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Discussion of Recent Decisions

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DISCUSSION OF RECENT DECISIONS

CONTRACTS—ILLEGALITY—LIABILITY OF ATTORNEYS FOR TRUSTEE IN BANKRUPTCY UNDER A CONTRACT TO FILE AND HAVE ALLOWED ACCOUNTANTS’ CLAIM AGAINST THE BANKRUPT ESTATE FOR SERVICES RENDERED WITHOUT COURT ORDER AS REQUIRED BY BANKRUPTCY RULE.—In Chesnut v. Schwartz,¹ a recent Illinois Appellate Court case, the defendants were appointed to serve as attorneys for the trustee in bankruptcy of an insolvent lumber corporation. Subsequently, the trustee was directed by the court to employ the plaintiffs in the capacity of accountants to aid in objecting to claims of the United States collector of internal revenue against the bankrupt estate.

Shortly thereafter, the wife of the president of the bankrupt corporation filed a claim for $95,000, allegedly loaned by her to the corporation. The defendants, on behalf of the trustee, filed an objection to the allowance of the claim, and induced the

¹ 293 Ill. App. 414, 12 N. E. (2d) 912 (1938).
plaintiffs to examine and audit the corporate books for the purpose of assisting in the defense to said claim. In return, the defendants promised to file the plaintiff's claim for the fair and reasonable value of their services and to see that it would be allowed and satisfied without the necessity of securing an additional order of the court empowering the trustee to employ the plaintiffs in connection with said claim. In accordance with the agreement, the plaintiffs procured the information and data necessary in resisting the allowance and payment of the wife's claim, and as a result of their efforts, it was changed from a preferred to a general one, and thereby reduced about one-half.

The plaintiffs duly submitted a bill for the fair and reasonable value of their services, and the defendants, by failing to present the plaintiff's claim to have it allowed, breached their agreement. Having no recourse against the estate, which had been closed after final distribution, the plaintiffs seek to hold the defendants liable for the reasonable value of services rendered pursuant to the agreement.

The sole contention of the defendants is that the contract is "null and void as against public policy, because of its tendency to interfere with the impartial administration of justice" in that it is in contravention of the United State Supreme Court General Order in Bankruptcy number 45, which reads as follows: "No auctioneer or accountant shall be employed by a receiver or trustee except upon an order of the court expressly fixing the amount of the compensation or the rate or measure thereof."

The court stated that the statute referred to is not in point as it specifically designates that receivers and trustees are so restricted, and the defendants are neither, but are attorneys who agreed on their own behalf to have the plaintiff's fee for services allowed by the bankruptcy court. Even if the statute is applicable, the plaintiffs should recover, for illegality does not always have the effect of voiding a contract for all purposes. Thus a contract may, because of the status or conduct of one party, be unenforceable by him and yet capable of being enforced by the other party.

In the instant case the purpose of the statute involved undoubt-
DISCUSSION OF RECENT DECISIONS

edly is to preserve the bankrupt estate against depletion from unnecessary administration expenses, and the purpose would not be violated in holding the defendants liable for breach of contract. If the plaintiffs had made a contract intending that the attorneys make an unlawful raid on the bankrupt estate, then there is no doubt the plaintiffs should not recover. Here, however, the agreement was not one inherently wrong, and the intent of the plaintiffs was apparently lawful. That the object to be accomplished was meritorious is apparent from the fact that, as a result of the plaintiffs' efforts, an unjust claim was greatly reduced, to the benefit of the estate.

The statute concerned does not forbid and, in fact, specifically authorizes such employment, and the fact that the defendants contracted to procure the necessary legal sanction does not make the contract illegal even though they were not in a position to control the sanction. The contract is illegal, if at all, because of not being authorized in the manner prescribed by a rule of court, and not because of being against public policy or because of involving moral turpitude. Therefore, as any illegality involved would be only as to the defendants' method of executing their part of the agreement, and, as a lawful method of performance was possible, a recovery should be allowed; this is especially true when we consider that the defendants are attorneys familiar with bankruptcy practice and proceedings, and the plaintiffs are accountants who relied upon the attorneys' knowledge of the law.

The court logically decided that the plaintiffs were entitled to the relief sought. That no other result could have been reached

4 Lamb v. Tomlinson, 261 Ill. 388, 103 N. E. 1058 (1913), affirming 77 Ill. App. 290; Crichfield v. Bermudez Asphalt Pav. Co., 174 Ill. 466, 51 N. E. 552, 42 L. R. A. 347 (1898); Gilmore v. Thomas, 252 Mo. 147, 158 S. W. 577 (1913); 13 C. J. 440, n. 18.

5 Tallman v. Lewis, 124 Ark. 6, 186 S. W. 296 (1916); Moss v. Cohen, 158 N. Y. 240, 53 N. E. 8 (1899); Warren v. Bouvier, 124 N. Y. S. 641 (1910); Gray v. Leggitt, 169 N. Y. S. 311 (1918). It is interesting to note that the distinction between malum in se and malum prohibitum is repudiated in some jurisdictions. Holland v. Sheehan, 108 Minn. 362, 122 N. W. 1 (1909).

6 Josephs v. Briant, 108 Ark. 171, 157 S. W. 136 (1913); Fox v. Rogers, 171 Mass. 546, 50 N. E. 1041 (1898); Favor v. Philbrick, 7 N. H. 326 (1834). The general principle that ignorance of the law is no excuse for violating that law is not applicable where the performance of the agreement in the manner intended would be illegal, but a legal method of performance is possible.

7 An attorney is bound to conduct himself as a fiduciary or trustee occupying the highest position of trust and confidence and is duty-bound to exercise the utmost good faith, honesty, integrity, fairness, and fidelity. People v. Kwasigroch, 296 Ill. 542, 130 N. E. 344 (1921); People v. Charone, 288 Ill. 220, 123 N. E. 291 (1919); 7 C. J. S. §125, note 44.
cannot be denied, for a refusal to allow the plaintiffs a recovery would not only be wholly out of proportion to the requirements of public policy, but would also interfere with the impartial administration of justice, which is the very thing the defendants, themselves, contend should not be countenanced.

E. B. MILLER

CONTRACTS — RESTRAINT OF TRADE — VALIDITY OF COVENANT RESTRAINING VENDOR OF VACANT LOT FROM COMPETING WITH VENDEE IN A BUSINESS PREVIOUSLY BOUGHT FROM VENDOR.— Tuzik v. Lukes, a case recently decided in the Illinois Appellate Court, brought forth a novel situation in which the doctrine of reasonable partial restraint was successfully applied. The facts show that in 1931 the defendants had sold their bakery shop to the plaintiffs, retaining ownership of the vacant lot next door; and that the plaintiffs purchased this lot in 1933. In conjunction with the latter sale defendants agreed to refrain from entering into the bakery business either as principals or employees for a period of ten years within a radius of one mile from the plaintiffs' bakery. In 1937 defendants breached this agreement by entering the employ of a baker one block away. Plaintiffs filed their bill for an injunction which was dismissed for want of equity.

