

CONDITIONAL GIFTS AND FREEDOM OF TESTATION- TIME FOR A REVIEW?

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1. Introduction

The purpose of the succession project, begun by the New Zealand Law Commission in 1993, is to develop a Succession Act to provide for all succession matters in one statute. The project is also designed to simplify the law, ensure that will-makers' wishes are better carried out, and to take account of the diversity of New Zealand families.¹ The major aspects of the project are testamentary claims,² the succession to Maori ancestral property,³ and wills and administration of estates.⁴ The present article relates in part to testamentary claims, the subject of a report published by the Law Commission in August 1997.⁵

Whilst the common law was not so permissive as is commonly believed, from the eighteenth to the twentieth century freedom of testation was the norm. Yet the common law still allowed testators to impose various conditions upon their legatees and beneficiaries. This meant that gifts might be dependent upon the performance of certain conditions, or the non-fulfilment of others.⁶

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¹The project commenced with the approval of the Minister of Justice. See "Succession Law: Testamentary Claims" (discussion paper) (1996) NZLC PP24 vii.

²These are presently covered by the Law Reform (Testamentary Promises) Act 1949, Family Protection Act 1955, Matrimonial Property Act 1963 ("Succession Law", supra note 1). A plain language summary accompanied the discussion paper, "What should happen to Your Property when You Die?" (1996) NZLC MP1.

³"The Taking into Account of Te Ao Maori in Relation to Reform of the Law of succession: A Working Paper" (1996) NZLC MP6.

⁴The Wills Act 1837 (7 Will IV & 1 Vict c 26) (UK), Administration Act 1969; "Wills Reforms" (1996). NZLC MP2; Succession Law: A Succession (Wills) Act (report) (1997) NZLC R41.

⁵"A Succession (Adjustment) Act" (1997) NZLC R39.

⁶A gift or donation is the voluntary and gratuitous transfer of any property from one person to another. It may be conditional but, condition apart, is not revocable nor terminable. Acceptance is presumed unless dissent is signified, but a gift may be rejected when the donee becomes aware of it. The title to the subject of gift must be transferred in whatever way is necessary for the kind of property concerned. A gift may be made *inter vivos*, or, on death, by will or *donatio mortis causa*.

A testator⁷ might, by will, dispose of any or all of his property to whomsoever he wished, creating any such interests as the law allowed in any part thereof, outright gifts, gifts subject to conditions, options, life or other terminable interests. But since the early part of the twentieth century the court may, under statutory authority, make provision for the maintenance of a dependant not otherwise adequately provided for.

In New Zealand today, the statute law intervenes in the testamentary freedom of a deceased to bequeath his or her property to whomsoever the deceased wishes. But statute law does not intervene with respect to lifetime gifts, nor does it regulate testamentary freedom to impose conditions on bequests, unless such conditions are held to infringe the duty to provide for dependents enshrined in the Family Protection Act 1955. The courts have limited scope for regulating the exercise of this testamentary freedom. But should this discretion perhaps be extended by statute?

The common law rules which govern testamentary dispositions were developed in a social environment markedly different to that found today. For similar reasons that have motivated the review of the law relating to Maori ancestral property,⁸ it may be questioned whether the common law now adequately reflects the nature of twenty-first century New Zealand society. Yet the common law is flexible, and does ultimately reflect the society of which it is a product. Whether legislative intervention is necessary, or whether the courts should be left to develop the law, will depend upon the degree to which the law is seen as being out of step with societal needs and expectations.

In this article the rules governing testamentary gifts are examined in light of the proposals from the Law Commission for a Succession Act. It is suggested that it might be desirable for a new Succession Act to also cover testamentary freedom to impose conditions, and that the law governing conditional gifts be otherwise brought up to date.

Before examining conditional gifts it is necessary to examine the wider question of testamentary freedom. Considerations of public policy which influence the regulation of conditions by the courts are assessed. The distinctions between conditions precedent and subsequent are evaluated, in particular in respect of the effect of void conditions, uncertainty, and illegal and repugnant conditions. Specific examples of categories of gifts, including those to intended husbands and wives, restraints on alienation, restraints of marriage, gifts inducing separation of spouses, and conditions affecting parental duty are examined. Conditions restricting freedom of religion, and conditions affecting freedom to impose conditions as to race are also reviewed. In the conclusion, the appropriateness of some statutory regulation of the current general freedom to impose conditions on testamentary gifts is assessed in light of the changed societal circumstances prevailing since most of these common law principles were established.

2. Testamentary Freedom

⁷Testator is to be taken as including a testatrix where appropriate.

⁸Supra note 3.

Until the turn of the nineteenth century, New Zealand, along with other common law jurisdictions, allowed generally unfettered testamentary freedom. This was in contrast to the practice followed in the civil law jurisdictions,⁹ where the Roman law inheritance denied testators the freedom enjoyed under the common law.¹⁰ Scotland was also influenced by the civil law tradition. Many non-European legal systems also restricted the freedom to bequeath one's estate solely as one wished.¹¹ The limitation of testamentary freedom was also encouraged by the Church, which sought to protect the rights of those owed a moral duty of support.¹² In general, this limitation took the form of a requirement that a given proportion of a deceased's estate should pass automatically to the nearest relatives.

As an example, in Scots law even today, if a deceased leaves a widow and children, the widow is entitled to a one-third share in the whole of the moveable estate,¹³ and the children are entitled to another one-third share equally between them.¹⁴ If he leaves a widow but no children, or children but no widow, the *jus relictæ* or *legitim* is increased to a one-half share of the net moveable estate.¹⁵ The remaining portion is known as the dead's part. A surviving husband and children have comparable rights in the wife's estate. The dead's part is the only portion of which the testator or testatrix can freely dispose. Legacies and bequests are payable only out of the dead's part. All debts are payable out of the whole estate before any division.¹⁶

⁹In France and Germany succession (*succession* or *Erbschaft*) to an estate (*patrimoine* or *Vermögen*) is controlled by various rules designed to protect the close family of the deceased. In France the free estate (*la quototé disponible*) only may be alienated. *La réserve héréditaire* is reserved to the close family (Code Civil art 913). In Germany, the *Pflichtteil* is the legal entitlement of the family (Law BGB ss 1922ff).

¹⁰Much was to be found in Roman law as to conditional gifts, and Bracton makes use of that learning to explain the effect of the various modes of enjoyment which could be prescribed by the will of the parties (Holdsworth, William, *A History of English Law* (3rd ed, 1923) ii, 263-264).

¹¹In the East there was an elaborate succession law. In Muslim countries, in particular, there was a minute fractional division of estates (Maine, Sir Henry Sumner, *Early Law and Custom* (1890) 125-144).

¹²Succession to an intestate's chattels was put on an entirely different basis to that of realty, owing to the fact that, as early as Glanvil, the ecclesiastical courts had acquired jurisdiction in this field. The basis of this jurisdiction was the claim of the bishop to a share of the goods, called the "dead part" for charity when the deceased had not made a will.

¹³Her *jus relictæ*, broadly analogous to personalty in the common law. Such rights are now subject to prior statutory rights.

¹⁴Their *legitim*.

¹⁵*Buntine v Buntine's Trustees* (1894) 21 PL 714; 1 SLT 592.

¹⁶The doctrine of legal rights in 1964 replaced the former rules of courtesy and *jus relictæ* for widowers, and *terce* and *jus relictæ* for widows. These rights are for heritable and moveable property respectively- and broadly equivalent to real and personal property. Children remain entitled to *legitim*, as more distant relatives have since 1968 (Succession

Anciently, the position in England was not dissimilar.¹⁷ Glanvill noted that one-third of a deceased's chattels passed to his heir, one-third to his wife, and one-third as he wished.¹⁸ Magna Carta referred to this provision,¹⁹ as does Bracton.²⁰ In a Christian world, the “dead man's part” was taken to apply to the property which had to be spent for the benefit of his soul and which, accordingly, the Church received. The common law courts early gave petitioners the writ *de rationabili parte bonorum* to allow widows and children to recover their “reasonable parts”.²¹ But the evolution of the separate secular and religious courts in the twelfth and thirteenth centuries led to testate and intestate succession to personalty coming within of the jurisdiction of the ecclesiastical courts.²² These courts were motivated by religious (and moral) considerations to a much greater extent than the common law courts, and indeed administered a distinct system of law.²³

In England the bishop remained the natural administrator of one-third of a deceased's personalty, at least on intestacy,²⁴ until the passage of the Court of Probate Act 1857 (UK)²⁵ abolished the testamentary jurisdiction of the ecclesiastical and other courts, and set up the Court of Probate. However, whilst the Church courts remained responsible for this area of law, over time the freedom to bequeath all one's personal property as one saw fit became prevalent.²⁶ The parts scheme thus became limited to succession on intestacy. To a large extent this evolution reflected an increasing belief in free choice. It also reflected the declining moral and religious influence of the Church, whose courts no longer looked exclusively to the canon and civil laws but increasingly to the common law for guidance.²⁷

(Scotland) Act 1964 (UK); Law Reform Miscellaneous Provisions) (Scotland) Act 1968 (UK) s 3, sch 1, paras 3-5).

¹⁷Generally, for English law, see *Dyke v Walford* (1846) 5 Moo PCC 434; 13 ER 557; Holdsworth, William, *A History of English Law* (5th ed, 1942) iii, 550.

¹⁸Glanvill, Ranulf de, *Treatise on the Law and Custom of the Realm of England* (ed & trs GD Hall, 1993) vii, 5, 4.

¹⁹Chapter 26.

²⁰Bracton, Henry de, *On the Laws and Customs of England* ('*Henri de Bracton de Legibus et Consuetudis Angliæ*') (ed GE Woodbine, trs SE Thorne, 1968) fol. 60.

²¹Blackstone, Sir William, *Commentary on the Laws of England* (ed E Christian, 1978) ii, 492; Coke, Sir Edward, *Coke upon Littleton* (reprinted 1979) 176b.

²²*Scott v Tyler* (1788) 2 Dick 712; 21 ER 448.

²³This was of predominantly canon and civil law origin, though not uninfluenced even in the earliest times by the developing common law in the king's courts (*Caudrey's Case* (1591) 5 Co Rep 1a; 77 ER 1).

²⁴Intestacy was rare, at a time when to die unabsolved was avoided if humanly possible. This led to a general belief that to die without a will was wrongful; Holdsworth, *supra* note 17, at iii, 535. The Statute of Distributions 1670 (22 & 23 Chas II c 10) (Eng) governed intestacy of personalty till the 20th century.

²⁵20 & 21 Vict c 77.

²⁶See Cox, “The Influence of the Common Law on the Decline of the Ecclesiastical Courts of the Church of England” *Rutgers Journal of Law and Religion* (forthcoming).

²⁷*Ibid.*

Before 1600 the province of Canterbury (except Wales and London) came to permit complete freedom of testation for personalty, whereas the province of York adhered to the old parts system until 1692-1703.²⁸ Freedom of testation was not universal in England until 1724, when it was extended to the City of London,²⁹ after a long process of gradually expanding application.

