FORFEITURE CONDITIONS IN WILLS AS PENALTY FOR CONTESTING PROBATE

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There is a growing tendency to insert in wills conditions that if any beneficiary contests or opposes the probate of the will he shall forfeit all rights to take thereunder.¹

These conditions vary in the acts objected to and in the penalties imposed, but it answers present purposes to treat them as cases of forfeiture for contesting the will. As to these forfeiture conditions it has been frequently remarked that the cases are in utter confusion. "Out of this confusion of authority there can come only a balanced negation, an equality of sounds which produce silence. There is a precedent for every inconsistent solution of the question, but prescript for none." ²

There is reason to suspect that this confusion is due almost solely to a failure to rest decisions upon a proper basis, to a rendering of lip service to what ordinarily is the proper rule, viz., that in distribution under a will intent governs, and, while professing adherence to the rule, in fact entirely departing from intent in certain cases when determining the effect to be given to these conditions of forfeiture. Jurisdictions allowing no exceptions to the validity of such conditions logically enough rest their decisions on the intent of the testator, and hold that no question of public policy is involved. Jurisdictions making exceptions often profess to follow intent and seek in the will signs that the testator did not intend, or if he were now present would not intend, forfeiture on the exceptional facts of the case, but meant the condition to be merely in terrorem. But this is a very forced effort to find an intent. It is contrary to the expressly declared intent, and that should govern unless contrary to some rule of law or public policy. Guesses at what a testator would intend are highly speculative and contrary to established rules of construction.

The contention here is that these forfeiture clauses clearly show an intent that there should be a forfeiture if the conditions are violated, and the only excuse for allowing a contestant to take must be based upon public policy defeating intent. With this distinction the confusion would disappear, and the cases would range into two conflicting classes, those always enforce-

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¹ It is noteworthy that every forfeiture case in the United States is of comparatively recent date, and that most of them are very recent.

² In re Wall, 76 Misc. 106 at 109, 136 N. Y. Supp. 452 at 454 (1912). This confusion in New York may result from the fact that distinctions rest upon undefendable grounds. See later consideration of New York cases.
ing forfeiture and those finding excuse on grounds of public policy for making certain cases an exception to the rule. There would still be conflict, but not confusion, at least not more confusion than is always present where construction of language is involved.

Few of the decisions speak of the question as one of difficulty or doubt. In jurisdictions reaching opposite conclusions each court speaks with such assurance and finality as to suggest the futility of further discussion of principles, and to leave to the researcher no more fruitful task than to classify the cases. But even if it were true that further discussion of principles could not hope to change the rule in any jurisdiction already clearly committed to any rule at all, it remains the fact that in many jurisdictions the validity of such forfeiture provisions is still an open question, in others there is confusion and uncertainty because results have been reached on unsound distinctions and unjustifiable precedents, and, finally, there is always the chance that a weighing of all the reasons for and against any rule as to forfeitures may bring about legislation if the cases seem contrary to the better rule. ¹ To this end inquiry is justified, but it should be concerned with fundamental, underlying principles upon which the ideal rule, if any there be, should rest. Incidentally, distinctions and precedents that are adventitious, which may have been resorted to in order to escape undesirable results in given cases, ² should be rejected, especially if such cases can be brought under a general rule that is approved as sound. ³

Most courts hold that there is no natural right to dispose of property by will. If while he lives one has a natural right, whatever that may be, to hold, enjoy or dispose of such property as he may in ways approved by the law succeed in acquiring, it certainly does not follow that he has any inalienable rights of control over such property after he is dead. The right to property, like that to life and liberty, of which he may not be deprived, does not reach beyond the grave. Disposal of property by will to take effect upon his death is a privilege granted by the legislature and wholly subject to limitation and control by statute. ⁴ It does not seem to go too far to say that, even in the absence of statute, the conditions and limitations he may impose as to the disposition and use of his property after his death are absolutely subject to the

¹ There are already statutes making void all such forfeiture conditions in wills. See Ind. Ann. Stat. (Burns, 1926) § 3482.