Against the contention of the defendants that this stipulation was void, because not incident to and in support of a contract of sale of some interest in a business which the instrument was designed to protect, the appellate court reversed and remanded the decision, saying that in view of all circumstances, including the previous sale of the business and the business interests of the plaintiffs, the sale of property adjacent thereto was sufficient to sustain the covenant.

The general rule as regards reasonableness of restraint is stated in the case of Pelc v. Kulentic, which was cited and relied on in the instant case. Statements to similar effect can be found in the bulk of the Illinois decisions dealing with restraint of trade, but

1 293 Ill. App. 297, 12 N. E. (2d) 233 (1938).
2 "Considered with reference to the situation, business and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made, if the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them, and not injurious to the public, the restraint will be held valid." 257 Ill. App. 213 (1930).
3 Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577 (1899); Lanzit v. Sefton Mfg. Co., 184 Ill. 326, 56 N. E. 393 (1900); Union Strawboard Co. v. Bonfield, 193 Ill. 420, 61 N. E. 1038 (1901); Rugg v. Rohrbach,
it might be noted that in all of these decisions the restraint was imposed at a time when a business, business good will, or business property was sold. Thus the Tuzik case would seem to extend the application of the rule in Illinois, and fit into the first of the five major classes of valid covenants outlined by Justice Taft in United States v. Addyston Pipe and Steel Company.\textsuperscript{4} Although the facts are different, a recent case in the Appellate Court of Indiana\textsuperscript{5} applied the general rule with an opposite result. In that case several years after dissolution of the partnership, the former partners contracted to secure registration of a trade name, and a covenant was inserted that one of them should not operate a retail shoe business within a certain area. This restraint was held invalid because not ancillary to the main purpose of the contract, or necessary to protect the covenantee in the enjoyment of the fruits thereof.

A few states in which similar situations have arisen have statutory declarations which preclude the making of a restraining covenant unless ancillary to the sale of a business or some substantial interest therein.\textsuperscript{6}

As the question of reasonableness of restraint is one of law for the court under the particular facts of the case\textsuperscript{7} it seems safe to assume that evidence not included in the report of the case was persuasive to the end of holding the restraint in question valid. The court in its opinion says, "The law is as stated by defendants, but in passing upon the validity of this agreement we must consider all the facts presented." In view of language in the Union Strawboard Company case\textsuperscript{8} and in Pelc v. Kulentis\textsuperscript{9} the present decision would seem to be a reasonable extension of the doctrine of reasonable restraint. However, no cases have been found in states not having a statutory declaration which have presented an agreement in restraint of trade in connection with the mere sale of real property. But, in cases where a sale of personal property is made, and a restraint imposed upon the seller, an anal-

\footnotesize{\textsuperscript{4} 85 F. 271, 46 L. R. A. 123 (1898). The first of the five classes is stated, "By the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold."

\textsuperscript{5} Milgram v. Milgram, 12 N. E. (2d) 394 (Ind. App., 1938).

\textsuperscript{6} California, North Dakota, South Dakota, and Oklahoma; see Prescott v. Bidwell, 18 S. D. 64, 99 N. W. 93 (1904).


\textsuperscript{8} 193 Ill. 420, 61 N. E. 1038 (1901).

\textsuperscript{9} 257 Ill. App. 213 (1930).}
gous situation is presented. Mr. Justice Holmes in the case of *Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Com-
pany v. Bay,* where a restraint was imposed on the seller of barges, vessels, coal flats, and stock, not to engage in the shipping business, stated, "It is said that there is no sale of good will. But the covenant makes the sale. Presumably all that there was to sell, . . . was the competition itself. . . ." Thus, property which is adapted to a specific kind of business can be said to carry with it the presumption of use in such business, and that a restraint imposed upon the seller if reasonable in view of the circumstances and objects of the parties is valid. Thus the Tuzik case cannot be taken for the view that mere sale of real property is sufficient to sustain such a restraint of trade, for the court in rendering its decision looked to all the circumstances—mainly the previous sale of the business.

Thus, the only question decided was one of fact, and, although the facts were novel, the decision is in accord with the tenor of previous decisions. At common law the reasons for voiding contracts in restraint of trade are twofold: first, because the covenanter is denied the pursuit of his livelihood, without a corresponding benefit to the covenantee; and, second, because it tends to monopoly, a detriment to the public. Neither of these reasons for invalidating the restraint appears in the present case.

A. A. Kreuter

***Corporations — Amendment to Certificate of Incorporation—Abrogation of Accrued Dividends on Cumulative Preferred Stock.—In Consolidated Film Industries v. Johnson,* plaintiff sought to enjoin the corporation from filing an amendment to its certificate of incorporation, which attempted, among other things, to abrogate the right of holders of cumulative preferred stock to receive dividends accrued by passage of time. The amendment was sought to be made under the Delaware corporation law, which permitted amendment of the certificate of incorporation "by increasing or decreasing its authorized capital stock or reclassifying the same, by changing the number, par value, designations, preferences, or relative, participating, optional, or other special rights of the shares. . . ." The question

10 200 U. S. 179, 26 S. Ct. 208, 50 L. Ed. 428 (1905).
1 197 A. 489 (Del., 1937).
presented was whether the corporation had the power to alter or extinguish, as an incident to the proposed reclassification of its capital structure, the right of preferred stockholders to receive accumulated dividends accrued on their shares through passage of time, but not declared.

It was contended on behalf of the corporation that the right of the shareholders to such dividends was merely an expectant or contingent right to receive accumulated dividends, because the rights of the stockholders were, by express provisions of the charter, made subject to the reserved power of amendment by the corporation.

The Delaware court held that while the shareholders did take their stock subject to the power of the corporation to amend or alter the character and priorities of their stock, their right to receive accrued and unpaid back dividends is a fixed contract right which may not be abrogated without their consent and that the shareholders had agreed to be subject to the amending power only from the date of the amendment forward. The statute, therefore, was held to have no retrospective effect.

The question presented in the principal case is of compelling interest in this state because Section 52(g) of the Illinois Business Corporation Act may give rise to a like problem.