The right to bequeath real property also grew. Although the right to alienate land was never absolutely denied, feudalism imposed strict limitations. However, with the decline in the economic importance of feudalism, alienation became more easily available.³⁰

Historically, testamentary freedom had often been more the exception than the rule. But legal fictions were developed early to allow the conveyance of property. Land could always be held in tail. But social pressure to lessen the application of inalienability of realty led to the development of the distinction between the legal and the equitable estate and the use.³¹

An express power to devise land by will was created in 1540-42, largely in response to the effect of the Statute of Uses 1535,³² largely because this Act was mistakenly believed to have prevented wills of land, by abolishing the distinction between the legal and the equitable estate.³³ All land held by common socage,³⁴ two-thirds of land held by tenure in chivalry, an “estate of inheritance”,³⁵ or any other modified fees other than fees tail,³⁶

²⁸Wills Act 1692 (4 Wm & Mar c 2) (Eng); Wills Act 1703 (2 & 3 Anne c 5) (Eng). For the parts system generally, see *Kemp v Kelsey* (1722) Prec Ch 594, 596 per Lord Macclesfield, LC.

²⁹City of London Elections Act 1724 (11 Geo I c 18) (GB) s 17. Wales received the new statutory scheme in 1695 (Wills Act 1695 (7 & 8 Wm III c 38) (Eng)).

³⁰Pollock, Sir Frederick and Maitland, FW, *The History of English Law before the time of Edward I* (2nd ed, 1898) ii, 17-18.

³¹Holdsworth, supra note 17, at 424-427, 438-439.

³²27 Hen VIII c 10 (Eng).

³³Sir Robert Megarry, “The Statute of Uses and the Power to Devise” (1941) 7 Cambridge LJ 354. It didn’t abolish the right to devise land which had been acquired by means of uses, though it was intended to do so (*Wild’s Case* (1599) 6 Co Rep 16b, 17a (“to abolish these and other abuses and horrors”). One indirect consequence of the Statute of Uses 1535 was the Pilgrimage of Grace, the Catholic rebellion (Froude, Anthony, *History of England from the Fall of Wolsey to the Death of Elizabeth* (1856-70) iii, 91, 105, 158).

³⁴Socage, called by Pollock and Maitland the great residuary tenure, was the most common non-military tenure (Pollock and Maitland, supra note 30, at i, 294). All land in New Zealand which has been granted by the Crown is held by free and common socage (commonly called freehold tenure).

³⁵This term is defined by the statute itself as “a fee simple only” (Wills Act 1540 (32 Hen VIII c 1) (Eng)). However, it was explained judicially as including determinable fees (*Cowper v Frankline* (1616) 3 Bulst 184 per Dodderidge J and Coke CJ; *Cassandra’s Case* (*Vernon v Gatacre*) (1566) Dyer 253a).

might be devised by will.³⁷ After the abolition of the military tenures in 1660,³⁸ there were no more restrictions on the power to devise, except for entailed lands.

The principle of freedom, though long in coming, perhaps reflected the spirit of the times better than the more restrictive system which was a survival of feudalism. Feudalism itself had collapsed as an economic system from the fourteenth century, and lost the bulk of its legal significance in 1660.³⁹ New Zealand inherited the newer system of succession, with its emphasis on the sanctity of the testators perceived intention- rather than the rights of the deceased's heirs- in 1840.⁴⁰

As a reaction to the perceived injustice of the unrestricted freedom of bequest which was the norm in the nineteenth century, the New Zealand Government resolved to adopt the principle of allowing a discretion to the courts where testamentary freedom had been misused. In 1900 the Testators Family Maintenance Act was passed by Parliament.⁴¹ This Act, and its successors, the Family Protection Act 1908 and 1955, were designed to give courts the statutory jurisdiction to remedy cases where a testator or testatrix had failed to make provision for the proper maintenance and support for those persons to whom they owed a moral duty of support.⁴² Giving a wide discretion to the courts may not be appropriate when there is no longer a commonly accepted social norm.

Testamentary freedom is restricted by various legal safeguards designed to prevent the testator or testatrix improperly denying provision for relatives. The entire field of testamentary conditions remains, however, common law. No statute regulates conditional gifts.⁴³ Largely the product of late nineteenth and early twentieth century judgements, the law on conditional gifts is heavily influenced by the tradition of freedom during which it was largely developed. Thus, limitations are comparatively few, and restricted to mainly to questions of practicality of interpretation and application. Even where public policy considerations are more clearly present, the prevailing attitude remains predominantly in favour of testamentary freedom.

³⁶Wills Act 1540 (32 Hen VIII c 1) (Eng); Wills Act 1542 (34 & 35 Hen VIII c 8) (Eng).

³⁷Wills Act 1540 (32 Hen VIII c 1) (Eng).

³⁸Tenures Abolition Act 1660 (12 Chas II c 24) (Eng).

³⁹Ibid.

⁴⁰English Laws Act 1858 (21 & 22 Vict no 2) (UK).

⁴¹See Wiren, "New Zealand Family Provision Legislation" (1929) 45 LQR 378. New Zealand's lead was soon followed in Australia (Testators Family Maintenance Act 1912 (3 Geo V No 7) (Tasmania)) and Canada (Married Women's Relief Act 1910 (c 18) (Alberta)). In England, the equivalent Act was not passed until 1938 (Inheritance (Family Provision) Act 1938 (2 & 3 Geo VI c 45) (UK), now replaced by the Inheritance (Provision for Family and Dependents) Act 1975 (UK)).

⁴²Family Protection Act 1955 s 4(1).

⁴³The Domestic Actions Act 1975 has altered the pre-existing law as to the return of engagement rings; *Jacobs v Davis* [1917] 2 KB 532 (the implied condition that it would be returned); *Cohen v Sellar* [1926] 1 KB 536 (could not recover if that party had refused without legal justification to marry).

Whether society is prepared to see greater intervention in the freedom to impose testamentary conditions is uncertain. But, as an analogy, it is important that the courts have always regarded the Family Protection Act 1955 in light of changing societal norms. Since that Act was passed, newer legislation on human rights and race relations,⁴⁴ and reforms to the Matrimonial Property Act 1976, would suggest that greater intervention in the field of testamentary gifts is a distinct possibility. For the common law still allows us to deny property to our heirs on the basis of considerations of sex, race, marital status or religion.

3. *Public Policy*

The history and policy behind the control which is exercised by the courts over those conditions which a donor has imposed on the enjoyment of their gift is long and complex.⁴⁵ Policy decisions are found under the heads of illegality, public policy and uncertainty. They are by no means absent from the differences in the treatment of conditions precedent and subsequent. Both illegality and uncertainty reflect public policy as the courts have interpreted it. Underlying the whole edifice however is the dichotomy of belief in need for testamentary freedom and public policy factors requiring the intervention of the courts in individual cases.

The courts are also reluctant to change long-established rules affecting testamentary dispositions even under the ambit of public policy. The courts are reflecting social sensitivity surrounding the dead. The judges have great difficulty in expounding what precisely is public policy in such case.⁴⁶ Generally speaking, a testator or testatrix may attach any condition they like to a gift under a will, in the same way that a donor may attach any conditions that they wish to a gift while living.

Some restrictions imposed by the courts have a less overt element of public policy than others. For example, where in a gift of a gift real or personal property a condition is attached which is inconsistent with and repugnant to the gift, the condition is wholly void and the donee takes the gift free from the condition.⁴⁷ These rules may be justified on the presumed intention of the testator or testatrix that the gift prevail.

⁴⁴Human Rights Act 1993, replacing the Race Relations Act 1971.

⁴⁵Parry, "Uncertainty and conditional gifts" (1982) 126 Sol Jo 518, 518.

⁴⁶*Re Wallace, Champion v Wallace* [1920] 2 Ch 274 (CA) (a gift of the testator's residue to "either or both of my said sons who shall have acquired the title of baronet or other title superior thereto" with a gift over equally between the "British Treasury and the Treasury of British India"- held to be a condition precedent and to be valid).

⁴⁷*Byng v Lord Strafford* (1843) 5 Beav 558, 567; *Re Cockerill, Mackaness v Percival* [1929] 2 Ch 131 (devise subject to a condition that a named corporation should have the option of purchasing the devised land at a price fixed in the will if the devisee should desire to sell within twenty years after the testator's death- option held void and the devisee entitled to sell as he pleased).

Perhaps even more important is the desire, on economic and social grounds, to encourage the free circulation of property, in much the same way that mortmain⁴⁸ was from late mediæval times the subject of legislative regulation. A total restraint on the alienation of an absolute interest in property during a certain period is invalid.⁴⁹

Although the justiciability of conditions was confined to conditions precedent and subsequent, and void conditions, the courts were required to make what can only be described as value judgements or public policy decisions. Thus a condition cannot be repugnant to the estate granted.⁵⁰ If the condition is that the donee commit a crime, or tends towards the commission of some act prohibited by law, it is void and the donee takes the gift free from the condition.⁵¹ The public policy justification is clear in these cases, even where the prohibited act is not intrinsically morally wrong.⁵² In *Re Neeld* Upjohn LJ said:

To establish that a condition is void on the grounds of public policy, it must be shown that it will have a tendency to produce injury to the public interest or good or to the common weal.⁵³

Different tests for certainty of conditions precedent and conditions subsequent were approved by the House of Lords in *Blathwayt v Lord Cawley*⁵⁴ on the basis that a greater degree of certainty is required for conditions subsequent. This is because where a condition subsequent fails the donee takes the gift free from the condition, while with a condition precedent the entire gift will fail (unless it was *malum prohibitum* or impossible). Since the courts prefer to construe a disposition in such a way as to prevent its failing, a more liberal test of uncertainty is applied to conditions precedent than to conditions subsequent.

4. Conditions Precedent and Subsequent

Testators (or donors) may attach any condition they choose to a gift. Depending upon the circumstances, a conditional gift may be subject to conditions either precedent or

⁴⁸The holding of land by a corporation in perpetual or unalienable tenure.

⁴⁹*In re Rosher, Rosher v Rosher* (1884) 26 ChD 801 (devise to testator's son with a provision that if the son should desire to sell in the lifetime of the testator's wife the testator's wife should have the option of buying at the price fixed in the will and the property should be first offered to her either in whole or in part, with a proportionate price if only part offered, and as to other devised properties if the devisee should desire to let them for more than three years the testator's wife should have the option of renting them herself at a rent fixed in the will- restrictions held repugnant and void).

⁵⁰*Earl of Arundel's Case* (1575) 73 ER 771; *Re Dugdale, Dugdale v Dugdale* (1888) 38 ChD 176.

⁵¹*Mitchel v Reynolds* (1711) 1 Pr Wms 181; 24 ER 347.

⁵²*Malum prohibitum* not *malum in se*.

⁵³*Re Neeld, Carpenter v Inigo-Jones* [1962] Ch 643, 680.

⁵⁴[1976] AC 397; [1975] 3 All ER 625 (HL).

subsequent. A condition precedent is one that is to be performed before the gift takes effect.⁵⁵ A condition subsequent is one to be performed after the gift has taken effect, and, if the condition is unfulfilled, will put an end to the gift.⁵⁶ That is, there is a divesting of the gift. Whether a particular condition is precedent or subsequent is a matter of construction. The courts prefer to find a condition subsequent, because even if the condition is void the gift is generally still good.

