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Wills -- Construction -- Absolute or Contingent

order to make the waiver of the remedy possible, the same facts must state a cause of action in either tort or assumpsit.[23] Here the enrichment of the defendant arising indirectly from the injury to the plaintiff does not give rise to a fictional promise implied in law to make reimbursement. Although it might be possible to find a property interest in the plaintiff's reputation, the advisability of excluding libel from the group of torts in which the plaintiff is permitted to waive the tort and substitute the fiction of a promise implied in law is further strengthened in the instant case by the statutory definition of libel as a personal injury.[24]

It is submitted that the distinction in the cases follows the division of the two general classes of torts, designated as "property torts," implying injuries to real or personal property, and "personal torts," including injuries to the person's reputation, feelings or body[25]—the election of remedies allowed in the case of "property torts" being further restricted by the requirement of enrichment of the defendant.[26]

WILLS — CONSTRUCTION — ABSOLUTE OR CONTINGENT

Decedent left a holographic will stating:

> Remember me W. W. Bagnall by this. If anything happens to me. While gone. All my belongings go to....

The instrument was written before decedent embarked on a hunting trip, from which he returned safely and resumed his affairs until his death eighteen years later. The purported beneficiary, decedent's brother, offered the will for probate, but the will was contested by another brother who contended that the will was contingent and inadmissible. *Held,* on appeal, judgment of the appellate court reversed and that of the county probate and district courts denying the probate of the will affirmed, as the will is not operative due to the failure of the condition to occur. *Bagnall v. Bagnall,* 25 S.W.2d 401 (Texas 1949).

One of the most perplexing problems in testamentary construction relates to conditional or contingent wills. A tremendous amount of legal effort has been expended upon the subject with widely divergent conclusions which cannot be reconciled. All courts agree that whether a will is to be regarded as contingent or absolute depends upon the intention of the

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23. Cooper v. Cooper, *supra.*
24. N.Y. GENERAL CONSTRUCTION LAW § 37-a.
25. Mumford v. Wright, 12 Colo. App. 214, 55 Pac. 744 (1898).
26. Minor v. Baldridge, 123 Cal. 187, 55 Pac. 783 (1898); Soderlin v. Marquette Nat. Bank of Minn., 214 Minn. 408, 8 N.W.2d 331 (1943); Olwell v. Nye & Nissen Co., 26 Wash.2d 282, 173 P.2d 652 (1947).

testator,[1] but clear cut and uniformly dependable tests to discover what the testator meant do not exist.

A contingent will is one dependent upon a specified condition or contingent event, the happening of which is a condition precedent to the operation of the will.[2] The will can take effect only if the contingency happens or occurs,[3] but if the condition fails, the will is thereafter inoperative and void[4] and cannot be admitted to probate.[5] In general, it can be said that if the condition is by way of inducement, explaining why the will was then written, the will is absolute;[6] but if it is the condition upon which the will is to become effective, then it is a conditional or contingent will.[7] If the language used can reasonably be construed to mean that the testator referred to a possible calamity or threatened danger only as the reason for making the will at that time, rather than as a condition precedent to the will becoming operative, such construction should prevail.[8]

A will is construed as absolute or general, and not as contingent, unless the intention to the contrary clearly appears either expressly or by necessary implication from a reading of the language of the will as a whole.[9] It is often said that the intent to make the will conditional must appear clearly on the face of the instrument.[10] The general rule of construction and presumption of validity, where the testator's intention is not clearly expressed in the instrument, favors that interpretation which will prevent intestacy.[11] The fact that the testator made and left a will implies that he did not intend to die intestate,[12] and the additional fact that the will was preserved

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1. Eaton v. Brown, 193 U.S. 411 (1904); American Trust & Safe Deposit Co. v. Eckhardt, 331 Ill. 261, 162 N.E. 843 (1928); *In re* Webb's Estate, 202 N.Y. Supp. 346 (Surr. Ct. 1924), *aff'd*, 122 Misc. 129, 203 N.Y. Supp. 958 (1925).

2. Tarver v. Tarver, 9 Pet. 174 (U.S. 1835); Walker v. Hibbard, 185 Ky. 795, 215 S.W. 800 (1919).

3. Barber v. Barber, 368 Ill. 215, 13 N.E.2d 257 (1938); Wilson v. Higgason, 207 Ark. 32, 178 S.W.2d 855 (1944).

4. Magee v. McNeil, 41 Miss. 17 (1866); Walker v. Hibbard, *supra*.

5. Lee v. Kirby, 186 Ky. 603, 217 S.W. 895 (1920).

6. *In re* Tinsley, 187 Iowa 23, 174 N.W. 4 (1919); Barber v. Barber, *supra*; Walker v. Hibbard, *supra*.