Under facts substantially similar to those in the principal case the Circuit Court of Appeals for the Second Circuit, in Harr v. Pioneer Mechanical Corporation, construed the same statute involved in the Consolidated Film case as authorizing alterations of past due dividends which had accrued by passage of time only. In this case the right to receive such dividends was regarded by the court as included within the amending power as to "relative, participating, optional, or other special rights of the shares." The court holds that purchasers of cumulative preferred shares buy them with the right of amendment in mind and must be held to have weighed that disadvantage in making the purchase.

The Harr case was followed in Ainsworth v. Southwestern Drug Corporation, which denied the right of holders of cumulative preferred stock to receive accrued dividends before any dividends

"A corporation may amend its articles of incorporation, from time to time.

"(g) To change the designation of all or any part of its shares, whether issued or unissued, and to change the preferences, qualifications, limitations, restrictions, and the special or relative rights in respect of all or any part of its shares, whether issued or unissued." Ill. Rev. Stat. 1937, Chapter 32, § 157.52.

* 65 F. (2d) 332 (1933); certiorari denied, 290 U. S. 673, 54 S. Ct. 92, 78 L. Ed. 581 (1933).

* 95 F. (2d) 172 (1938).
could be paid upon new stock issued pursuant to an amendment of the charter.

*Keller v. Wilson & Company*\(^6\) presented a situation wherein the corporation attempted to abrogate the right of cumulative preferred shares to accrued dividends by virtue of an amendment to the corporation law enacted subsequent to the creation of the corporation. Here the Delaware court held the right to such dividends, as between the shareholders, to be a presently vested right, the enjoyment of which was postponed, and the proposed amendment to the articles of incorporation void.

Likewise in New York it has been held that a holder of cumulative preferred stock, the number of whose shares had been reduced pursuant to a recapitalization, was entitled to be paid dividends accrued prior to recapitalization on the number of shares held prior thereto before any dividends could be paid on common stock out of surplus earned subsequent to such recapitalization. The court there held that while the preferred shareholders are not creditors of the corporation in a technical sense, as between themselves and other shareholders they were creditors, entitled to be fully paid as to arrears in dividends before any surplus profits could be appropriated to the new common stock.\(^7\)

The different light in which the right here under consideration is regarded is responsible for the division of authorities heretofore noted. Those cases, of which the principal case is representative, seem to indicate that until the time of amendment to articles of incorporation changing participating rights of holders of cumulative preferred shares in corporate surplus, the right of such shareholders to dividends theretofore accruing is a fixed contract right, the enjoyment thereof being postponed until the creation of a fund out of which they may be paid and the declaration of the dividend.\(^8\) This right is deemed fixed by their contract and any amendment which seeks to alter the extent or mode

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\(^6\) 190 A. 115 (Del., 1936).

\(^7\) Roberts v. Roberts-Wicks Co., 184 N. Y. 257, 77 N. E. 13, 3 L. R. A. (N. S.) 1034, 6 Ann. Cas. 213 (1906). On June 25, 1904, the capital stock of defendant corporation was reduced apparently in accord with vote of its stockholders. Plaintiff voted against such measure but thereafter exchanged her certificate for 250 shares of cumulative preferred stock for 166 shares of the same class. In December, 1904, the corporation declared a dividend for both common and preferred stock, based, however, on the number of shares outstanding after the capitalization. Plaintiff claimed to be entitled to accrued dividends up to the date of recapitalization on the number of shares held by her up to such time.

DISCUSSION OF RECENT DECISIONS

of their participation in surplus can speak only from the time of amendment forward. On the other hand, the Harr and Ainsworth cases regard that right as merely a special privilege or preference of the shares and hence subject to change in accordance with the reservation of the power of amendment.

B. P. Morissette

Corporations — Foreclosure of Trust Deeds — Power of Trustee to Act Independently of Bondholders.—In the recent case of Chicago Title & Trust Company v. Chief Wash Company, defaults had existed in the payment of the principal maturities due June 1 and December 1, 1933, and June 1, 1934, and of interest installments on the dates specified. The payment of taxes was likewise in arrears. The bond issue was secured by a trust in the nature of a mortgage upon real estate improved by a building used solely by the defendant in the operation of its laundry business. Rents, issues, and profits were also pledged to secure the bonds. The mortgage provided that upon default in the payment of interest the trustee could in its own discretion, or upon the written request of the holders of not less than twenty-five per centum of the outstanding bonds, accelerate the entire issue and foreclose the trust deed. In June, 1934, defendant Chief Wash Company wrote the trustee, stating that in view of negotiating an extension plan eighty per centum of the outstanding bonds had been deposited with said defendant, that since the trustee was not required to foreclose unless the holders of twenty-five per centum of the outstanding bonds demanded such action it was obvious that no such demand could be made, and that if the trust company proceeded to foreclose it would do so at its own risk. The trustee, nevertheless, filed a complaint to foreclose the trust deed. Counterclaim was then filed to remove the trustee and to recover damages for wrongful institution of the foreclosure suit.

The unusual feature of this case was that, while eighty per centum of the bondholders sought to stay the foreclosure proceedings, not a single bondholder requested that the trustee accelerate the maturity of the bonds. The case is also unusual because, while the usual complaint of bondholders is that the trustee has been guilty of failing to act to protect the rights or the property of the security holders, here the trust company was more concerned with marshalling the assets for the cestuis que trust than were the bondholders themselves. The court upheld

1 368 Ill. 146, 13 N. E. (2d) 153 (1938).
this apparent overzealousness on the part of the trustee by holding that it was trying to protect the interest of the minority bondholders and had not shown an abuse of discretion.

The ordinary duty of a trustee is "to protect and preserve the subject of the trust, being authorized, for that purpose, to invoke the aid of the courts in a proper case ... ." The rule in Illinois and elsewhere is that the care and prudence to be exercised by the trustees is that which ordinary men would exercise in like circumstances in connection with their own affairs. Generally speaking, the trustee represents the bondholders, and the latter are usually not permitted to intervene in any action begun by the trustee. Since it holds legal title, the trustee, not the bondholders, is patently the proper party to institute foreclosure proceedings. Ordinarily it is in the trustee's discretion to determine when it shall do so, but it is the trustee's duty to act in good faith.

Nor is the action by a trust company against the apparent desires of a majority of the bondholders without support in our courts. A Federal court has held that a trustee could sue to foreclose, despite opposition of a majority of the bondholders, on the theory that the trustee cannot blindly submit to the domination of the majority and that such majority has no right to employ the voting power as an instrument by which the rights of the minority shall be injuriously affected.