An interest upon condition subsequent arises where a qualification is annexed to a conveyance or gift, whereby it is provided that, in case a particular event does or does not happen, or in case the grantor or grantee does or omits to do a particular act, the interest shall be defeated. This must be distinguished from a condition precedent, where the qualification provides that the interest will not commence until the occurrence of the event.⁵⁷ Sometimes this condition precedent must be implied. In *Re London University Medical Sciences Institute Fund*⁵⁸ a testator bequeathed £25,000 to “the Institute of Medical Sciences Fund, University of London”. The fund was started by voluntary contributions. The legacy was held subject to an implied condition precedent that the particular purpose for which it was given be practicable. If the gift is capable of subsequent defeat it is a condition subsequent.

Examples of conditions subsequent include a grant to trustees of fee simple on condition that if the land granted shall ever be used for other than hospital purposes, it shall revert to the heirs of the grantor;⁵⁹ a devise of fee simple to the council of a school on condition that the council shall publish annually a statement of payments and receipts;⁶⁰ a devise of land to J “on condition that he never sells out of the family”;⁶¹ a devise to A for life provided that he “makes the mansion-house his usual common place of abode and residence”;⁶² and a devise to A for life on condition that he assumes the name and arms of the testator within twelve months.⁶³ In all these cases there vests in the grantor, the heirs and assignees, a right to resume title, the exercise of which right determines the interest of the grantee.

There is also a fundamental distinction between limitations upon condition and determinable limitations (or interests). It is necessary to distinguish between a limitation properly so called, and a condition.⁶⁴ A limitation is a form of words which creates an interest and denotes its extent by designating the event upon which it is to commence and

⁵⁵*Errington v Errington and Wood* [1952] 1 KB 290.

⁵⁶*Egerton v Earl Brownlow* (1853) 4 HL Cas 1; 10 ER 359.

⁵⁷Cheshire, GC and Burn, EH (eds), *Modern Law of Real Property* (13th ed, 1982) 345.

⁵⁸[1909] 2 Ch 1.

⁵⁹*Re Hollis' Hospital Trustees and Hagues Contract* [1899] 2 Ch 540.

⁶⁰*Re Da Costa* [1912] 1 Ch 337.

⁶¹*Re Macleay* (1875) LR 20 Eq 186.

⁶²*Wynne v Fletcher* (1857) 24 Beav 430; 53 ER 423.

⁶³*Re Evans's Contract* [1920] 2 Ch 469; See “Names and Arms Clauses and Law of Arms in the common law courts” (Winter 1999) vol XIII (NS) no 188 *The Coat of Arms, the Journal of The Heraldry Society* 167-172.

⁶⁴Cheshire and Burn, *supra* note 57, at 346.

the time for which it is to endure. The determining event is incorporated in the limitation so that the interest automatically and naturally determines if and when the event happens. It marks the utmost time for which the interest can continue.

Such limitations are in two forms. A direct limitation marks the time of determination by denoting the interest created (in real property, the size of the estate). This is done in familiar terms such as “for life”, or “in fee simple”. A determinable limitation gives an interest for one of the times possible in a direct limitation, but also denotes some event that may determine the interest during the continuation of that time. Thus with a grant “to A and his heirs, tenants of the manor of Dale”, the determining event is incorporated in, and forms an essential part of, the whole limitation, and if the estate expires because the tenancy of Dale is no longer in A’s family, it is none the less considered to have lasted for the period originally fixed by the limitation.

A condition subsequent may be distinguished from a conditional limitation that it resembles by virtue of the fact that the interest does not automatically end. Thus a gift of income to continue while the donee maintains a particular house is a variety of condition subsequent, because it is a continuing condition which may be brought to a premature end. It is possible however to have a limitation of an interest which is not a condition subsequent, as with a gift until marriage, with a gift over on marriage. The happening of the marriage is not a condition subsequent. The interest only lasts until marriage and there is nothing to take it beyond that event. Words which are merely descriptive of the person who is to take, or forming a qualification are not conditions. An example is *Re Allen*,⁶⁵ where the gift was “to the eldest of the sons” of the testator’s nephew “who shall be a member of the Church of England and an adherent of the doctrine of that Church”. Similarly, a transfer to grandsons “who shall at the time be actively engaged in farming”, was not a condition subsequent but “words or description or qualification or as a condition precedent”.⁶⁶ To be a condition subsequent there must be a continuing interest.

A condition specifies some event, which, if it takes place during the time for which an interest continues, will defeat that interest. If the terminating event is an integral and necessary part of the formula from which the size of the interest is to be ascertained, the result is the creation of a determinable interest. But if the terminating event is external to the limitation, the interest granted is an interest upon condition subsequent, where the grant is subject to an independent proviso that the interest may be brought to a premature end if the condition is fulfilled.⁶⁷ “While,” “during,” “as long as,” “until” are indicative of determinable limitations. “Provided that,” “on condition that,” “but if,” “if it happens that” are usually conditions subsequent. Thus a gift “to a woman for life, but if she remarries then her life interest shall cease” is a condition, while a gift “to a woman during widowhood” is a determinable limitation.⁶⁸

⁶⁵*Re Allen, Faith v Allen* [1953] 2 All ER 898.

⁶⁶*Re Cowley* [1971] 1 NZLR 468 (CA).

⁶⁷Pettit, PH, *Equity and the Law of Trusts* (5th ed, 1984) 61.

⁶⁸Cheshire and Burn, *supra* note 57, at 347.

The rule against perpetuities applies equally to conditions subsequent and to a possibility of reverter arising on the grant of a determinable interest. It must apply for each successive limitation.⁶⁹ It is concerned not with the duration of the interests, but with their commencement.⁷⁰ While a condition subsequent that is void is totally cancelled and the gift takes effect as if the condition had not been imposed, with a determinable interest the gift fails altogether if the possibility of reversion is invalidated.⁷¹ This is because with the condition subsequent the interest has already commenced.

Although the fundamental distinction between conditions subsequent and conditions precedent is well established, it is not free from difficulties.⁷² In many cases the same condition may be a condition precedent in one context, and valid, and a condition subsequent in another context, and void.⁷³ Thus a condition referring to “a person professing the Jewish faith” will be valid if a condition precedent but void if a condition subsequent.⁷⁴

It is not clear that there any real distinction between the two situations, or that the distinction ought to be maintained. There is much to be said for maintaining known and settled principles of law. But surely this is not necessarily so where uncertainty or confusion results.

5. Effect of Void Conditions

If a condition is void, it depends on the nature of the gift and the nature of the condition whether the gift is also void. The general rule is that where a condition precedent is void, a devise or gift of land fails.⁷⁵ Valid conditions are severable from invalid,⁷⁶ though only if valid and void limitations are not so intermixed as to vitiate the whole settlement.⁷⁷ However with conditions subsequent the initial gift is good and the donee takes an absolute interest free from the invalid condition.⁷⁸ Thus a gift though vested on condition

⁶⁹Megarry, Sir Robert and Wade, HWR, *The Law of Real Property* (4th ed, 1975) 238.

⁷⁰Hayton, DJ (ed), *Underhills' Law Relating to Trusts and Trustees* (13th ed, 1979) 40.

⁷¹*Re Moore, Trafford v Maconochie* (1888) 39 ChD 116 (the condition was limited to a married woman while she is living apart from her husband; void as the husband and wife were living together at the time of the testator's death).

⁷²*Scott v Rania* [1966] NZLR 527 (CA).

⁷³*Re Abraham's Will Trust* [1967] 2 All ER 1175.

⁷⁴Parry, supra note 45, at 519.

⁷⁵*Egerton v Earl Brownlow* (1853) 4 HL Cas 1; 10 ER 359 (a limitation to the devisee for life with remainder to the heirs male of his body subject to the condition that if he should die without “having acquired the title of Duke or Marquis of Bridgewater” the gift to the heirs was to go over); *Re Turton, Whittington v Turton* [1926] Ch 96.

⁷⁶*Garland v Brown* (1864) 10 LT 292; *Re Hepplewhite's Will Trusts* (1977) *The Times* 21 January 1977.

⁷⁷*Re Abraham's Will Trust* [1967] 2 All ER 1175.

⁷⁸*Re Lockie, Guardian Trust and Executors* [1945] NZLR 230; *Re Croxon, Croxon v Ferrers* [1904] 1 Ch 176; *Re Hayes' Will Trusts* [1954] 1 WLR 22.

that it was not to be enjoyed until an age latter than majority took effect freed from the condition.⁷⁹ This is justified on the grounds that in the first case the property has failed to vest, while in the second is the divesting which fails.

With gifts of personalty however a different position has arisen. In the case of a condition subsequent the legatee takes the gift free from the condition, as for realty.⁸⁰ For a condition precedent the gift normally fails as with realty. But, where the condition was originally impossible,⁸¹ or was rendered impossible by operation of the law before the date of the will,⁸² the bequest is good and freed from the condition.⁸³ This will be so also if the condition was made impossible by the act or default of the testator or court,⁸⁴ or is illegal as involving *malum prohibitum*. If however the performance of the condition is the sole motive, or its impossibility was unknown to the testator, or the condition which was possible has since become impossible by Act of God or where it is illegal as involving *malum in se*, the gift and condition are void.⁸⁵

The difference between *malum in se* and *malum prohibitum* is not very precise and has been subject to much judicial criticism, and confusion.⁸⁶ It has been criticised as obsolete and inherently unsound. All commentators agree on its existence in the law of wills, but it has not been the subject of very extensive judicial review in modern times.⁸⁷

Malum in se seems to mean some act that is intrinsically and morally wrong, which justifies invalidating the gift. It must tend to provoke or further the doing of some unlawful act, or to restrain or forbid someone from doing their duty. *Malum prohibitum* on the other hand offends against a rule of law but is not wrong in itself.⁸⁸ Where a gift of personalty contains several conditions precedent, some of which are valid, some invalid, these conditions can be separated to preserve the gift as far as possible.⁸⁹

⁷⁹*Saunders v Vautier* (1841) Cr & Ph 240; 41 ER 482 (“If the circumstances are such as that the gift is to be immediately separated from the rest of the property, and the income is at once given to the beneficiary, and when and so soon as he attains the named age the corpus is given him and the accumulations are given him, then the Court ceases to regard the gift as a contingent gift and holds it to be a vested gift”).

⁸⁰*Poor v Mial* (1821) 6 Madd 32; 56 ER 1001.

⁸¹*Lowther v Cavendish* (1758) 1 Eden 99; 28 ER 621.

⁸²*Re Thomas's Will Trusts* [1930] 2 Ch 67.

⁸³*Re Elliott, Lloyds Bank v Burton-on-Trent Hospital Management Committee* [1952] All ER 145.

⁸⁴*Darley v Langworthy* (1774) 3 Bro PC 359, 1 ER 1369; *Re Turton, Whittington v Turton* [1926] Ch 96.

⁸⁵*Re Moore, Trafford v Maconochie* (1888) 39 ChD 116.

⁸⁶*Re Piper, Dodd v Piper* [1946] 2 All ER 503, 505 per Rome J.

⁸⁷Delany, “Illegal Conditions Precedent and legacies of Personalty” (1955) 19 Conv 176, 177.

⁸⁸Pettit, *supra* note 67, at 172.

⁸⁹*Re Hepplewhite's Will Trusts* (1977) *The Times*, 21 January 1977.