² Such as the distinctions between legacies and devises growing up in England and followed by some courts in this country but repudiated in most jurisdictions. E. g., South Norwalk Trust Co. v. St. John, 92 Conn. 168, 101 Atl. 561 (1917); and see Note (1930) 67 A. L. R. 59.

³ Cf. Schiffer v. Brenton, 247 Mich. 512, 226 N. W. 253 (1929), and Tate v. Camp, 147 Tenn. 137, 245 S. W. 839 (1922), reaching opposite results, but agreeing as to the artificial distinctions in the English cases.

⁴ Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 18 Sup. Ct. 594 (1898); Re Stanford, 126 Cal. 112, 58 Pac. 462 (1899); Re Speed, 216 Ill. 23, 74 N. E. 809 (1905); Crane v. Reeder, 21 Mich. 24 (1870). Contra: Nunnenmacher v. State, 129 Wis. 190, 108 N. W. 627 (1906); Ball v. Boston, 153 Wis. 27, 141 N. W. 8 (1913).
public good as pronounced by the courts. The limitations of the rule against perpetuities, setting limitation on future control by the dead hand is a case in point. Long before any perpetuity statutes the so-called rule against perpetuities had been invented by the courts and in a long line of cases stated and defined,—judicial legislation all, and based upon public policy.  

It is equally true that no one has any natural or constitutional right to take by will. In exceptional instances a wife or child may take when the will of husband or parent fails to provide, but this is subject to statute, and there is no statutory requirement that any provision be put in a will. Neither is any person required to accept benefits under a will. Hence, it is a general rule that if he does accept it must be on the conditions laid down in the will. The right to give and the right to take are creatures of the law, subject to the determination of the legislature in statutes and of the courts in matters not covered by statutes but involving questions of public policy. No vested rights of testator, or legatee or devisee, stand in the way of considering the validity of contest forfeiture clauses in a will as matter of policy alone. It is nevertheless true that the law always has favored disposition of personal property by will, and since the statute of 1540, of realty as well, and as to the dispositions, with specified exceptions, the intent of the testator governs. Citation of authorities is quite unnecessary. It is axiomatic, not only in construing, but also in giving effect to wills, that the polar star is the intent of the testator. To every person of full age and sound mind the statutes give the right to dispose of his property by will as pleases him. They make no exceptions that touch forfeiture conditions. Whether testator's dispositions are wise or unwise, just or unjust, reasonable or shocking to one's notion of the fitness of things, the courts have but to carry out the provisions of the will. As before stated, this right of the testator is the creature of, and is wholly subject to the statute. No one has a vested property right; to give or receive by will. But the bounties received are gratuities to the beneficiaries, and except as subject to some rule of law or to public policy may be bestowed on such conditions as the testator may impose. Not being compelled to accept, if he is unwilling to meet the conditions of the will the beneficiary is free to reject the gift.

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7 See Gray, Rule Against Perpetuities (1886).
8 See the very recent case on renunciation of benefits under a will, Lehr v. Switzer, 213 Iowa 658, 239 N. W. 564 (1931).
10 Rogers v. Law, 66 U. S. 253 (1862). See Moran v. Moran, 144 Iowa 451, 123 N. W. 202 (1909), a leading case on this point holding that the question the donee has to decide is the ordinary business question whether the thing offered him is worth the price.