At first blush such a holding might seem to be quite illogical. If the trustee is acting in behalf of the beneficiaries, why should his own opinion not give precedence to the voice of the holders of a majority of the bonds? The only answer to this is that it would defeat the very purpose for which the trustee was selected. Let us suppose that in a similar case one party owned sixty per

2 41 C. J. 606, par. 571.
5 Louis S. Posner, "The Trustee and Trust Indenture," 46 Yale L. Journal 737 at 766. However, see Clinton Trust Co. v. Joralemon St. Corp., 263 N. Y. S. 359 (1933), which held that, even after foreclosure proceedings have been instituted, they may be enjoined at suit by dissenting bondholders for time to investigate a reorganization plan pursuant to which foreclosure suit was instituted.
7 Toler v. East Tennessee, V. & G. Ry. Co., 67 F. 168 (1894); Hollister v. Stewart, 111 N. Y. 644, 19 N. E. 782 (1889), affirming 37 Hun 645. Here the court said, "His duty is to bondholders severally, and he is not at liberty to follow the advice or wishes of the majority, but is always liable to the minority for a faithful administration of his trust."
centum of all the bonds and he, being of a gambling nature and confronted with the present situation, decided that he would stake all on the future and refuse to foreclose. Or suppose that he had some equity in the mortgagor company and might, therefore, deny the trustee the right to take appropriate action to protect the minority's interest. The result in either case would be that the trustee would be helpless to prevent the latter's interest from being entirely lost. That is the reason for the rule that the trustee should represent the minority as well as the majority.

In a recent Idaho case,\(^8\) the mortgage stated: "If default shall be made in the payment of said bonds . . . the said trustees may, in their discretion, and shall upon written request of the holders of a majority in amount of said outstanding bonds . . . take immediate steps for the foreclosure of this mortgage . . . . It is further agreed that any such suit or action shall be subject to the control of such majority in amount of the bondholders, and it shall be lawful at any time before sale of the property, for such majority to direct the trustees in writing to waive such default or breach and dismiss any suit theretofore brought for the foreclosure of this mortgage." And where the majority attempted to stop such foreclosure proceedings, the court, in referring to the


In Sturges v. Knapp, 31 Vt. 1 at 21 and 23 (1858), the court stated: "But after the forfeiture occurs either by non-payment of interest or principal, or both, . . . the duties of the trustees become, not only active and responsible but critical and delicate. It not only is not a dead, dry trust, but is one of the most active and momentous responsibility. . . . The trustee must then elect between delay and action; between, on the one hand, taking possession of the road and its fixtures, . . . and on the other, delay, and consequent further emption, confusion, and loss; or they must undertake the ultimate and final remedy of foreclosure. . . . They could not consult the entire body of cestuis que trust, and their duty being due to the bondy severally they were not at liberty to follow the advice or wishes of the majority, as they were still liable to the minority for faithful administration. And in showing this, the advice of the majority would be no more conclusive, in their favor than that of others, equally skilled and equally interested in the question. Having assumed the duty of faithful administration of the trust in behalf of the several owners of the bonds, they were not at liberty to shield themselves by anything short of showing the fact of such administration, or that they were excused by the owners' unanimous consent from the performance of their duty under the trust. They must act without delay, and under the responsibility of being made liable for a breach of trust, if they failed to act in time, or to act with proper discretion, wisdom and forecast."

New York Trust Co. v. Michigan Traction Co., 193 F. 175 at 180 (1912), where the court stated, "The trustee, independently of the provisions of the trust deed, has the power, and it is its duty, whenever the necessity arises, to invoke the aid of a court of equity to preserve the trust estate, and this power cannot be abridged or restricted even by agreement of the parties."

latter restriction, said: "Clauses of this character, restrictive of
the common-law right of the creditor, who holds a plain obliga-
tion of his debtor, are not favored in law, and must be strictly
construed. . . . This provision . . . cannot be construed to give
the holders of a majority of the bonds the right to destroy the
security of the minority bondholders or to extend to the point of
releasing or discharging the indebtedness. If it were intended
that such stipulation should grant such an arbitrary power to the
holders of the majority of the bonds, it would be void and a court
of equity would disregard it."

Apparently, then, once the trust agreement gives the trustee
the discretionary right to foreclose the trust deed the courts are
loath to restrict his authority. The fact that in the instant case
the trust company was seeking also to sequester the income and
rents further justified its action. In fact, according to one
authority, the trustee "may be guilty of a breach of trust in
failing to commence foreclosure proceedings promptly, especially
where the mortgage, in addition to covering the property, pledges
the income, because the lien on future income attaches only after
it has been impounded by the assertion of the mortgagee's rights,
in some appropriate proceedings."

The failure to pay a single installment of interest being a
breach of the trust deed and the trustee having the right to ac-
celerate the entire issue upon such breach, the instant case does
not show an abuse of discretion on the part of the trustee.

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JUDGMENTS — FORMS AND REQUISITES — EFFECT OF and/or
BEING CONTAINED IN STATUTES, PLEADINGS, JUDGMENTS, AND
CONTRACTS.—In Sproule v. Taffe, the Illinois Appellate Court
reversed a judgment on the ground that the symbol "and/or"
contained therein rendered it void for uncertainty. This is the
first decision in Illinois reversed for this reason, but the result
was forecast as early as 1931 when Mr. Justice O'Connor, who
wrote the opinion in the instant case, strongly criticized the use
of the symbol.2

2 Silvester E. Quindry, Bonds and Bondholders—Rights and Remedies,
(Chicago: Burdette Smith Co., 1934), I, § 212.
1 294 Ill. App. 374, 13 N. E. (2d) 827 (1938). The judgment was by
confession on a written lease which recited that it was between an individual
and/or a corporation and a tenant and the judgment followed the terms of
the lease.
2 In Preble v. Architectural Iron Workers' Union, 260 Ill. App. 435
(1931), Mr. Justice O'Connor stated, "In a close case where these words are
used, a situation may be presented that would warrant this court in reversing
Because the phrase destroys accuracy, its meaning in each instance being dependent upon the context and circumstances, courts have often urged that its use be discontinued. Its employment in statutes has been disapproved on the ground that laws enacted in alternatives are riddles propounded for future solution by the courts and ultimately express the will of the courts and not that of the legislature. Its use in pleadings has been discouraged for the reason that its presence therein creates uncertainty, whereas good pleading requires averments to be clear in order that definite issues can be reached. Uncertainty in judgments is tolerated least of all. In the Putnam case, the Supreme Court of Utah reversed a judgment because the use of the phrase "and/or" rendered it uncertain.