The Court in *Re Piper*⁹⁰ held that a condition precedent that a child should not reside with his father was *malum prohibitum* but not *malum in se*. Thus although the condition was void the bequest stood, as it was a gift of personalty. Rome J adopted the statement of the law in *Jarman on Wills*:

The civil law, which in this respect has been adopted by courts of equity, differs in some respects from the common law in its treatment of conditions precedent; the rule of the civil law being that where a condition precedent is originally impossible, or is illegal as involving *malum prohibitum*; the bequest is absolute, just as if the condition had been subsequent. But where the performance of the condition is the sole motive of the bequest, or its impossibility was unknown to the testator, or the condition which was possible in its creation has since become impossible by Act of God, or where it is illegal as involving *malum in se*, in these cases the civil agrees with the common law in holding both gift and condition void.⁹¹

Re Piper is a good illustration of the confusion in the law of testamentary conditions. The condition was *malum prohibitum* because it was calculated to separate parent and child, which was contrary to public policy. But logically separating parent and child should be *malum in se*, as morally wrong.⁹²

It was in the criminal law that the origin of the distinction between *malum prohibitum* and *malum in se* arose. The earliest reference is in a judgement of Fineux CJ in 1496.⁹³ In that case a distinction was drawn between those things which the king prohibited for his personal convenience, and those offences against the “eternal law” or the common law. Only the former could be dispensed with by the king. The Bill of Rights swept away the suspending power of the Crown,⁹⁴ but the rule survived.⁹⁵

Today the distinction between a thing bad in itself and a thing bad only because it is prohibited by law forms no part of the criminal law, and survives only in law relating to conditions in wills of personalty. The survival of this rule has been widely criticised. As early as 1674, Vaughan CJ said: “I think that rule hath more confounded men's judgments on that subject, than rectified”.⁹⁶ His Honour took the view that the distinction was an invalid one, as no act is legally *malum* unless forbidden by some law. As has been

⁹⁰[1946] 2 All ER 503.

⁹¹Jarman, Thomas, *Jarman on Wills* (ed by Charles Sanger, 7th ed, 1930) ii, 1443, 1444.

⁹²Morris, “Notes on recent cases 2: Will cases” (1947) 11 Conv 218.

⁹³(1496) YB Mich 11 Hen VII f. 11 p 135.

⁹⁴However, the Bill of Rights 1688 (1 Will III & Mary sess 2 c 2) abolished the dispensing power only so far as “it had been assumed and exercised of late”. This qualification has not always been appreciated by the courts; *R v London County Council* [1931] 2 KB 215, 228 per Scrutton LJ.

⁹⁵The Bill of Rights 1688 (1 Will III & Mary sess 2 c 2) abolished the suspending power completely. The title, preamble, s 1 as amended by s 62 of the Juries Act 1825 (6 Geo IV c 50) (UK), and s 2 are preserved in New Zealand law by the Imperial Laws Application Act 1988.

⁹⁶*Thomas v Sorrell* (1674) Vaugh 330; 124 ER 1098.

suggested by Delany, the logical course would be to treat a condition as inoperative in every case (and validating the legacy) or apply the rule in cases of realty (and avoid the legacy in all cases). The latter course, by treating the legacy as void, however assumes that the condition is valid.⁹⁷

With gifts of personalty certain conditions may also be void as made *in terrorem* (as an idle threat to induce compliance).⁹⁸ These however only apply to conditions against disputing a will and in restraint of marriage.⁹⁹

A limitation following one that is void for remoteness under the perpetuity rule is itself void.¹⁰⁰ Thus a picture given to A for life, then to B for life, then to C for life, then after C's death to the first and every other son "then living" of A successively for their lives then to B and C's sons in the same way, is void. The limitation to B's sons is void for remoteness, since "then living" meant living at the death of the last son of A and not living at the death of C. All subsequent limitations including the ultimate gift are void for remoteness since to be valid the interest would have to vest within the limitation period.¹⁰¹

Cases have however held that the ultimate limitation will be good if it is not dependent on the void limitation. Decisions since 1936 have extended this exception, which is based on the perceived intention of the donor. The intention will be found in the words of the testator. It is assumed that the gift is intended to take effect unless displaced by a valid exercise of a preceding power of appointment. If the power is invalid, then the result is that the interest is never displaced.¹⁰²

Limitations which follow void limitations may be classified as vested (which will always safe from the perpetuities rule); contingent but independent (ultimate gift succeeds); and contingent but dependent (ulterior gift fails).¹⁰³ The only authority (excluding dicta) for holding that a prior remote limitation always leads to voidness of the ultimate gift is an unreserved judgement of a court at first instance.¹⁰⁴ It may be that to hold a vested limitation following a void limitation to be valid in all cases would be the best approach as representing the likely intention of the testator.¹⁰⁵

A gift to trustees of a fee simple "on condition that it shall always be used for the purposes of a hospital only" gives the grantor's successors a right of re-entry. The remainder is void if infringing the perpetuity rule.¹⁰⁶

⁹⁷Delany, *supra* note 87, at 181.

⁹⁸*Dudley v Gresham* (1878) 2 LR Ir 442.

⁹⁹*Rhodes v The Muswell Hill Land Co* (1861) 29 Beav 560; 54 ER 745.

¹⁰⁰Morris, *supra* note 92, at 392.

¹⁰¹*Re Backhouse* [1921] 2 Ch 51.

¹⁰²Morris, *supra* note 92, at 406.

¹⁰³Megarry and Wade, *supra* note 69, at 240.

¹⁰⁴*Re Backhouse* [1921] 2 Ch 51.

¹⁰⁵Morris, *supra* note 92, at 409-410.

¹⁰⁶Megarry and Wade, *supra* note 69, at 247.

All subsequent vested limitations are valid and all subsequent limitations affected by the contingency are void, but there is no clear test for those cases where the limitation is not specifically subject to the same contingency as the prior void limitation. The question of contingency in general precedes the problem of ulterior limitations. There is a legal presumption that interests following a contingent interest in a regular unbroken series are subject to the same contingency.¹⁰⁷

The courts have proven willing to develop different principles for realty and personalty, for conditions precedent and subsequent. It depends on the nature of the gift and the nature of the condition whether the gift is void if the condition is void. These rules preserve what might be seen as an artificial distinction between realty and personalty. Worse, when even the courts have difficulty at times distinguishing between conditions precedent and subsequent, it is possible that having different rules govern each causes undue problems, and is overly technical.

6. Uncertainty

The rules governing certainty draw a distinction between the degree of certainty which is required for a condition subsequent and that required for a condition precedent. A stricter degree of certainty is required for conditions subsequent than for conditions precedent.¹⁰⁸ Conditions do not fail for uncertainty merely because they lack clarity of expression. In such cases it is the responsibility of the courts to endeavour to construe the meaning in the light of the ordinary canons of construction.¹⁰⁹ A condition will not necessarily fail simply because it is uncertain whether it is certain enough.¹¹⁰ It is only when a meaning cannot be properly ascribed to language used that it fails for uncertainty.¹¹¹

The test for certainty for a condition subsequent remains as propounded by Lord Cranworth in *Clavering v Ellison*:

where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested interest was to determine.¹¹²

¹⁰⁷Kiralfy, "Vested Interests Remote for Perpetuity" (1950) 14 Conv 148.

¹⁰⁸*Blathwayt v Lord Cawley* [1976] AC 397; [1975] 3 All ER 625 (HL). See however *Trustees of the Church Property of the Diocese of Newcastle v Ebbeck* (1960) 104 CLR 394 per Dixon CJ (HCA).

¹⁰⁹*Re Neeld, Carpenter v Inigo-Jones* [1962] Ch 643, 675 per Upjohn LJ.

¹¹⁰*Re Boulter, Capital and Counties Bank v Boulter* [1922] 1 Ch 75.

¹¹¹*Re Viscount Exmouth* [1883] 23 ChD 158, 166.

¹¹²(1859) 7 HL Cas 707; 11 ER 282.

This test was approved and applied by the Privy Council in *Sifton v Sifton*.¹¹³ In that case “so long as she shall continue to reside in Canada” was held to be not certain enough. Lord Romer distinguished between uncertainty of expression, and uncertainty of application. The former were void in all cases, the latter could be resolved by extrinsic evidence. This was reaffirmed in the House of Lords in *Clayton v Ramsden*.¹¹⁴ In this case, “not of the Jewish faith” was held to be void because it was a question of degree, and the testator had failed to give any indication as to what degree of faith was required. Lord Cranworth's test of “precisely and distinctly” was rephrased as “with the greatest precision and in the clearest language”.

Thus, conceptual or linguistic uncertainty, and evidential uncertainty are to be distinguished. A condition is uncertain when it may, as a matter of semantics, be incapable of interpretation, or being capable of interpretation leaves doubt as to its application to the facts of the case.¹¹⁵ The courts “will hold a condition subsequent void if its terms are such that ... it cannot be clearly known in advance or from the beginning what are the circumstances the happening of which will cause the divesting or determining of the gift or estate”.¹¹⁶ This is a rigorous test.

A less stringent test was earlier used in *Re Sandbrook* (“with reasonable certainty”).¹¹⁷ In *Re Hanlon*, Eve J said that “it must reasonably have been known” that the conduct would result in forfeiture.¹¹⁸ In *Re Neeld*, Evershed MR said it “must be capable at once of a clear and easy answer”.¹¹⁹ There was no need however for the language to be “of so exactly precise a character” that no question could ever sensibly arise on the actual facts. The modern approach may well be to reduce the strictness of the condition subsequent test,¹²⁰ and thereby allow conditions to survive which would otherwise fail.

Other examples of conditions which have been found to be insufficiently certain include “associated, corresponded or visited with my present wife's nephews or nieces”,¹²¹ “have social or other relationship with” a named person,¹²² “to provide a house for”.¹²³ By contrast, conditions which were found to be sufficiently certain include “taking up permanent residence in England”.¹²⁴

¹¹³[1938] AC 656.

¹¹⁴[1943] 1 All ER 16.

¹¹⁵Butt, “Testamentary Conditions in Restraint of Religion” (1977) 8 Sydney LR 400.

¹¹⁶*Re Allen, Faith v Allen* [1953] 2 All ER 898 at 907 per Evershed MR.

¹¹⁷*Re Sandbrook, Noel v Sandbrook* [1912] 2 Ch 471, 477 per Parker J.

¹¹⁸*Re Hanlon, Heads v Hanlon* [1933] Ch 254.

¹¹⁹*Re Neeld, Carpenter v Inigo-Jones* [1962] Ch 643.

¹²⁰Butt, *supra* note 115, at 400.

¹²¹*Jeffreys v Jeffreys* (1901) 84 LT 417.

¹²²*Re Jones* [1953] Ch 125.

¹²³*Re Brace* [1954] 1 WLR 955.

¹²⁴*Re Gape's Will Trusts* [1952] Ch 743.

Conditions precedent are not subject to the strict rule that is applied to conditions subsequent.¹²⁵ For conditions precedent the leading authority is *Re Allen*.¹²⁶ The gift there was to the eldest son of the testators' nephew, "who shall be a member of the Church of England and an adherent of the doctrine of that Church". The testator (a King's Counsel) had died in 1908. As a condition precedent (or more correctly as a description or qualification), performance necessarily preceded vesting, and it will only fail if it is impossible to give the condition any meaning at all or they involve repugnancies or inconsistencies in the possible tests they postulate. The court held that this condition was sufficiently certain.