This choice of the beneficiary between taking as provided in the will and risking forfeiture by making a contest is often spoken of as an election. It is not important to a decision, but it may be doubted whether election in the legal sense is an accurate description in many cases. In Harber v. Harber, 158 Ga. 274 at 277, 123 S. E. 114 at 115, the court held that a
Not all conditions in a will are valid. There are some which the law does not permit as matter of public policy; there are others that are repugnant to the gift. For example, conditions in general restraint of marriage, except in the case of remarriage of a widow, are held to be contrary to public policy,11 and a gift of a fee simple cannot be restricted by a condition withholding from the devisee a necessary incident of every fee simple, the right to dispose of the estate. One cannot give and at the same time withhold the whole or an essential part of that which is given. But, in general, conditions in a will are good. He who would take a gift without fulfilling the condition on which it is given assumes the burden of showing the condition in question is an exception out of the rule.12 It matters not that it is harsh, or that it seems unjust; it must be shown to be contrary to public policy.13

The present inquiry is, does a condition for forfeiture for contesting a will fall in the class of those which are contrary to public policy? No other good ground has ever been given for holding such a condition void.

The answer to the question is not easy. Much may be, and has been, said both for and against the validity of such conditions. Reluctance to declare a forfeiture has led courts to base refusal to uphold conditions on grounds that cannot be justified in reason. They have professed to carry out intent and yet have reached results contrary to the intent clearly declared in the will. As already pointed out, in England and in New York, especially, many cases have held that in gifts of personal property the forfeiture clause is to be regarded as in terrorem if there is no gift over on breach of the condition. Such was the rule of the Civil Law, but it flies in the face of the expressly declared intent of the testator, and there is no good reason why the court should find he did not mean what he said in the will, as well when there is not, as when there is a gift over. This exception has the further objection that it makes a distinction between legacies of personal property and devises of realty. The explanation for the difference in England is historical. The Civil Law came into the English law as to personalty through the probate jurisdiction of the Ecclesiastical courts. There is no reason to borrow the English rule in the United States where this historical reason is of no force and where modern conceptions require one rule for realty and personalty alike. No doubt intent is the same in gifts of each and there is no policy requiring the distinction. It has in some jurisdictions been grasped

prosecution for dower was not an election under the will. "An election can exist only where there is a choice between two or more inconsistent remedies actually existing at the time the election is made." For further discussion in forfeiture cases see especially Rogers v. Law, supra; Smithsonian Inst. v. Meech, 169 U. S. 398, 18 Sup. Ct. 396 (1898); Hoit v. Hoit, 42 N. J. Eq. 388, 7 Atl. 856 (1886); Rudd v. Searles; Perry v. Rogers, both supra note 9; Fifield v. Van Wyck, 94 Va. 557, 27 S. E. 446 (1897).

11 In re Kitchen's Estate, 192 Cal. 384, 220 Pac. 301 (1923); In re Wall, supra note 2.
12 Dutterer v. Logan, 103 W. Va. 216, 137 S. E. 1 (1927).
13 But see In re Wall, supra note 2.
at to afford an excuse for escaping forfeiture. If exceptions are to be made there should be a better reason.\textsuperscript{14}

Another exception shows the reluctance of courts to enforce a provision for forfeiture. The duty of courts to protect the rights of infants has led to decisions that a condition against contest of the will is void as against an infant.\textsuperscript{15} But if the intent of the testator is to govern, and if he may impose such conditions as he will upon the gift, then no reason appears why he may not include forfeiture by an infant contestant, and such is the view of some courts.\textsuperscript{16}

The reluctance of the courts to follow the rule of forfeiture is further seen in the strict construction of such conditions. Nice questions have arisen as to what amounts to a contest. The great variety in the wording of these contest clauses, as well as the different attitudes of different courts, leads to great uncertainty here. It answers the present purpose to cite some cases in which it had to be decided whether acts of beneficiaries brought them within the forfeiture clause.\textsuperscript{17} It has often been held that an action for the construction of a will, even if the construction urged would invalidate a gift, is not a contest,\textsuperscript{18} though an attempt to set a will aside cannot be concealed by purporting in the petition merely to ask for a construction of the will.\textsuperscript{19} But an ineffectual attempt to probate a later will has been held not to be a contest.\textsuperscript{20}