The use of the symbol in contracts has not been as severely criticised as when utilized in statutes, pleadings, and judgments. Such contracts are sustained where a court, in construing the agreement as a whole, has been able to give effect to the intention of the parties.

It should be recognized that the phrase "and/or" does not always create uncertainty. This may seem inconsistent in view of the decisions criticizing its use, but the symbol has unquestionably been used innumerable times without causing confusion. In such cases the court made no comment, as none was necessary. Consequently, there is some basis for the contention that as a proposition must sometimes necessarily be stated both ways, the symbol is properly used when the intention is to express both views without being prolix, a fault for which attorneys are con-
stantly criticized. However, while the prolixity of lawyers has been properly criticized, especially where the use of a symbolic short-cut causes accuracy and requires litigation in aid of its construction, no such fault can be attributed to an attorney who prefers to express alternatives clearly and unequivocally. Moreover, the use of the phrase by legislators and attorneys can often be attributed to their indolence and inability and not to a desire to avoid prolixity.

E. B. MILLER

LICENSES—OCCUPATIONAL SALES TAX—WHETHER A CONSTRUCTION CONTRACT IS WITHIN THE ILLINOIS OCCUPATIONAL SALES TAX ACT.—In the recently decided case of Herlihy Mid-Continental Company v. Nudelman, the Illinois Supreme Court determined that the Illinois Occupational Sales Tax Act was not applicable to sand, gravel, cement, reinforced steel, and the like used in performance of contracts made by a contractor with the Sanitary District of Chicago, whereby the former was to erect certain concrete sewers and tunnels. The court held that the transfer did not constitute a retail sale of the building materials, but that it was a mere incident to the rendition of services, and as such was not taxable. Mr. Chief Justice Farthing, who wrote the majority opinion in the Blome case, dissented.

The Director of Finance, to sustain his position that the transfer of the building materials constituted a taxable retail sale, relied upon two prior Illinois decisions, namely Bradley Supply Company v. Ames and R. S. Blome Company v. Ames. The former case decided that a building contractor resells to the owner of the completed structure the plumbing supplies and fixtures which he puts into the structure; and the latter case decided that a building contractor resells and must pay a sales tax on such materials as the sand and gravel which he put into the completed structure. In the instant case, the court expressly

7 18 A. B. A. Jour. 574. B. K. Sandwell in "The Which of And/Or," appearing in Harper's for July, 1932, suggests that the symbol has vast possibilities if extended to other fields, giving as an example the symbol for/against and pointing out how expedient it would be if political candidates could state they were for/against the issues of the campaign.
8 18 A. B. A. Jour. 456, 574.
9 367 Ill. 600, 12 N. E. (2d) 638 (1937).
10 367 Ill. 600, 12 N. E. (2d) 638 (1937).
11 367 Ill. 600, 12 N. E. (2d) 638 (1937).
12 Ill. Rev. Stat. 1937, Ch. 120, § 440, et seq. Sec. 441 reads, "A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State. . . ." The original act was held invalid in Winter v. Barrett, 352 Ill. 441, 186 N. E. 113 (1933). The present act was held valid in Franklin County Coal Co. v. Ames, 359 Ill. 178, 194 N. E. 268 (1934).
13 359 Ill. 162, 194 N. E. 272 (1934).
14 365 Ill. 456, 6 N. E. (2d) 841, 111 A. L. R. 940 (1937).
overruled the Blome case but distinguished the Bradley case, which remains good law in Illinois.\(^5\)

It would seem, therefore, that, since the Herlihy decision, the Illinois law is now settled that if a building contractor builds into the structure certain articles which substantially retain their identity in the completed structure, such as plumbing supplies and fixtures, this constitutes a retail sale of these articles and the contractor must pay a sales tax thereon. Moreover, the first sale of these commodities by the supply house to the contractor is not taxable, since he buys them not for his own use, but for the purpose of reselling them to the owner of the completed structure.\(^6\) But if, as in the instant case, the contractor, as an incident to the rendition of his services in erecting the structure, uses certain building materials which lose their identity in the completed structure, such as sand, gravel, and cement, this does not constitute a taxable sale of tangible personal property to the owner of the house as contemplated by the act, and no sales tax need be paid by the contractor.

In other jurisdictions the commonest method of determining who should pay the sales tax in such cases is to ascertain whether a party to the transaction is the ultimate consumer or user of the goods and, if so, which one.\(^7\) But the cases using this test are not uniform, and there are decisions holding each way.\(^8\) Although

\(^5\) The point of distinction is that the Bradley case involved materials which retained their identity in the completed structure, whereas the Blome and Herlihy cases involve materials which lose their identity in the completed structures. Moreover, the instant decision in no way jeopardizes the prior Illinois cases holding that there are taxable sales even though the transfers are commingled with incidental services. See Brevoort Hotel Co. v. Ames, 360 Ill. 485, 196 N. E. 461 (1935); Swain Nelson & Sons Co. v. Dept. of Finance, 365 Ill. 401, 6 N. E. (2d) 632 (1937).


\(^7\) Warren v. Fink, 146 Kan. 716, 72 P. (2d) 968 (1937). For a general discussion on this point see 34 Col. L. Rev. 809.

\(^8\) The courts of Arkansas have held that the owner of the completed structure is the ultimate user of the building materials which go into the structure, and hence that the transaction constitutes a taxable retail sale of the building materials by the contractor to the owner of the structure. See Wiseman v. Gillioz, 192 Ark. 950, 96 S. W. (2d) 459 (1936). On the other hand, the courts of Louisiana, Maryland, and Arizona have taken the view that it is the contractor who is the ultimate user of the building materials as an incident to the rendition of his services, and hence his putting them into the completed structure is not taxable as a retail sale. See State v. J. J. Watts Kearny & Sons, 181 La. 554, 160 So. 77 (1935); State v. Christhilf, 170 Md. 586, 185 A. 456 (1936); Moore v. Pleasant Hasler Construction Co., 76 P. (2d) 225 (Ariz., 1937). It is interesting to note the history of this last case. The original decision, reported in 72 P. (2d) 573 (Ariz., 1937), held contrary, but the same court reversed itself on rehearing, and one of the court's reasons for reversal was the fact that the Blome case, which it had cited as authority for its prior decision, had in the interim been overruled by the Illinois court, in the Herlihy case.
the Illinois court does not expressly guide itself, either in the Blome or Herlihy case, with the aforementioned test, as such, yet it is always in the background as a determining factor, inasmuch as the Illinois statute defines a taxable retail sale as one for use or consumption.\(^9\)

It should, of course, follow as a necessary corollary of the Herlihy decision, that, since building materials which do not retain their identity in the completed structure are used, and not resold, by the contractor, the sale of these building materials by the manufacturer or supply house to the contractor is now taxable as a retail sale, since he purchases them for his own use and not for resale.\(^10\) This result has already been reached in another state.\(^11\)

It is also to be noted that by virtue of a refund clause in the Illinois act,\(^12\) all contractors who paid sales tax in reliance on the Blome case, now overruled, can recover these payments,\(^13\) even though no protest was made.