There is no need for the court to be able to determine in advance the precise circumstances upon which the condition will operate. Even if the condition is conceptually uncertain it will be valid if someone can establish that they satisfy the requirements. Because the condition need not be in a conceptually certain form there will be instances where trustees or executors will have no way of knowing whether a claimant satisfies the requirement or not.¹²⁷ The condition will be sufficiently certain if there is at least one person of whom one can say with certainty that they are included. This will be true even though there are others of whom it may be impossible to say whether or not they qualify.

The House of Lords in *Blathwayt v Lord Cawley*¹²⁸ approved the different tests. A greater degree of certainty is required for conditions subsequent. This is justified on the basis that where a condition subsequent fails the donee takes the gift free from the condition, while with a condition precedent the entire gift will fail (unless it was *malum prohibitum* or impossible). Since the courts prefer to construe a disposition in such a way as to prevent its failing, a more liberal test of uncertainty is applied to conditions precedent than to conditions subsequent.

This distinction was criticised by Lord Denning in *Re Tuck's Settlement Trusts*.¹²⁹ Sir Adolf Tuck, Bt, had created a settlement which was to pay its income to the baronet for the time being, "so long as he shall be of the Jewish faith and shall be married to an approved wife". An "approved wife" was defined in the settlement trust as "a wife of Jewish blood by one or both parents and who has been brought up in and has never departed from and at the date of her marriage continues to worship according to the Jewish faith." The Court of Appeal decided that the provision was in substance a condition precedent and therefore not void, although the words used had tended to imply a condition subsequent. The court asserted the correctness of *Re Allen*,¹³⁰ though it did not endorse the precise test of validity.¹³¹

¹²⁵ *Re Balkind* [1969] NZLR 669.

¹²⁶ *Re Allen, Faith v Allen* [1953] 2 All ER 898 (CA).

¹²⁷ Parry, *supra* note 45, at 519.

¹²⁸ [1976] AC 397; [1975] 3 All ER 625 (HL).

¹²⁹ *Re Tuck's Settlement Trusts, Public Trustee v Tuck* [1978] 1 All ER 1047.

¹³⁰ *Re Allen, Faith v Allen* [1953] 2 All ER 898 (CA).

¹³¹ McKay, "Re Barlow and the certainty of objects rule" [1980] 44 Conv 263, 277.

The existence of different tests as to uncertainty for precedent and subsequent conditions was criticised by Lord Denning MR as unsound. The conceptual and evidential distinction also worked to defeat the intent of the testator. The High Court of Australia has held that the certainty required for conditions precedent are the same as for conditions subsequent.¹³² The decision of the House of Lords in *Blathwayt v Lord Cawley*¹³³ however has stronger precedent value for New Zealand courts, and would appear to be founded on a stronger line of authority.

The effect of having two different tests for certainty means that a condition will be certain or uncertain merely because it is a condition precedent or a condition subsequent. As *Re Tuck's Settlement Trusts*¹³⁴ shows, the courts will hold a condition to be precedent rather than subsequent despite the words of the will or deed so as to give effect to what they perceive is the donors intentions and to prevent the working of an injustice. The distinction is explicable but perhaps illogical. The policy objective of giving effect to the donor's intentions, and of enabling executors and trustees to administer estates without the need for recourse to the courts would seem to raise doubts about the justification for a separate, more liberal test for conditions precedent.¹³⁵

Judged by the principles of certainty in *Morice v Bishop of Durham*,¹³⁶ the *Re Allen*¹³⁷ test of certainty is inadequate because it allows compliance in virtually every case of conditions precedent. The original policy objectives of the certainty requirement was that every private trust had to have sufficient controls over the trustees to prevent them from misapplying trust property. As a result the courts required a high degree of certainty of objects.¹³⁸

In *Re Gulbenkian's Settlements*¹³⁹ the House of Lords rejected the test of certainty of objects for trust powers and *Re Allen*¹⁴⁰ was distinguished. The House did not however discuss the propriety of the test for conditions precedent.¹⁴¹ The test adopted asked “was it possible to say with certainty whether any individual was or was not a member of the class of beneficiaries”.¹⁴² The House in *McPhail v Doulton*¹⁴³ assimilated the test for certainty of objects in discretionary trusts with that for powers.

¹³²*Trustees of the Church Property of the Diocese of Newcastle v Ebbeck* (1960) 104 CLR 394 per Dixon CJ.

¹³³[1976] AC 397; [1975] 3 All ER 625 (HL).

¹³⁴*Re Tuck's Settlement Trusts, Public Trustee v Tuck* [1978] 1 All ER 1047.

¹³⁵Parry, supra note 45, at 520.

¹³⁶(1804) 9 Ves Jun 399; 32 ER 656.

¹³⁷*Re Allen, Faith v Allen* [1953] 2 All ER 898 (CA).

¹³⁸McKay, supra note 131, at 269.

¹³⁹[1970] AC 508.

¹⁴⁰*Re Allen, Faith v Allen* [1953] 2 All ER 898 (CA).

¹⁴¹McKay, supra note 131, at 263.

¹⁴²*Re Gulbenkian's Settlements* [1970] AC 508. Followed in *Re Beckbessinger* [1993] 2 NZLR 362 (HC).

¹⁴³[1971] AC 424 (HL).

It has been suggested¹⁴⁴ that the test used in *McPhail v Doulton*¹⁴⁵ must be preferred to that in *Re Allen*¹⁴⁶ to give proper weight to policy considerations. In the former case the question was asked “was it possible to say with certainty whether any individual was or was not a member of the class of beneficiaries.” *McPhail v Doulton*¹⁴⁷ concerned a discretionary trust however, and where there are conditions precedent there is rarely any discretion. Indeed the courts have been quick to deny any discretion for the trustees to interpret a condition without recourse to the courts. However *Re Coxen*¹⁴⁸ provides uncertain authority for the contention that there may be vested in trustees the power to make a decision binding on the parties as to whether or not the events have occurred which will cause the condition to operate.

The absence of a discretion alone may be reason for extending *McPhail v Doulton*¹⁴⁹ into the law of conditional gifts. Where there is no discretion the courts should be more ready to restrict the trustees by requiring a harder standard of proof be reached. However, although the House of Lords rejected the test of certainty of objects for trust powers in *Re Gulbenkian's Settlements*,¹⁵⁰ *McPhail v Doulton*¹⁵¹ preceded *Blathwayt v Lord Cawley*.¹⁵² There may not be sufficient reasons why this authority should be rejected in favour of the earlier, especially as the question of conditions precedent were not considered. Even if *Re Allen*¹⁵³ is incorrect, and there is some argument that it is not consistent with earlier authorities,¹⁵⁴ its test has been approved by the House of Lords. There may be some advantage to a uniformity of tests between discretionary trusts, trust powers and conditions precedent, but it is not certain that *McPhail v Doulton*¹⁵⁵ applies also to fixed trusts.

*Re Barlow's Will Trust*¹⁵⁶ brought the test into contention again. This held that the test is not limited to issues of certainty of conditions precedent, but is in some circumstances the appropriate criterion for assessing the validity of the beneficiary. This view would however appear inconsistent with *Re Gulbenkian's Settlements*¹⁵⁷ and *Re Baden's Deed Trusts (No 2)*¹⁵⁸ and merely makes the picture more unclear than ever.¹⁵⁹ Barlow died in

¹⁴⁴McKay, supra note 131, at 272.

¹⁴⁵[1971] AC 424 (HL).

¹⁴⁶*Re Allen, Faith v Allen* [1953] 2 All ER 898 (CA).

¹⁴⁷[1971] AC 424 (HL).

¹⁴⁸*Re Coxen, McCallum v Coxen* [1948] Ch 747.

¹⁴⁹[1971] AC 424 (HL).

¹⁵⁰[1970] AC 508.

¹⁵¹[1971] AC 424 (HL).

¹⁵²[1976] AC 397; [1975] 3 All ER 625 (HL).

¹⁵³*Re Allen, Faith v Allen* [1953] 2 All ER 898 (CA).

¹⁵⁴McKay, supra note 131, at 280.

¹⁵⁵[1971] AC 424 (HL).

¹⁵⁶[1979] 1 All ER 296.

¹⁵⁷[1970] AC 508.

¹⁵⁸[1973] Ch 9.

¹⁵⁹McKay, supra note 131, at 263.

1975 leaving her collection of paintings to trustees who were authorised to sell them at the 1970 valuation to those who qualified as “friends of mine”.

Both the *Re Gulbenkian's Settlements*¹⁶⁰ (“was it possible to say with certainty whether any individual was or was not a member of the class of beneficiaries”) and *IRC v Broadway Cottages Trust*¹⁶¹ (“was it possible to completely ascertain the entire range of beneficiaries”) tests were inappropriate. The will comprised a series of individual gifts, each requiring its own individual test of certainty.¹⁶² In *Re Barlow's Will Trust*¹⁶³ the judge applied *Re Allen*:¹⁶⁴ “was it possible to say of one or more persons that he or they undoubtedly qualify even though it may be impossible to say of others whether or not they qualify”. The will satisfied this test.

7. *Illegal and Repugnant Conditions*

Where there is a gift of real or personal property and a condition is attached which is inconsistent with and repugnant to the gift, the condition is wholly void and the donee takes the gift free from the condition.¹⁶⁵ The same rule applies if the condition is that the donee commit a crime, or tends towards the commission of some act prohibited by law.¹⁶⁶ Repugnancy is a remnant of scholasticism, which has spread over three branches of law-conditions in gifts, arbitration and clogging an equity of redemption. It has proven in all three cases to be irrational and inconvenient. It may tend to mask public policy, and it has been suggested that it would perhaps be better to discard it in favour of a more overt test of public policy.¹⁶⁷ It may be that in this area, if in none other, the common law may have fallen out of alignment with social standards and expectations. However there is at least room for genuine repugnancy.

Repugnancy may be either genuine or spurious. Of the first type are those documents that contain mutually inconsistent provisions.¹⁶⁸ Documents must be read as a whole and effect must be given to that part calculated to carry out the real intention of the party. Where the real intention is undiscoverable the rule of thumb is used, but it must first have been impossible to harmonise the whole of the document. The first words in a deed and the last words in a will shall prevail,¹⁶⁹ and any other gifts will be void for uncertainty. It

¹⁶⁰[1970] AC 508.

¹⁶¹[1955] Ch 20.

¹⁶²McKay, *supra* note 131, at 264.

¹⁶³[1979] 1 All ER 296.

¹⁶⁴*Re Allen, Faith v Allen* [1953] 2 All ER 898 (CA).

¹⁶⁵*Byng v Lord Strafford* (1843) 5 Beav 558, 567; 49 ER 694; *Re Cockerill, Mackaness v Percival* [1929] 2 Ch 131.

¹⁶⁶*Mitchel v Reynolds* (1711) 1 Pr Wms 181; 24 ER 347.

¹⁶⁷Glanville Williams, “The doctrine of Repugnancy- Conditions in gifts” (1943) 59 LQR 343.

¹⁶⁸*Ormerod v Riley* (1865) 12 Jur (NS) 112.

¹⁶⁹*Doe d. Leicester v Biggs* (1809) 2 Taunt 109.

is difficult however to reconcile this rule with the professed desire to give effect to the real intention of the donor.