All of these exceptions and distinctions make pretty clear the fact that giving effect to conditions of forfeiture is often very distasteful to the courts and that many of them are eager to find an excuse to escape the forfeiture. They are, however, at best mere subterfuges, and do not go to the fundamentals. As said before, they seem to pay lip service to the rule that intent governs and arrive at results squarely against intent. For it is not the intent of the testator that the courts must follow, but that intent as found in the four corners of the instrument. If he has not succeeded in getting his intent

\textsuperscript{15}Bryant v. Thompson, 59 Hun 545, 14 N. Y. Supp. 28 (1891).
\textsuperscript{17}Smithsonian Inst. v. Meech, supra note 10 (claiming title to land which testator attempts to dispose of in his will); Donegan v. Wade, 70 Ala. 501 (1881) (actively assisting in a contest); Re Hite, 155 Cal. 436, 101 Pac. 443 (1909) (instituting and later withdrawing a contest). Cf. Lobb v. Brown, 208 Cal. 476, 281 Pac. 1010 (1929); Haradon v. Clark, 190 Iowa 798, 180 N. W. 868 (1921) (appearing as witness in will contest); Wright v. Cumnings, 108 Kan. 661, 196 Pac. 245 (1921) (presenting a claim against the estate); Re Kirkholder, 171 App. Div. 153, 157 N. Y. Supp. 37 (1916) (offering for probate a forged instrument); Tate v. Camp, supra note 5 (petition as to hearing as to devksen vel non).
\textsuperscript{18}Black v. Herring, 79 Md. 145, 28 Atl. 1063 (1894); Unger v. Loewy, 202 App. Div. 213, 195 N. Y. Supp. 582 (1922); and see extensive Note (1920) 5 A. L. R. 1370, 1372.
\textsuperscript{19}South Norwalk Trust Co. v. St. John, supra note 4.
\textsuperscript{20}Re Bergland, 180 Cal. 629, 182 Pac. 277 (1919). See an extensive Note (1920) 5 A. L. R. 1370, as to what does and what does not bring about a forfeiture.
expressed in the writing the courts cannot make his will for him. The books are full of cases in which the courts are satisfied from all the surroundings that the intent of the testator was quite other than that expressed in the writing. Other writings or his statements before and after the will make this clear, but the duly executed will must control, in the absence of fraud or undue influence. When, therefore, the writing says that the gift is to be forfeited by any beneficiary who contests the will there is small justification for saying that was not the intent; that such provisions are merely in terrorem, were not intended to apply to infants, or show a different intent as to realty and personalty. In almost every case the intent shown in the will is that if the beneficiary does the forbidden thing the gift shall be forfeited.

If, then, forfeitures are not to take effect in accordance with the language of the will, the reason is to be found not in any intent. It is contrary to intent and should be based upon public policy alone. Many cases take the position that public policy is not concerned with whether the probate of a will shall be contested, or who shall or shall not take the property of the deceased; that if public policy is concerned at all it should discourage wasting the estate in litigation and dragging the name of the deceased and the secrets of the family through the mire of a will contest. In the leading case of Cooke v. Turner the court held that there is no policy of the law one way or the other.

"It matters not to the state whether the land is enjoyed by the heir or by the devisee." "The state has no interest whatever apart from the interest of the parties themselves."

This has generally been quoted by American cases following this rule.

In Smithsonian Institution v. Meech, a case often claimed for both sides of the question under discussion, the Court said,

"Experience has shown that often after the death of a testator unexpected difficulties arise, technical rules of law are found to have been trespassed upon, contests are commenced wherein not infrequently are brought to light matters of private life that ought never to be made public, and in respect to which the voice of the testator cannot be heard either in explanation or denial, and, as a result, the manifest intention of the testator is thwarted. It is not strange, in view of this, that testators have desired to secure compliance with their dispositions of property, and have sought to incorporate provisions which would operate most powerfully to accomplish that result."