B. FELDMAN

\(^9\) It would seem that the recently decided case of Babcock v. Nudelman, 367 Ill. 626, 12 N. E. (2d) 635 (1937), holding an optometrist not subject to a tax for lenses and frames sold to his patients, loses sight of this aforementioned test. Contra, State Tax Commission v. Hopkins, 243 Ala. 556, 176 So. 210 (1937).

\(^10\) This result in no way conflicts with the Bradley case, since the court distinguishes between the contractor’s use of materials which lose their identity and those which retain their original form. The attitude of the sales tax department originally, as evidenced by the first code of regulations that it promulgated, was that the contractor was the ultimate consumer of all building materials which he used, and hence the department ruled that all sales by the supply house or manufacturer to the contractor were taxable as retail sales. The Bradley case, which was instituted to test the validity of this original regulation, decided against the state and hence resulted in the entire abandonment of the original regulation. The state evidently believed that the Bradley case was authority for the proposition that the contractor resold (but did not use) all building materials which he incorporated into the finished structure, and the Department laid down the second order, that henceforth all sales by the contractor to the owner of the structure were taxable as a retail sale. While the Illinois court originally sustained this regulation in the Blome case, as we know now, the Herlihy case ultimately held this regulation invalid as to transfers of materials which lost their identity in the completed structure. It would seem, therefore, that insofar as the materials concerned are such as lose their identity, the original regulation is now correct; and only insofar as the materials are such as retain their identity is the second regulation the correct one to apply. For a general discussion on this point, see 31 Ill. L. Rev. 741.


\(^12\) Ill. Rev. Stat. 1937, Ch. 120, § 445: “If it shall appear that an amount of tax, penalty or interest has been paid which was not due under the provisions of this Act, whether as the result of a mistake of fact or an error of law . . . such amount shall be refunded to such person by the department.”

\(^13\) It would seem that the converse of this proposition should also be true,
DISCUSSION OF RECENT DECISIONS

MUNICIPAL CORPORATIONS—BUILDING REGULATIONS—WHETHER TAKING IN PAYING GUESTS CONSTITUTED A VIOLATION OF ZONING ORDINANCE.—In the case of Re Rex v. Roulet\(^1\) it was held that defendant’s practice of taking in paying guests constituted a violation of a zoning ordinance of the City of Toronto, which forbade the use of premises within the restricted zone for any purpose other than as a ‘‘detached private residence.’’ The decision was grounded on several English and Canadian cases holding such conduct to amount to carrying on a business and resulting in a use for other than residential purposes.

Although the exact question involved in the Roulet case does not appear to have risen in this country under zoning ordinances, several analogous situations appear in the printed decisions. In City of Syracuse v. Snow\(^2\) the problem presented was whether the use of a residence as a sorority house was violative of an ordinance limiting the type of dwelling to single family dwellings and restricting their use to only one family living together as a single housekeeping unit. It was there decided that for the purposes of the ordinance in question the sorority was a family, the girls living, eating, and sleeping together as a unit under the control and supervision of a chaperon as the head of the family. However, the Michigan Supreme Court reached a contrary result in a case arising under a restrictive covenant in a deed limiting the use of any house on the premises to ‘‘one single private dwelling house.’’ The Michigan court said that a fraternity was not a family, any resemblance between the two being superficial only, and that the use of a residence as a fraternity house violated the covenant.\(^3\)

The case of Village of Riverside v. Reagan\(^4\) might be said to furnish some authority for the proposition that a boarder may be considered as part of the family residing on premises the use of which is restricted by zoning ordinance as a dwelling for not more than one family. Although the practice of taking in boarders was not brought into question by the case, boarders and

\(^1\) [1937] O. R. 912.
\(^2\) 205 N. Y. S. 785 (1924).
\(^3\) Seeley v. Phi Sigma Delta House Corp., 245 Mich. 252, 222 N. W. 180 (1928).
\(^4\) 270 Ill. App. 355 (1933).
lodgers were included in the definitions of the word "family" set out in the course of the opinion. Likewise, in *Gallon v. Hussar*, the New York court, in determining whether a covenantor had breached a restrictive covenant by taking in boarders, held that boarders could be considered as part of the family.

However, several cases arising under alleged breaches of restrictive covenants in deeds have held that the practice of taking in boarders is contrary to the purpose of covenants which limited the use of the premises "for the purpose of a private dwelling or residence only," "for residence purposes only," or as "a dwelling house to be used exclusively as a residence for a private family." In these cases, however, it appears that the practice complained of was carried on to such an extent that it might be said that the covenantors in such cases were using the premises primarily for the business of taking in boarders or lodgers.

The above cases furnish no standard for determining whether a householder is forbidden by zoning ordinance or restrictive covenant from taking in one or two close friends as boarders or lodgers, or where the line will be drawn. In this regard, the only satisfactory test suggested is found in *Trainor v. Le Beck*, wherein it is stated that the true test should be whether the premises are used primarily for the business of taking in boarders or lodgers and only incidentally for family use, or vice versa. This would seem to be the most satisfactory test to which this problem is susceptible.

B. P. Morissette

**Perpetuities — Powers — Devolution of Property When Exercise of Appointment Is Ineptective.** — In *Northern Trust Company v. Porter*, the problem was presented to the Illinois Supreme Court for the first time whether the period in the rule against perpetuities is computed from the time of the creation of a general testamentary power of appointment or from the time of the donee's exercise thereof. In this case Mrs. Porter was donee of a general power to appoint by will a fund bequeathed by the donor to her as trustee and life beneficiary. Donee so appointed the fund that if the period of the rule were

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5 158 N. Y. S. 895 (1916).
6 Linwood Park Co. v. Van Dusen, 63 Ohio St. 183, 58 N. E. 576 (1900).
9 101 N. J. Eq. 823, 139 A. 16 (1927).
1 368 Ill. 256, 13 N. E. (2d) 487 (1938).
computed from the time of the creation of the power, the appoint-
ment would be invalid, but, if the period were computed from
the time of the exercise of the power, the appointment would
be valid.

