for the sale of a corporation, owned by *P*'s brothers, in exchange for an undisclosed consideration and a promise by *D*s to pay certain stipulated royalties to a donee beneficiary. The beneficiary was *P*'s mother until her death and then *P*, if she had not theretofore remarried, until her death or remarriage. This was a gift by *P*'s brothers to their mother and to *P*. The condition was in no way related to the *formation* of the contract but related solely to the duty of performance.

In this case the lower court used the intent theory to determine whether the condition was precedent or subsequent. This is not the better view. *D* promised to pay *P* after her mother died, as long as she did not remarry. The promise of *D* then was, in effect, to pay *P* if she remained unmarried. This condition is not a condition subsequent. The fact, (the marriage), is not an occurrence that can consistently with the terms of the promise, (*D* promises to pay royalties to *P* if she remains unmarried), take place after the duty of immediate performance has arisen. This condition is therefore plainly a condition precedent stated in the form of a condition subsequent. So the condition precedent is a fact, (the unmarried state), which must exist or occur before a duty to perform the promise, (*D*'s promise to pay royalties to *P* if she remains in an unmarried state), arises. In other words, *P*'s remaining in an unmarried state is a condition precedent to *D*'s duty to make the royalty payments. There is no duty of immediate

performance of a conditional promise on the part of *D* until the condition is complied with. 12 AM. JUR. CONTRACTS § 328 (1938).

Since the condition in the instant case was held to be a void condition, (which will be discussed subsequently), the question then arises as to what is the legal effect of a void condition precedent in a contract. If a condition in a contract is in unlawful restraint of marriage and the promise is open to the same objection no obligation ever arises. 6 WILLISTON, CONTRACTS § 1741 (rev. ed. 1938). Also if a contract is conditional or illegal, the rights of a donee beneficiary are subject to the same limitations. 2 WILLISTON, CONTRACTS § 364A (rev. ed. 1936), RESTATEMENT, CONTRACTS § 140 (1932). Therefore it seems that if the condition in the instant case was illegal and void the *P* has no right under the contract. This is not the position that was taken in the instant case, where the court held that the *P* was entitled to the royalties provided for her in the contract. The court seems to apply rules of property law, although there was no discussion of this, which do not apply in contracts. The legal consequences of a void condition in a deed or will, in contrast to a void condition in a contract, are very different. 6 WILLISTON, CONTRACTS § 1741 (rev. ed. 1938).

Before discussing the validity of restraints on marriage it must be noted that "the same considerations of public policy which invalidate conditions in restraint of marriage in deeds or wills apply when the restraint is imposed by contract." ANNOT., 122 A.L.R. 7, 127 (1939).

Since restraints on marriage are governed by public policy, various rules have been adopted. One rule with which all courts seem to be in accord is that there can be no valid contract or condition which is in perpetual restraint of marriage upon one who has not previously married. Public policy renders this restraint illegal and therefore void. 17 C.J.S. *Contracts* § 233 (1939), 6 WILLISTON, CONTRACTS § 1741 (rev. ed. 1938), RESTATEMENT, CONTRACTS § 581 (1932).

To this general rule many exceptions have been made, resulting in some confusion. The only exception which will be considered here is that concerning contracts and conditions in restraint of a *second* marriage. Here, there is a conflict of authority. The majority view is that a condition in restraint of *remarriage* is a valid

condition. 17 C.J.S. *Contracts* § 233 (1939). The instant case holds that a condition in restraint of remarriage is void unless it is placed upon a widow by her deceased husband. This position was criticized in the dissenting opinion, which argued that the majority of the court had arrived at its decision by the use of obiter dicta in two previous Illinois cases. Assuming that this case represents the Illinois view, it is decidedly a minority view.

The majority view has been criticized by some courts, which state that there is no logical reason why a restraint on marriage should be treated differently, whether it be a first, second, or third marriage. These courts contend that it is still against public policy to restrain one's free choice of a mate. ANNOT., 122 A.L.R. 7 (1939).

Although the majority view has been criticized, it seems to be supported by a logical foundation. "This foundation seems to be that in such a case the donor does not ordinarily impose the restraint out of caprice, but for the purpose of providing support while it is needed," 35 AM. JUR. *Marriage* § 262 (1941). The majority view seems to be the better view and it is supported by the weight of authority in the United States. 2 POMEROY, EQUITY JURISPRUDENCE § 933 at 1962 (4th ed. 1918), 35 AM. JUR. *Marriage* § 262 (1941).

In West Virginia there seems to be no case construing contracts in restraint of marriage. In respect to conditions in a deed or will just one case has been found, and this concerns a condition precedent in a will. The will contained a bequest which was conditional upon the legatee remaining unmarried until she became twenty one years of age, and the court held that this was not such a restraint on marriage as to make the condition void. *Reuff v. Coleman*, 30 W. Va. 171 (1887). In light of the liberal position taken in this case, it seems that West Virginia would follow the majority view and not declare a condition in restraint of second marriage illegal and void.

William Warren Upton