This much should be admitted, viz., that the only ground on which the state is interested, on which, if at all, it should interfere with carrying out
such forfeiture provisions in a will, is one of public policy. It has been suggested that the determination of which rule shall be adopted has often, apparently, been influenced by sympathy aroused by the facts of the first case coming before the courts in that jurisdiction, and there is some confirmation of that idea in the cases.\textsuperscript{24}

But that could hardly be said of the leading English case, \textit{Cooke v. Turner}, where the forfeiture was enforced against the only child of testator, who was duly found a lunatic in 1823 by a commission on lunacy; the finding was established by verdict of a jury in 1826, and the commission had never been superseded to the date of the will, 1841, and the death of the testator in 1842. Nor can it be said of many another case. But if it cannot be said that sympathy determines the rule, it does make the courts acute to find in the facts of the case an excuse to avoid forfeiture in an appealing case. And certainly, the cases make it too clear for question that mere sympathy for a beneficiary in individual instances should have no influence in determining a rule of law. Public policy must rest upon broad principle, applied even where sympathy pulls the other way. For this reason all the exceptions save one on which forfeiture conditions have been held invalid are unjustified on principle. They seem to be mere subterfuges availed of by the courts to avoid an undesirable result. That one exception is in cases where there is probable cause for the contest.

The exception for probable cause admittedly introduces an uncertainty as to whether the contestant had such \textit{probabilis causa litigandi}. Clearly one claiming relief from forfeiture must bring himself within the exception,\textsuperscript{25} and the danger of forfeiture will usually deter a contestant until on legal advice he feels assured there is probable cause. In few forfeiture cases, indeed, has the court found the contest frivolous. There is no lack of merely vexatious contests of wills containing no such forfeiture conditions. The court, if it makes such an exception, must, of course, find in every case whether the evidence shows probable cause for contest.\textsuperscript{26}

The question, then, is shortly this: Shall clauses in wills providing for forfeiture of benefits by any beneficiary contesting the will be held valid except in those cases where the court finds there was probable cause for the contest?

\textsuperscript{24} Cf. \textit{In re Chambers' Estate}, 322 Mo. 1086, 18 S. W. (2d) 30 (1929), in which the clause affected a son who had brought only sorrow to his father; Rudd v. Searles, \textit{supra} note 9, in which the son had already received $4,000,000.00 from the estate under a compromise agreement and now seeks in addition to secure the legacy of $250,000.00, which, under the gift over in case of contest was to go to the University of California; Dutterer v. Logan, \textit{supra} note 12, in which the contestants whom the father favored in an earlier will, opposed a later will greatly favoring a son of a domineering nature who had no particular affection for his father whom he treated with disrespect and who would hardly stop work to attend his funeral.

\textsuperscript{25} See \textit{Re Friend}, \textit{supra} note 21; Dutterer v. Logan, \textit{supra} note 12.

\textsuperscript{26} See cases cited in note 50 \textit{infra}, and especially \textit{Re Friend}, \textit{supra} note 21; Dutterer v. Logan, \textit{supra} note 12. Whitehurst v. Gotwalt, \textit{supra} note 14, is one of the few cases finding there was no probable cause.
On the weight of authority as between the rules upholding the forfeiture and those holding it void if probable cause for contest exists there is much dispute. Each side claims the preponderance. There are a number of jurisdictions enforcing the forfeiture in every case in which the contest fails. If the contest succeeds the forfeiture falls with the will. If it fails, no matter how close the decision may be, the contestant forfeits his gift under the will, unless he can show that his act was not within the language of the condition. Then there are jurisdictions, already referred to, making various exceptions to the rule, as, for example, where there is no gift over, and the forfeiture clause is treated as in terrorem, and those excluding infant beneficiaries from operation of the rule. On principle these exceptions are unsound unless the cases show probable cause. These cases profess to carry out the intent of the testator, and take the view that if he really intended a forfeiture he would have expressly provided for alternative disposition of the property in case of a contest, or that it is unreasonable to presume an intent to forfeit the gift to a minor because some one acting for him and beyond his legal control instituted a contest. This view is not without force in the case of a minor, but as before stated, there seems little basis for a distinction as to intent where there is and where there is not a gift over. In each case the intent is clearly expressed, and an implied intent directly opposite can be accounted for only as an attempt to escape the undesirable forfeiture. Again, it appears that the only justifiable reason for refusal to declare a forfeiture in accordance with the provisions of the will is a rule of law defeating intent, i.e., a rule of law based on public policy and overriding what must be construed as the clear intent of the testator. Is there justification for such a rule of law?