The Supreme Court decided that the period of the rule
begins to run from the time of the creation of a general testa-
mentary power of appointment, because the donee cannot appoint
the property during his lifetime and therefore the restraint on
alienation begins with the creation of the power by donor. Since
the power was exercised in violation of the rule, and since the
court held the valid portions could not be separated from the
invalid portions of the appointment, the entire appointment
failed.

While this same problem has been the subject of a noted
controversy between Professors Gray and Kales, the authorities
in this country, with apparently but one exception, agree that
the rule applied by the Illinois court in the instant case, which
is also the doctrine espoused by Gray, is the correct one.

The opposite view is represented by the case of Miller v.
Douglass which holds that the period must be computed from the
time of the exercise of the general testamentary power. It is
worthy of note, however, that the Wisconsin court in that case
does not unqualifiedly oppose the majority view, but admits that
there may be cases whose facts would warrant the application
of the majority rule.

The variance in the two views arises from different concep-
tions of the nature of general testamentary powers. In the case
of a true general power there are no restrictions on its exercise,
either as to the appointees or the mode of appointment, and the
donee has the immediate power to constitute himself owner of
the property. The estate limited by the donor is deemed to have
vested in donee for the purpose of the rule. Hence, in such case,
the period of the rule runs from his exercise of the power. The
donee of a general power to appoint only by will cannot appoint

2 See 27 Harv. L. Rev. 705; 26 Harv. L. Rev. 64.
4 192 Wis. 486, 213 N. W. 320 (1927).
the property during his lifetime and is not regarded as the owner for the purpose of measuring the period of the rule.\(^6\)

When the Illinois court, in the principal case, decided that the appointment had wholly failed, it was faced with the question whether the appointive fund should pass by intestacy to the heirs of the donee or whether it should pass in default of appointment as provided by the will of donor. This question the court held was governed by the intention of the donee and by the fact that the donor had made provision for disposition of the property in default of appointment. The court decided that the donee's act of keeping the appointive fund separated from her own property in the will in which she exercised the power was indicative of her intention that the property should pass under the donor's will in default of appointment.

The general rule appears to be that where donee wholly fails to exercise his general testamentary power of appointment the appointive property devolves under the donor of the power.\(^7\) This would also appear to be true where the power is ineffectually exercised, as, for example, an appointment which violates the rule against perpetuities.\(^8\) However, Illinois and Massachusetts seem to have adopted an exception to this rule from the English rules of law applicable to like cases.\(^9\) This exception is to the effect that where there is an attempted exercise of a general power, including a general testamentary power, in the absence of provision by donor for default of appointment, the question whether the appointive property will devolve as donor's property, or whether it will devolve as donee's property, is governed by the intention with which donee exercised the power. The theory is that if the primary intention of the donee in exercising the power is to take the property out of the instrument creating the power, that is, to make the property his own for the purpose of devolution, and the intention to benefit the particular appointee is merely secondary, then the property will pass as the donee's property despite the ineffective appointment. This exception apparently applies only in the absence of provision by the donor for disposition of the property in default of appointment.\(^10\)

\(^6\) See cases in note 3, supra.
\(^7\) Low v. Bankers Trust Co., 270 N. Y. 143, 200 N. E. 674 (1936); Piegler v. Jefferies, 128 S. C. 254, 121 S. E. 783 (1924); Davis v. Kendall, 130 Va. 175, 107 S. E. 751 (1921).
\(^8\) Lincoln Trust Co. v. Adams, 177 N. Y. S. 889 (1919).
\(^9\) In re Marten, [1902] 1 Ch. 314; Re Boyd, [1897] 2 Ch. 232; Chatterton v. De Lusi, Ir. L. R. 3 Eq. 232 (1879).
DISCUSSION OF RECENT DECISIONS

The foregoing illustrates the theory behind the principal case and behind Bradford v. Andrew, which presented the converse of the problem evolved in the principal case. There a part of the appointive fund lapsed because of the death of an appointee, and, in the absence of provision for default of appointment, the question presented was whether the lapsed portion should pass to donee's heirs or to the heirs of the donor. Because the appointive property was blended with donee's property in her will, the court decided it was her intention to take the property out of the instrument creating the appointment and the property accordingly devolved through donee.

B. P. Morissette

Tenancy in Common—Leases—Right of One Tenant in Common to Grant Oil and Gas Lease.—In Fyffe v. Fyffe, decided recently, the Illinois court affirmed its view that one tenant in common has no authority to grant to a third person the right to take oil and gas from the common property. In this case Fyffe, a tenant in common with his children, individually, and without their assent, executed an oil and gas lease to one Wise, giving him the exclusive right to exploit the common property. The appellant herein, an oil company, succeeded Wise through an assignment of the lease.

Those claiming through the nonassenting children filed a bill for partition, alleging these facts, and sought an accounting of the oil produced. The court, after allowing an accounting, as authorized by the statute in force at the time the bill was filed, held that Fyffe had no right to execute the lease.

Recognizing a well-defined conflict of authority, the court cited Zeigler v. Brenneman and Murray v. Haverty as supporting its conclusion. In the former case the court held that a lease such as this is valid between the lessor and the lessee even

11 See note 10, supra.

2 Ill. State Bar Stats. (1933), Ch. 2, § 1, which provides: "That where one or more joint tenants, tenants in common or coparceners in real estate, or any interest therein, shall take and use the profits or benefits thereof, in greater proportion than his, her or their interest, such person or persons, his, her, or their executors and administrators, shall account therefor to his or their cotenant, jointly or severally."
3 Prairie Oil and Gas Co. v. Allen, 2 F. (2d) 566, 40 A. L. R. 1389 (1924); Earp v. Mid-Continent Petroleum Corp., 167 Okl. 86, 27 P. (2d) 855, 91 A. L. R. 188 (1933); Riddle v. Ellis, 139 Okl. 68, 281 P. 286 (1929); York v. Warren Oil & Gas Co., 191 Ky. 157, 229 S. W. 114 (1921).
4 237 Ill. 15, 86 N. E. 597 (1908).
5 70 Ill. 318 (1873).
while the premises remain undivided but is void as to the grantor's cotenants; that is, in the determination of their rights, no consideration will be given to the existence of that lease.

Such a lease or license will not, therefore, bind a non-assenting, non-joining cotenant. There are cases holding that, inasmuch as the owner of an undivided half interest in oil and gas lands has not the right to exploit the common property without the consent of his cotenants, he cannot confer any greater right upon his lessee. This problem is as old as the Roman Law.

Petroleum oil in its place in the land is part of the land just as coal, lumber, and other minerals, and equity will enjoin its unlawful removal. It has accordingly been held that it is waste by a tenant in common to exploit the common property for gas and oil to the exclusion of his co-owners, and he is held accountable to them in their pro rata shares.