7. Capps v. Richardson, 73 S.C. 586, 53 S.E. 2d 876 (1949); Likefield v. Likefield, 82 Ky. 589 (1885); Davis v. Davis, 107 Miss. 245, 65 So. 241 (1914).

8. McMerriman v. Schiel, 108 Ohio St. 334, 140 N.E. 600 (1923); *In re* Morrison's Estate, 361 Pa. 419, 65 A.2d 384 (1949); *In re* Moore's Estate, 332 Pa. 257, 2 A.2d 761 (1938).

9. Eaton v. Brown, *supra*; *In re* Johnston's Estate, 186 Misc. 533, 53 N.Y.S.2d 212 (Surr. Ct. 1945); Succession of Gruganus, 206 La. 1012, 20 So.2nd 296 (1944); Ferguson v. Ferguson, 121 Tex. 119, 45 S.W.2d 1096 (1931); American Trust & Safe Deposit Co. v. Eckhardt, *supra*.

10. *In re* Johnstons' Estate, *supra*.

11. Fitchie v. Brown, 211 U.S. 321 (1908); Booth v. Krug, 368 Ill. 487, 14 N.E.2d 645 (1938); Carter v. Lewis, 364 Ill. 434, 4 N.E.2d 853 (1936); Lewis v. Payne, 113 Md. 127, 77 Atl. 321 (1910); French v. French, 14 W.Va. 459 (1878).

12. Ferguson v. Ferguson, *supra*.

shows the intention to have the will probated after the testator's death.[13]

The most frequently cited case of a conditional will is *Morrow's Appeal,*[14] where the testator wrote in a holographic instrument:

> I am going to town with my drill and i ain't feeling good and in case if i shouldend get back do as i say on this paper ....

Although the decedent died at home within a few days from an illness contracted during the journey, the fact that he returned safely was held to make the will inoperative and it was refused admission to probate. That case should be compared with the *Ferguson* case,[15] from the same jurisdiction as the instant case, where the testatrix wrote:

> 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.

Despite the fact that the testatrix returned alive, the will was held absolute and admitted to probate.

These two cases barely illustrate the hopeless irreconciliability of the cases both between and within the various jurisdictions. Conditional or contingent wills contests arise in many situations, with the courts almost evenly split on the question of whether the will shall be regarded as absolute or contingent. Such suits arise where reference is made in the will to some occasion or peril,[16] taking a voyage,[17] taking a trip,[18] death in military service,[19] sickness, or surgery,[20] death away from home,[21] death before a particular time.[22]

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13. *Ex parte* Lindsay, 2 Bradf. 204 (N.Y. Surr. Ct. 1852); Ferguson v. Ferguson, *supra.*

14. 116 Pa. 440 (1887).

15. Ferguson v. Ferguson, *supra.*

16. Ellison v. Smoot's Adm'r, 286 Ky. 768, 151 S.W.2d 1017 (1941); Hampton v. Dill, 354 Ill. 415, 188 N.E. 419 (1933); Jeffrie's Estate, 18 Pa. 439 (1901); Morrow's Appeal, *supra. Contra*: *In re* Estate of Barton, 52 Cal. 538 (1878); Redhead v. Redhead, 83 Miss. 141, 35 So. 761 (1904); Kelleher v. Kernan, 60 Md. 440 (1883); Forquer's Estate, 216 Pa. 331, 66 Atl. 192 (1907); Tarver v. Tarver, *supra*; *In re* Tinsley, *supra.*

17. Oetjen v. Diemmer, 115 Ga. 1005, 42 S.E. 388 (1902); *In re* Bittner, 104 Misc. 112, 171 N.Y. Supp. 366 (Surr. Ct. 1918). *Contra*: Thompson v. Connor, 3 Bradf. 366 (N.Y. Surr. Ct. 1855).

18. *In re* Poonarian's Will, 201 App. Div. 288, 194 N.Y. Supp. 511 (4th Dep't 1922). *Contra*: Watkins v. Watkins' Adm'r, 106 S.W.2d 975 (Ky. 1937); *In re* Kimmel's Estate, 278 Pa. 435, 123 Atl. 405 (1924); Cody v. Conly, 27 Gratt. 313 (Va. 1876).