The second type of repugnancy (spurious) are those cases in which the gift is accompanied by a condition which is contrary to the interest given. Thus in *Mildmay's Case* "it was resolved, that if a man makes a gift in tail, on condition, that he shall not suffer a common recovery, that this condition is repugnant to the estate-tail, and against the law".¹⁷⁰ There are certain incidents inseparable from particular estates, and grantors are not permitted to give the estate without giving the incidents as well.¹⁷¹ Certain restrictions are allowed however, although the justification for this is unclear as they are equally repugnant to the gift. The rule works very much like public policy. A condition that beneficiaries deal in a certain manner with the proceeds of the sale of land was repugnant.¹⁷²

Conditions are not void for impossibility if the condition is only highly improbable, or because it is out of any human power to ensure its performance.¹⁷³ Performance of a condition precedent that is made impossible by the act or default of the testator is excused as regards personalty but not realty.¹⁷⁴ Conditions that are contrary to public policy will be held to be void. A condition will be void if there is a tendency to conflict with the general interest of the community, even though it will not necessarily do so.¹⁷⁵

Historically the most common examples of conditions that have been found to be either illegal or contrary to the policy of the law include incitement to commit a crime,¹⁷⁶ to live apart from wife,¹⁷⁷ and those conditions which are in general restraint of marriage.¹⁷⁸ It is also contrary to public policy to settle one's own property on oneself until bankruptcy, so as to avoid the claims of the official assignee.¹⁷⁹ The distinctions between different types of illegal conditions are important when it is remembered that the validity of the gift depends upon the *malum* rule.

Some examples may be given to show how the courts have dealt with different situations over time. In 1853 it was held that a condition which required the beneficiary to acquire a peerage was contrary to public policy, but only after great conflict of opinion in the House of Lords.¹⁸⁰ The decision turned upon the legislative rights and duties of peers, so

¹⁷⁰(1605) 6 Co Rep 40a; 77 ER 511.

¹⁷¹Glanville Williams, *supra* note 167, at 345.

¹⁷²*Lucas v Goldie* [1929] NZLR 29.

¹⁷³*Egerton v Earl Brownlow* (1853) 4 HL Cas 1; 10 ER 359.

¹⁷⁴*Re Turton, Whittington v Turton* [1926] Ch 96.

¹⁷⁵*Egerton v Earl Brownlow* (1853) 4 HL Cas 1; 10 ER 359, 181 per Lord Truro.

¹⁷⁶*Mitchel v Reynolds* (1711) 1 P Wms 181, 24 ER 347; *Shrewsbury v Hope Scott* (1859) 6 Jur (NS) 452, 456.

¹⁷⁷*Re Moore, Trafford v Maconochie* (1888) 39 ChD 116; *Re Caborne, Hodge and Nabarro v Smith* [1943] Ch 224.

¹⁷⁸*Jones v Jones* (1876) 1 QBD 279; *Re Hewett, Eldridge v Illes* [1918] 1 Ch 458.

¹⁷⁹*Mackintosh v Pogose* [1895] 1 Ch 505; *Re Wombwell* [1921] 125 LT 437.

¹⁸⁰*Egerton v Earl Brownlow* (1853) 4 HL Cas 1; 10 ER 359.

baronetries, which have no such duties, were distinguished.¹⁸¹ It would follow that knighthoods and other honours can also be distinguished, although stipulations regarding these might be thought to be equally contrary to public policy to allow a condition which required the beneficiary to acquire a title. In light of changed attitudes to public life it is probable that a court would less favourably receive such a condition today.

Conditions which forbid entry into military or naval service, have also been held to be void.¹⁸² Public policy in this case is the maintenance of the military forces of the Crown rather than the prevention of any private wrongs. As such, it would appear less liable to fall victim to changing social norms.

Names and arms clauses, which required the beneficiary to adopt the surname and coat of arms of the testator, were for a time after 1945 held to be contrary to public policy.¹⁸³ This was generally on the ground that in the case of a married woman being the beneficiary, the taking by her of another's surname might lead to dissension between husband and wife. There was also some difficulty with certainty.

In 1962 however the Court of Appeal overruled many previous decisions and held that the conditions were not contrary to public policy.¹⁸⁴ It may be that the actual public policy, which the courts had in mind, was the protection of a patriarchal nomenclature. Certainly the recognition of the lawfulness of such conditions can be seen as a recognition of changing social conditions. It is no longer seen as conducive of marital dissension to require a beneficiary to take the name and arms of a testator. This shows that in the field of illegal and repugnant conditions at least, the courts are alive to changing social conditions, and are able to mould the common law accordingly.

A condition requiring a woman, whether single or married, to bear the testator's surname was held to be contrary to public policy as coercive and quasi-punitive.¹⁸⁵ The rationale for this rule would appear suspect in light of the change of judicial attitude towards names and arms clauses. It would appear not to be good law now in light of the observations of Upjohn J in *Re Neeld*.¹⁸⁶

Conditions in restraint of religion are not as such contrary to public policy.¹⁸⁷ This is so even in cases involving charitable trusts.¹⁸⁸ The courts are more willing to interfere with testamentary freedom of choice because it is thought that these conditions do not have a coercive or quasi-punitive effect. Nor is family dissension induced because religious belief is personal to the individual.

¹⁸¹ *Re Wallace, Champion v Wallace* [1920] 2 Ch 274.

¹⁸² *Re Beard* [1908] 1 Ch 383.

¹⁸³ *Re Fry* [1945] 1 Ch 348. See "Names and Arms Clauses", supra note 57, at 167-172.

¹⁸⁴ *Re Neeld, Carpenter v Inigo-Jones* [1962] Ch 643.

¹⁸⁵ *Re Fry* [1945] 1 Ch 348.

¹⁸⁶ *Re Neeld, Carpenter v Inigo-Jones* [1962] Ch 643.

¹⁸⁷ *Lysaght v Edwards* (1876) 2 ChD 499; *Re Sutcliffe* [1982] 2 NZLR 330.

¹⁸⁸ *Cheshire and Burn*, supra note 57, at 354.

It is doubtful as to how far, if at all, the requirements of public policy could invalidate conditions in wills tending to restrict the trade of a beneficiary.¹⁸⁹ The encouragement of grandsons to become farmers was not contrary to public policy. Indeed it was regarded as a worthy aim.¹⁹⁰ Clearly the encouragement of an illegal or immoral activity would be void, but whether the courts can and should make judgements in other cases is uncertain.

8. *Gifts to Intended Husbands and Wives*

At common law the parties to an agreement to marry could bring an action for breach of promise of marriage.¹⁹¹ This included the recovery of property given to the intended spouses. The Domestic Actions Act 1975 has altered the pre-existing law as to the return of engagement rings.¹⁹² Property disputes arising out of failed agreements to marry are dealt with in such a way as to return the parties to the position they would have had been in but for the agreement.¹⁹³ The assigning of responsibility for breaking the agreement no longer has any legal significance. There was no common law presumption that wedding presents were the joint property of both spouses.¹⁹⁴ The common law presumption was that gifts originating from the husband's family and friend were intended for the husband, and that gifts originating from the wife's family and friends were intended for the wife.¹⁹⁵

The nature of the gift may supply evidence of the donor's intention.¹⁹⁶ A gift to a fiancé who was dying was absolute and not conditional on marriage. The gift was not recoverable by the donor after her death.¹⁹⁷ When a man gave jewels to a woman during courtship and in contemplation of marriage, he was entitled to recover them if the match was broken off.¹⁹⁸ Where gifts were made to introduce one party to another with a view to possible marriage, there however no such right to restitution.¹⁹⁹

Because of the Domestic Actions Act 1975 the scope of judicial discretion in actions arising from breakdowns in intended marriages has been reduced. The legislative approach is to place the parties in the position they would have held but for the agreement, in line with the philosophy of the Matrimonial Property Act 1976. In that legislation also the discretion of the courts to do justice on the facts has been reduced. A

¹⁸⁹ *Cooke v Turner* (1846) 15 M & W 727, 735; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 259, 328, per Lord Pearce.

¹⁹⁰ *Re Cowley* [1971] NZLR 468.

¹⁹¹ As is shown, in a humorous way, in Sir Arthur Sullivan's opera, *Trial by Jury* (1875).

¹⁹² *Jacobs v Davis* [1917] 2 KB 532 (the implied condition that it would be returned); *Cohen v Sellar* [1926] 1 KB 536 (could not recover if that party had refused without legal justification to marry).

¹⁹³ Section 8(3).

¹⁹⁴ *Young v Burrell* (1576) Cary 54; 21 ER 29.

¹⁹⁵ *Samson v Samson* [1960] 1 All ER 653; 1 WLR 190 (CA).

¹⁹⁶ *M'Donald v M'Donald* 1953 SLT 36 (Sh Ct).

¹⁹⁷ *Emery v Morgan* (1938) 33 MCR 15.

¹⁹⁸ *Oldenburgh's Case* (1676) 1 Freeman 213; 89 ER 151.

¹⁹⁹ *Robinson v Cumming* (1742) 2 Atk 409; 26 ER 646, LC.

statutory requirement to return the parties to their former positions may not always do justice to the parties.

9. Restraint on Alienation

A total restraint on the alienation of an absolute interest in possession during a certain period is invalid.²⁰⁰ A condition cannot be repugnant to the estate granted.²⁰¹ Partial restraints are permitted however. Thus there is no objection to a limitation which takes effect so as to defeat a particular alienee,²⁰² to a condition that the donee shall not alienate a reversionary interest²⁰³ or to a condition that the donee shall not alienate to a particular person or class of person.²⁰⁴ Property can be given on condition that another is not alienated, as this does not interfere with the donee's power to alienate the property given.²⁰⁵

The Property Law Act 1952²⁰⁶ allows the court to remove a restraint upon alienation either wholly or partly where it appears to be for the benefit of the persons subject to any restraint. This provision allows a proviso that property shall not be sold during the life of beneficiary, or pass by bankruptcy or be seized, attached or taken. This applies however only to children, grandchildren, and spouses.²⁰⁷

Conditions which are void include a restraint on alienation to anyone other than one person,²⁰⁸ and to anyone other than one or more of a small and diminishing class of persons.²⁰⁹ A grantor of fee simple cannot enforce a condition that that the grantee shall always let the land at a definite rent or cultivate it in a certain manner, as this would be incompatible with that complete freedom of enjoyment, disposition and management that the law attributes to ownership of such an estate.²¹⁰ Where a gift is absolute in the first instance, a restraint on the power of leasing is void on the same principle as is a restraint on alienation.²¹¹

²⁰⁰*In re Rosher, Rosher v Rosher* (1884) 26 ChD 801.

²⁰¹*Earl of Arundel's Case* (1575) 73 ER 771; *Re Dugdale, Dugdale v Dugdale* (1888) 38 ChD 176.

²⁰²*Re Johnson, ex parte Matthews* [1904] 1 KB 134.

²⁰³*Re Porter, Coulson and Capper* [1892] Ch 481.

²⁰⁴*Doe d. Gill v Pearson* (1805) 6 East 173; 102 ER 1253.

²⁰⁵*Caldy Manor Estate Ltd v Farrell* [1974] 3 All ER 753; 1 WLR 1303 (CA).

²⁰⁶Section 33(4).

²⁰⁷*Re Hardley* [1977] 1 NZLR 161.

²⁰⁸*Muschamp v Bluett* (1617) J Bridg 132; 123 ER 1253.

²⁰⁹*Re Brown, District Bank Ltd v Brown* [1954] Ch 39.

²¹⁰Cheshire and Burn, *supra* note 57, at 349.

²¹¹(1884) 26 ChD 801.