Supporting the view contrary to that adopted in Illinois, the Oklahoma court has held that the lessee becomes for the time being a tenant in common with the lessor's cotenants and is entitled to the same rights that his lessor had, even to entering the premises to exploit, produce, and market the oil and gas obtained. His only obligation is to render an accounting to his cotenants.

Under the doctrine of stare decisis, and upon precedents, the Illinois court was firm in stating its conclusion in the Fyffe case

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6 See also Gulf Refining Co. v. Carroll, 145 La. 299, 82 So. 277 (1919). In Freeman v. Egnor, 72 W. Va. 830, 79 S. E. 824 (1913), the court said: "Of course, to be effectual in the sense that the lessee may enter on and operate the premises for the production of gas and oil, all the cotenants must join. A lease by one only does not warrant such entry and production. Those not joining may restrain the lessee from entering for the purpose of operating thereunder without their consent." Accord, Gulf Refining Co. v. Carroll, 145 La. 299, 82 So. 277 (1919).


9 Dig. L. 28, Communi Dividundo.


12 Prairie Oil and Gas Co. v. Allen, 2 F. (2d) 566, 40 A. L. R. 1389 (1924); Earp v. Mid-Continent Petroleum Corp., 167 Okla. 86, 27 P. (2d) 855, 91 A. L. R. 188 (1933); Riddle v. Ellis, 139 Okla. 68, 281 P. 286 (1929).

notwithstanding the obvious conflict of views as expressed by other courts.

F. J. NOVOTNY

WILLS — CONDITIONAL WILLS — AMBIGUOUS EXPRESSION OF TESTATOR TO BE GIVEN EFFECT AS CONDITIONAL OR ABSOLUTE WILL.—The recently decided case of Barber v. Barber\(^1\) is the first case in which the Illinois Supreme Court has expressed itself with reference to the doctrine of conditional wills.\(^2\) In this case, the testator, contemplating a train trip to Buffalo, New York, executed the following instrument: "I am leaving for New York State this morning, and if anything should happen to me, I request that everything I own, both personal and Real, be given to my sister, Miss May Barber (petitioner)." This instrument was validly executed and attested. The evidence further showed that the testator returned from his trip alive and well, resumed his normal employment, and died a year later from natural causes. The petitioner then offered this above document for probate as the testator's last will and testament. The contestant resisted the probate on the grounds that it was a conditional will, and the condition (namely, the testator's death at some time during his then contemplated trip) not having taken place, the will was void and inoperative. The Illinois Supreme Court affirmed the decision of the lower court and admitted the will to probate, holding that the will was absolute and not conditional and that therefore it came into full force and effect at the testator's death.

The Illinois court in its decision adopts several rules of construction which are supported by a majority of the courts. In general the policy of the law is to construe wills to be absolute rather than conditional.\(^3\) The courts hold uniformly that to render a will conditional its language must clearly and unequivocally express the testator's intention that the will should operate only upon a certain contingency.\(^4\) Moreover, courts are not inclined to hold a will conditional where it can reasonably be construed as having been absolute even though under a strict

\(^1\) 368 Ill. 215, 13 N. E. (2d) 257 (1938).
\(^2\) While the earlier case of American Trust & Safe Deposit Co. v. Eckhardt, 331 Ill. 261, 162 N. E. 843 (1928), does mention contingent wills, the reference is only dicta in the case.
\(^3\) 68 C. J. 630, § 256; 28 R. C. L. § 121, and cases there cited.
\(^4\) 1 Schouler on Wills, Executors, and Administrators (5th ed.), § 285. See also 11 A. L. R. 832 and 79 A. L. R. 1163.
construction the language used might import a condition.\(^5\)

Adopting these rules of construction, the court points out that the approach to the problem is highly factual and that the result is to be determined from the facts and circumstances of each case.\(^6\) In general, it can be said that if the expressed condition is by way of an inducement, explaining why the will was then written, the will is absolute.\(^7\) But if the contingency referred to in the will is the reason for making such a particular disposition of the property and is in its terms a condition precedent to the will’s operation, the will is conditional.\(^8\)

Guided by these well settled rules of construction, the court in the instant case reached a conclusion that is manifestly sound.\(^9\) It is more reasonable to believe that the testator’s contemplated trip was merely the reason for writing the will and not the reason for the particular distribution provided for. The will merely reads, “If anything should happen to me, I request that everything...” To construe a condition into this language is to


\(^6\) Whether the will is contingent or absolute in any given case depends upon the individual testator’s intention. This latter will necessarily vary with the peculiar facts and circumstances of each case.


\(^8\) Likefield v. Likefield, 82 Ky. 589, 56 Am. Rep. 908 (1885); Cody v. Conly, 27 Grat. (Va.) 313; Davis v. Davis, 107 Miss. 245, 65 So. 241 (1914).

\(^9\) In the leading case of Eaton v. Brown, supra, in which the conditional language was even stronger than in the instant case, Mr. Justice Holmes held the will to be absolute. The will in that case read, “I am going on a journey, and may not ever return. And if I do not, this is my last request.” In the case of Ferguson v. Ferguson, supra, the will read, “I am going on a journey and I may never come back alive so I make this Will, but I expect to make changes if I live.” The Texas Supreme Court held this to be an absolute will. In the case of In re Poonarian’s Will, 234 N. Y. 329, 137 N. E. 606 (1922), the court held the will to be contingent, but it contained the express condition, “if anything Happen to me in Constantinople or in ocean.” In the case of In re Tinsley’s Will, supra, where the testator, about to start on a journey, wrote that “in case of any serious accident” certain things were to be done, the court held the will to be absolute. In the case of Tarver v. Tarver, 9 Pet. (U. S.) 174, 9 L. Ed. 91 (1835), in which the will read, “Being about to travel a considerable distance, and knowing the uncertainty of life... do make this my last will and testament,” and the court held the will to be absolute. In McMerriman v. Schiel, supra, note 7, in which the will read, “In case that I meet with accident on this journey,” the court held the will to be absolute. And in the case of In re Forquer’s Estate, supra, in which the will read, “should anything befall me while away or that I should die,” the court held the will to be absolute. In all these cases, and there are many more along the same lines, the courts felt that the apparent condition in the language was merely a narrative explaining why the will was then written.
interpolate by inference the words, "while during this trip," into the instrument. This the court properly refused to do. If it was the intention of the testator that the will be inoperative unless he died during the contemplated trip, he should have made this intention clear by express language.

B. Feldman