19. Magee v. McNeil, 41 Miss. 17 (1866). *Contra*: Cartwright v. Cartwright, 158 Ark. 278, 250 S.W. 11 (1923).

20. Underwood v. Rutan, 101 Ohio St. 306, 128 N.E. 78 (1920); Davis v. Davis, 107 Miss. 245, 65 So. 241 (1914); *In re* Cook, 173 Cal. 465, 160 Pac. 553 (1916); Dougherty v. Holschieder, 40 Tex. 31, 88 S.W. 1113 (1905). *Contra*: Skipwith v. Cabell, 19 Gratt. 758 (Va. 1870).

21. Maxwell v. Maxwell, 3 Met. 101 (Ky. 1860). *Contra*: Likefield v. Likefield, 82 Ky. 589 (1885).

22. Murphy v. Brown, 159 Ind. 106, 62 N.E. 275 (1901); Hamilton's Estate, 74 Pa. 69 (1873).

These cases which involve real problems of construction are to be distinguished from those situations where spouses make mutual wills dependent upon their joint deaths,[23] and from cases where the effective operation of the will is dependent upon the death of another, or the death of the testator and another person.[24] Contingent will analysis should not be confused with cases where the power of disposition of the testator's property is given to someone else to exercise after his death,[25] and where the will is refused admittance to probate because of the unjust, unnatural and absurd result its distribution would yield.[26] Similarly excluded from consideration should be those wills that are conditional not as to their operation, but rather as to a particular distribution of the property, and the corollary problem of leaving to beneficiaries a contingent instead of a vested remainder. Many of these factors are often unwittingly taken into consideration by the court and further muddle the already dark waters of the construction of an ambiguous will. Divergent rules in different jurisdictions with reference to the admissibility of oral testimony, as to the testator's intention,[27] also tend to complicate the interpretation.

The early cases tended to hold ambiguous wills conditional,[28] but the modern trend, moving in a salutary direction, consistently holds a will conditional only when the will so provides in express language and there is no other alternative left open to the court. If a will is equally capable of two constructions, one of which will uphold it and the other will destroy it, the former interpretation should be given by the courts;[29] and such con-

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23. Glover v. Reynolds, 136 N.J. Eq. 116, 40 A.2d 624 (Ch. 1944); Gibson v. Seymour, 102 Ind. 485, 2 N.E. 305 (1885).

24. *In re* Young's Estate, 95 Okla. 205, 219 Pac. 100 (1923); *In re* Bittner, *supra*; Oetjen v. Diemmer, *supra*.

25. Dudley v. Weinhart, 93 Ky. 401, 20 S.W. 308 (1892).

26. French v. French, *supra*; *In re* Bittner, *supra*.

27. Three separate and distinct views are present in this situation: First, that extrinsic evidence is not admissible to vary, contradict, or add to the terms of a will, or to show a different intention on the part of the testator from that disclosed by the language of the will. Mackie v. Storey, 93 U.S. 589 (1876); Summers v. Summers, 198 Ala. 30, 73 So. 401 (1916); Snellings v. Downer, 193 Ga. 340, 18 S.E.2d 531 (1942); Foster v. Clifford, 87 Ohio St. 294, 101 N.E. 269 (1913).

Second, that where a will contains no ambiguity, latent or patent, and can be carried into effect without the aid of extrinsic evidence, such evidence is inadmissible. Woodruff v. Marsh, 63 Conn. 125, 26 Atl. 846 (1893); Hartman v. Pendleton, 96 Ore. 503, 186 Pac. 572 (1920); Smith v. Coxe, 183 S.C. 509, 191 S.E. 422 (1937).

Third, that evidence of extrinsic circumstances is admissible to explain an ambiguous will. Rufty v. Brantly, 204 Ark. 32, 161 S.W.2d 11 (1942); *In re* Wells, 113 N.Y. 396, 21 N.E. 137 (1889).

28. Dougherty v. Dougherty, 4 Met. 25 (Ky. 1862); Robnett v. Ashlock, 49 Mo. 171 (1872); Cowley v. Knapp, 42 N.J.L. 297 (1880); Phelps v. Ashton, 30 Tex. 345 (1867).

29. Eaton v. Brown, *supra*; Ferguson v. Ferguson, *supra*; *In re* Forquer's Estate, *supra*; Likefield v. Likefield, *supra*.

struction will be applied where it can reasonably be held that the testator was merely expressing his motive or purpose for making the will, although his inaccurate language, if strictly construed, might possibly express a condition.[30] The policy of the law is to construe wills to be absolute rather than conditional. The court in the instant case appears to be out of step, both with the modern trend of her sister states and with the celebrated *Ferguson* case[31] within her own jurisdiction.

30. Barber v. Barber, *supra*.
31. 121 Tex. 119, 45 S.W.2d 1096 (1931).