After an absolute gift, a proviso of forfeiture on bankruptcy or alienation is void,²¹² but a gift of income may be made conditional upon termination in the event of an attempted alienation or bankruptcy.²¹³ It is not permissible to include with a grant of a life interest a condition that the property shall not be liable to seizure for debt,²¹⁴ so as to avoid one of the incidents to which all absolute interests are subject- liability for debts. A gift over of what the donee of an absolute interest in the asset or income does not dispose of, is of necessity void.²¹⁵ This is true at least of gifts by will, and probably also applies to gifts by deed or instruments in writing *inter vivos*. A condition that a donee shall not alienate during a particular time such as the life of a certain person²¹⁶ or during their own life²¹⁷ is void.

A determinable limitation such as a grant of a life interest to X until they attempt to alienate the gift or become bankrupt, is perfectly valid as it is not repugnant to the (limited) interest granted.²¹⁸ A gift “to X for life or until he becomes bankrupt” is not the same as a gift “to X for life on condition that if he becomes bankrupt his interest shall determine”.

A restraint on alienation to anyone other than one or more of a small class which is likely to increase is good. In *Re Macleay*,²¹⁹ a case where land was devised “on the condition that he never sells out of the family”, Jessel MR held that this did not infringe the rule against total restraint upon alienation because it bound only the devisee personally, it applied only to sales and not other modes of alienation, and within the family even sales were permissible. The family was construed as meaning “blood relations”, and comprehended many persons. This judgement was somewhat critical of *Attwater v Attwater*²²⁰ and was itself the subject of criticism in *Re Rosher, Rosher v Rosher*.²²¹ *Re Brown, District Bank Ltd v Brown*²²² declined to follow *Re Macleay*,²²³ distinguishing that case on the basis that in *Re Brown* the limitation was to four or five named persons.

The principle that underlies the cases on alienation is that the donor cannot take away indirectly by a condition the incidents of the estate given.²²⁴ This is true also where the subject of the gift is for life only. This doctrine has been criticised on the basis that the invalidity should be based on public policy rather than repugnancy to the interest

²¹²*Brandon v Robinson* (1811) 18 Ves Jun 429; 34 ER 379; *Metcalf v Metcalfe* [1891] 3 Ch 1 (CA).

²¹³*Brandon v Robinson* (1811) 18 Ves Jun 429; 34 ER 379.

²¹⁴*Graves v Dolphin* (1826) 1 Sim 66; 57 ER 503.

²¹⁵*Watkins v Williams* (1851) 3 Mac & G 622; 42 ER 400.

²¹⁶*Egerton v Earl Brownlow* (1853) 4 HL Cas 1; 10 ER 359.

²¹⁷*Corbett v Corbett* (1888) 14 PD 7 (CA).

²¹⁸*Brandon v Robinson* (1811) 18 Ves Jun 429; 34 ER 379.

²¹⁹(1875) LR 20 Eq 186.

²²⁰(1853) 18 Beav 330; 52 ER 131.

²²¹*In re Rosher, Rosher v Rosher* (1884) 26 ChD 801.

²²²[1953] Ch 39.

²²³(1875) LR 20 Eq 186.

²²⁴*Re Dugdale, Dugdale v Dugdale* (1888) 38 ChD 176, 182.

given.²²⁵ Whether this is a valid criticism or not is unclear, as it has been argued that repugnancy merely acts as a cover for public policy in any case.

The tendency in modern cases has increasingly been to curtail the extent to which the dead hand of a testator may rule the living.²²⁶ Perhaps the courts are losing sight of the fundamental doctrine of repugnancy, and have unintentionally and unwittingly allowed the necessities of public policy to engraft certain exceptions to the rule against restraints on alienation.²²⁷ It is a mistake to see restraint on alienation to be seen as merely an aspect of public policy, as repugnancy ought to be a ground for voiding a condition.

10. Restraint of Marriage

The rules governing restraint of marriage present some difficulty. Distinctions are drawn between partial and general restraint, and personalty and realty. Perhaps more importantly, it might be questioned whether principles which were largely evolved during the nineteenth and early twentieth centuries, when marriage was still the principle basis for family life, remains valid today. Formal legal marriages (though still prevalent) are not universally regarded as necessary, and tend to be of shorter duration than formerly.

A condition that is in total restraint of marriage is void per se as regards personalty. For realty however total restraint is void only if there is an intention to promote celibacy or an intention to restrain marriage (rather than this being merely the effect).²²⁸ Where the purpose is to provide for a person while they are single, or to benefit the subject in whose favour the gift over is made it is effective.²²⁹ This is equally so whether the gift is by deed or will.²³⁰

A condition in partial restraint of marriage is prima facie valid,²³¹ and in the case of personalty, unless there is an explicit gift over on marriage, or the gift is so made that it is revoked by the marriage, it is treated as *in terrorem* and is therefore valid.²³² The *in terrorem* doctrine does not apply to gifts of realty²³³ so a condition in partial restraint of marriage can result in the estate being determined to the benefit of the residuary beneficiary.²³⁴ The position is not clear for joint gifts of personalty and realty,²³⁵ and though the presumption in favour of conditions being valid still applies, the *in terrorem*

²²⁵Glanville Williams, supra note 167, at 343.

²²⁶Sir Robert Megarry, "Note on Re Macleay" [1954] 70 LQR 15, 16.

²²⁷Cheshire and Burn, supra note 57, at 350.

²²⁸*Jones v Jones* (1876) 1 QBD 279 (DC).

²²⁹*Re Hewett, Eldridge v Illes* [1918] 1 Ch 458.

²³⁰*Re Whiting's Settlement, Whiting v De Rutzen* [1905] 1 Ch 96 (CA).

²³¹*Clayton v Ramsden* [1943] 1 All ER 16.

²³²*Gillet v Wray* (1715) 1 P Wms 284; 24 ER 390; *Re Nourse, Hampton v Nourse* [1899] 1 Ch 63.

²³³*Jenner v Turner* (1886) 16 ChD 188, 196 per Bacon VC.

²³⁴*Re Bathe* [1975] Ch 377.

²³⁵(1878) 2 LR Ir 442.

rule probably does not apply. Thus conditions in partial restraint of marriage will be valid but gifts of realty and personalty will probably be void.

Gifts intended to determine on marriage are perfectly valid,²³⁶ as they are not intended to prevent marriage. A gift conditional on the beneficiary not marrying a person born in Scotland or of Scottish parents,²³⁷ or who was not to profess the Jewish religion and not born a Jew,²³⁸ is valid. Neither would now be seen as consistent with the principles underlying the Human Rights Act 1993.

A condition that a beneficiary should take “and for so long as she shall not enter into a de facto relationship” (determination at the sole and absolute discretion of trustees),²³⁹ a condition subsequent, was void as “de facto” lacked the requisite degree of definition and certainty.²⁴⁰ The conceptual difficulty was not removed by giving power of decision to trustees. This would avoid difficulties with evidential uncertainty however. The condition was not contrary to public policy. This was perhaps because when the precedent was set in 1986, “de facto” relationships were far from uncommon. Their status is currently the subject of legislative attention with a view to strengthening the respective rights of the parties to a degree analogous to that of marriages properly so called. But such a gift would remain void as a condition subsequent- though not a condition precedent, for uncertainty.

11. Gifts Inducing Separation of Spouses

Conditions encouraging the separation or divorce of spouses have been held to be void as contrary to public policy.²⁴¹ The effect of each case however has to be carefully considered. Trusts made in contemplation of future separation are void as they may have the effect of encouraging this.²⁴² A condition that a woman should live apart from her husband was held *contra bonus mores* and therefore void.²⁴³ It has been held that a condition precedent which was intended to promote the divorce of the testator's son from his wife was *malum prohibitum*.²⁴⁴

²³⁶*Morley v Rennoldson, Morley v Linkson* (1843) 2 Hare 570; 67 ER 235.

²³⁷*Perrin v Lyon* (1807) 9 East 170; 103 ER 538.

²³⁸*Hodgson v Halford* (1879) 11 Ch 959.

²³⁹*Re Lichtenstein; Lichtenstein v Lichtenstein* [1986] 2 NZLR 392.

²⁴⁰The condition was “for so long as she remains my widow and for so long as she shall not enter de facto relationship”.

²⁴¹*Re Caborne, Hodge and Nabarro v Smith* [1943] Ch 224; *Re Johnson's Will Trusts, National Provincial Bank Ltd v Jeffrey* [1967] Ch 387; 1 All ER 553.

²⁴²*Re Moore, Trafford v Maconochie* (1888) 39 ChD 116; *Marquess of Westmeath v Marchioness of Westmeath* (1830) 1 Dow & Cl 519; 6 ER 619.

²⁴³*Wren v Bradley* (1848) 2 De G & SM 49; 64 ER 23.

²⁴⁴*Re McBride* (1980) 107 DLR (3d) 233.

Where separation with immediate effect has been agreed upon, any consequential arrangements would not be invalid.²⁴⁵ Where the parties are already separated, a condition may be valid as providing for maintenance, unless there is evidence that the object was to induce the spouse to not return to their former partner.²⁴⁶ The case which established this last point has however been the subject of criticism on the basis that it disregarded the rule that the law looks to the general tendency of the disposition and not to the possibility of public mischief occurring in the particular instance.²⁴⁷

In *Re Caborne*, Simonds J observed that

The contention, on the one hand, being that such a condition is against public policy, and, therefore, void, I received, on the other hand, the usual warning against the court attempting to define the policy of the law, but I do not think that I set up any new head of public policy, or urge that “unruly horse” from its measured gait, if I re-assert the sanctity of the marriage bond and with it the importance of maintaining the integrity of family life, and, therefore, denounce and declare void a provision which is designed or tends to encourage an invasion of that sanctity.²⁴⁸

The public policy in these cases are simply the desire to maintain the integrity of the family. The social situation has altered somewhat since the time most of these cases were decided, and it may be questioned whether it is appropriate for the courts to restrict the freedom of testamentary disposition in this way. On balance it would appear that the active undermining of spousal relationships ought not to be approved by the courts, whatever the contemporary frequency or durability of marriages.

12. Conditions Affecting Parental Duties

A condition that is designed to separate a parent from their child, even where the parents are divorced, will be held void as *malum prohibitum* and contrary to public policy.²⁴⁹ So will be a condition designed to interfere with the performance of parental duties.²⁵⁰ The operation of the later principle was restricted however by *Blathwayt v Lord Cawley*.²⁵¹ Not every condition that in any way might affect or influence the way in which a child is brought up, or in which parental duties are exercised, will be void. They must be designed to deter the parent from performing their parental duties. As with conditions tending to separate spouses, each case has to be carefully considered on the facts. This distinction is doubtless motivated by the realisation by the courts that the degree of

²⁴⁵*Wilson v Wilson* (1848) 1 HLC 538; 9 ER 870; *Vansittart v Vansittart* (1858) 2 De G & J 249; 44 ER 984.

²⁴⁶*Re Lovell, Sparks v Southall* [1920] 1 Ch 122.

²⁴⁷*Re Caborne, Hodge and Nabarro v Smith* [1943] Ch 224 per Simonds J.

²⁴⁸*Re Caborne, Hodge and Nabarro v Smith* [1943] Ch 224.

²⁴⁹*Re Piper, Dodd v Piper* [1946] 2 All ER 503.

²⁵⁰*Re Borwick, Borwick v Borwick* [1933] Ch 657.

²⁵¹[1976] AC 397; [1975] 3 All ER 625 (HL).

control exercised by parents over their children is much less than it was in Victorian times.

A condition that grandchildren would receive property on condition that they lived with their mother if she and their father lived separately was void as tending to restrict parental duty.²⁵² Equally void were a condition whereby grandchildren were to forfeit property if they were under the control of their father,²⁵³ and one that was directed against children living abroad.²⁵⁴

13. Conditions Restricting Freedom of Religion

Particular problems surround the determination of the certainty of religious conditions. These conditions are generally now held to be sufficiently certain, but the question is not entirely free from doubt. They are not contrary to public policy, however, and it is in this regard that they might come to most clearly conflict with contemporary attitudes.

It was not until the 1930s that the question arose as to the certainty of the religious test. Until then a long line of cases had assumed that they were sufficiently certain, both conceptually and evidentially. These decisions approved conditions such as “educated ... in the Protestant religion according to the rites of the Church of England”,²⁵⁵ “who does not profess the Jewish religion or not born a Jew”,²⁵⁶ “a member or adherent of the Roman Catholic Church”,²⁵⁷ “be of the Lutheran religion”,²⁵⁸ and “in the Protestant faith”.²⁵⁹ In none of these cases was it argued that they were void for uncertainty.²⁶⁰

In the 1930s a series of cases cast doubt on the certainty of conditions in restraint of religion. In *Re Borwick*²⁶¹ Bennett J held void for uncertainty a condition that a beneficiary not “be or become a Roman Catholic or not be openly or avowedly Protestant”. This was on the basis that an infant below the age of discretion is not in law capable of choosing their religion, at least so far as their present or future property rights may be affected by their decision. The decision could be interpreted as based on the uncertainty of the words used. Answering a question on the adherence to a religion required an assessment of facts for which the court was without guidance. A condition requiring that a person “become a convert to the Roman Catholic religion” would therefore be valid, as it requires of necessity the performance of certain definite acts.²⁶²

²⁵²*Re Morgan* (1910) 26 TLR 398.

²⁵³*Re Sandbrook, Noel v Sandbrook* [1912] 2 Ch 471.

²⁵⁴*Re Boulter, Capital and Counties Bank v Boulter* [1922] 1 Ch 75.

²⁵⁵*Clavering v Ellison* (1859) 7 HLC 707; 11 ER 282.

²⁵⁶*Hodgson v Halford* (1879) 11 Ch 959.

²⁵⁷*Re Carleton* [1909] 28 NZLR 1066.

²⁵⁸*Patten v Toronto General Trusts Corporation* [1930] AC 629 (PC).

²⁵⁹*In Re Gunn* [1912] 32 NZLR 153.

²⁶⁰Butt, *supra* note 115, at 400.

²⁶¹*Re Borwick, Borwick v Borwick* [1933] Ch 657.

²⁶²*Blathwayt v Lord Cawley* [1976] AC 397; [1975] 3 All ER 625 (HL).

However, in *Clayton v Ramsden*,²⁶³ “of the Jewish faith” was held to be uncertain, not merely of expression, but of operation- though in a dissenting speech Lord Wright thought that “faith” was not unclear, and was a question of fact easily proven. The testator had failed to indicate what degree of observance was sufficient. *Clayton* was followed by *Re Lockie*²⁶⁴ (“remain a Protestant”; “adhere to the Protestant faith”), *Re Biggs*²⁶⁵ and *Re Myers*²⁶⁶ (“contracting marriage outside the Jewish faith”), as well as *Re Allen*²⁶⁷ (“who shall be a member of the Church of England and an adherent to the doctrine of that Church”).

In all of these cases there was some lack of precision in distinguishing between uncertainty of expression and uncertainty of operation. The former were void in all cases, the latter could be resolved by extrinsic evidence. In *Re Tegg*²⁶⁸ “at all times conform to and be a member of the Established Church of England” was uncertain, because “members” was certain, but “at all times conform to” was uncertain. It may be that *Clayton*²⁶⁹ rested at least in part on the policy consideration that the testator ought not to be allowed to control from the grave the marriage partners and religious convictions of their beneficiaries.²⁷⁰

The House of Lords revisited the question of the certainty of religious conditions in 1975 in *Blathwayt v Lord Cawley*²⁷¹ (“be or become a Roman Catholic”). They distinguished *Clayton*²⁷² by restricting its application to conditions requiring adherence to the Jewish faith, and declined to extend it to other religions.²⁷³ The conditions in *Clayton* and *Re Borwick*²⁷⁴ were composite ones. Lord Wilberforce did not feel himself obliged, or indeed justified, in extending the conclusion reached in *Clayton*.²⁷⁵ Thus that case did not lay down any general principle that all conditions subsequent relating to religious belief were void for uncertainty. It was a particular decision expressed in a particular way about one kind of religious belief or profession.²⁷⁶

²⁶³[1943] 1 All ER 16.

²⁶⁴*Re Lockie, Guardian Trust and Executors* [1945] NZLR 230, 239-246.

²⁶⁵*Re Biggs, Public Trustee v Schneider* [1945] NZLR 303, 307.

²⁶⁶*Re Myers, Perpetual Trust Estate and Agency Co of New Zealand v Myers* [1947] NZLR 828, 834.

²⁶⁷*Re Allen, Faith v Allen* [1953] Ch 810.

²⁶⁸*Re Tegg, Public Trustee v Bryant* [1936] 2 All ER 879.

²⁶⁹[1943] 1 All ER 16.

²⁷⁰*Clayton v Ramsden* [1943] AC 320, 325 per Lord Atkin, 332 per Lord Romer.

²⁷¹[1976] AC 397; [1975] 3 All ER 625 (HL); *Re Sutcliffe* [1982] 2 NZLR 330 (followed).

²⁷²[1943] 1 All ER 16.

²⁷³A distinction which was justified as based on the facts of the case, no doubt in an attempt to indirectly or surreptitiously restrict the application of the former rule.

²⁷⁴*Re Borwick, Borwick v Borwick* [1933] Ch 657.

²⁷⁵[1943] 1 All ER 16.

²⁷⁶Butt, supra note 115, at 400.

In *Blathwayt v Lord Cawley*, Lord Wilberforce thought that as to public policy, despite the Race Relations Act 1968 (UK) and the European Convention of Human Rights 1950, it was not proper to substantially reduce a freedom of testamentary disposition. His Lordship noted that “discrimination is not the same thing as choice, it operates over a larger and less personal area, and neither by express provision nor by implication has private selection yet become a matter of public policy”.²⁷⁷

*Re Tuck's Settlement Trusts*²⁷⁸ the English Court of Appeal further restricted the effect of *Clayton v Ramsden*.²⁷⁹ A condition providing for forfeiture on the grounds of failure to adhere to “the Jewish faith” was valid despite the latter case, because of the vesting in someone the power to decide whether or not the beneficiary has failed to adhere to the Jewish faith. This will only work however if there is no uncertainty of expression in the phrase “the Jewish faith”, which is perhaps questionable.

Between 1943 (*Clayton v Ramsden*)²⁸⁰ and 1978 (*Re Tuck's Settlement Trusts*),²⁸¹ there was some relaxation by the courts of their views of uncertainty. But this had the effect of rendering conditions based on religious belief less likely to fail. This was despite that tendency over this period to be less tolerant of religious discrimination, in whatever form. Since 1978 human rights legislation in both the United Kingdom and New Zealand have raised further questions about the underlying correctness of this approach.

14. Conditions Affecting Freedom of Race

It would appear to not be contrary to public policy to discriminate on the grounds of race alone.²⁸² The Human Rights Act 1993 and the preceding Race Relations Act 1971 however make the discrimination on grounds of race unlawful. Section 21 of the former Act prohibits discrimination on the grounds of sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status, sexual orientation. Specifically discrimination on any of these grounds is unlawful in the fields of employment, education and accommodation. The Act does not however directly affect the freedom of testamentary disposition.

The view of Lord Wilberforce in *Blathwayt v Lord Cawley*²⁸³ that, despite the Race Relations Act 1968 (UK) and the European Convention of Human Rights 1950, it was not proper to substantially reduce a freedom of testamentary disposition, would appear to be equally applicable in New Zealand. There is reason to believe however that the courts will recognise that legislative provisions against discrimination has been greatly extended since the early 1970s, both in New Zealand and the United Kingdom. Public policy

²⁷⁷[1976] AC 397, 426.

²⁷⁸*Re Tuck's Settlement Trusts, Public Trustee v Tuck* [1978] Ch 49 (CA).

²⁷⁹[1943] 1 All ER 16.

²⁸⁰[1943] 1 All ER 16.

²⁸¹*Re Tuck's Settlement Trusts, Public Trustee v Tuck* [1978] Ch 49 (CA).

²⁸²Cheshire and Burn, *supra* note 57, at 354.

²⁸³[1976] AC 397.

should perhaps require the courts to give judicial recognition to changed perceptions of what is acceptable in social relations. That this would mean that private selection would become a matter of public policy must act as the greatest restraint upon any judge who sought to hold that a testator should not have left their estate to their descendants who “be or become a Roman Catholic”. The difficulty is that relatively few of these conditions ever reach the courts, thereby denying the courts the opportunity to reconsider the matter.

15. Conclusions

Whilst statutory provisions as to testamentary claims, the succession to Maori ancestral property, and wills and administration of estates, are being reviewed with the intention of introducing a new Succession Act, testamentary freedom to impose conditions upon gifts remains. Some difficulties have arisen, due to the piecemeal way in which the law has developed. In light of the fact that there are now certain areas where the common law sits uneasily with statutory provisions, it would be appropriate to examine the whole field of conditional gifts.

The effect of void conditions, and the tortuous field of uncertainty may perhaps be left to the courts to resolve, but the field of illegal and repugnant conditions is intimately concerned with questions of public policy, and should be considered in that light. For a single example, it is doubtful as to how far, if at all, the requirements of public policy could invalidate conditions in wills tending to restrict the trade of a beneficiary.²⁸⁴ Such decisions may properly be referred to Parliament for guidance.

Similarly, in the field of restraint on alienation, the tendency in modern cases has increasingly been to curtail the extent to which the dead hand of a testator may rule the living.²⁸⁵ Perhaps the courts are losing sight of the fundamental doctrine of repugnancy, and have unintentionally and unwittingly allowed the necessities of public policy to engraft certain exceptions to the rule against restraints on alienation.²⁸⁶

The public policy in the cases of gifts inducing separation of spouses is simply the desire to maintain the integrity of the family. But the social situation has altered somewhat since the time most of these cases were decided, and it may be questioned whether it is appropriate for the courts to restrict the freedom of testamentary disposition in this way. The courts are reluctant to change long-established rules affecting testamentary dispositions even under the ambit of public policy. Perhaps most importantly, while we retain the right to confer benefits upon whomsoever we wish whilst alive, then why not enjoy this right when one is deceased. Should Parliament intervene where the courts are reluctant to tread? That is ultimately their responsibility. But the common law has proven itself quite capable of changing to meet contemporary requirements, and it is not to be supposed that they have lost this ability.

²⁸⁴*Cooke v Turner* (1846) 15 M & W 727, 735; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 259, 328, Lord Pearce.

²⁸⁵Megarry, *supra* note 226, at 16.

²⁸⁶Cheshire and Burn, *supra* note 57, at 350.