In passing it may be noted that almost every legal writer favors treating the forfeiture clause as invalid where probable cause for contest exists. Page takes the position that

"the policy of allowing such a condition, where there is probable cause for contesting the will, is unquestionably a bad one. In cases of fraud and undue influence, they offer a most effective means of terrorizing the heirs and next of kin who are given any substantial benefits under the will, and thus preventing them from contesting the will."

He notes that "a number of courts have held such a condition does not apply to a contest in good faith and on probable grounds; partly on the theory that such a condition is not intended to include a contest under such circumstances, and partly on the theory that such a condition would be contrary to public

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27 See cases infra note 39.
28 See cases cited infra note 53.
29 See infra note 51.
30 PAGE, WILLS (2d ed. 1926) § 1151.
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policy.” It would certainly strengthen this position in cases of probable cause to give up pretense of considering intent, or probable intent, or what testator would intend if he could be consulted, and put the decision squarely on public policy.

Schouler in his work on wills 31 remarks that

to exclude all contest of the probate on reasonable ground that the testator was insane or unduly influenced when he made it is to intrench fraud and coercion more securely; and public policy should not concede that a legatee, no matter what ground of litigation existed, must forfeit his legacy if the will is finally admitted.”

He approves the English distinctions in the case of legacies as to conditions treated as in terrorem, but says that they are “void for being against sound policy, wherever it appears that the legatee had probable cause for contesting the validity or effect of the will, though not otherwise.” That would be good if true. Some cases might seem to justify the statement, but later cases limit the exception to cases of no gifts over on the forfeiture.32

As to the decided cases the weight of authority is in doubt. There are cases regarding all such conditions for forfeiture to be against public policy, as attempts to prevent free access to the courts to determine the legal rights of litigants.

“It may be politic to encourage parties in the adjustment of doubtful rights by arbitration or by private settlement; but it is against the

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31 Schouler, Wills, Executors and Administrators (5th ed. 1915) § 605.
32 As authority for this he cites only the very old cases cited in 2 JARMAN, WILLS (1881) 59*, viz., Powell v. Morgan, 2 Vern. 90 (Ch. 1688) (with no discussion; a bare decision that on probable cause there was no forfeiture); Loyd v. Spillet, 3 P. Wms. 344 (Ch. 1724) (in which the Lord Chancellor said he “very much disliked the defence of forfeiture” and observed that testator plainly intended payment of the annuities. The defence was based, not on forfeiture, but on alleged revocation of the will by a subsequent deed.); Morris v. Burroughs, 1 Atk. 399, 404 (Ch. 1737) (holding no forfeiture by contesting any disputable matter in a court of justice). But JARMAN, op. cit. supra, adds that it appears that this is the rule only when there is no gift over. “Sound policy” seems first to appear in a devise, not in a legacy, and was rejected in the leading case previously referred to, Cooke v. Turner, supra note 22. Mr. Schouler rightly observes that “if the maxim is a just one, it ought to avail as well in a devise.” In England it does not, and even in the case of a legacy the maxim seems there to rest on intent as shown by absence of a gift over rather than on any sound policy which might defeat intent.


Valuable annotations expressing no preference are to be found in (1920) 5 A. L. R. 1370; (1921) 14 id. 609; (1923) 26 id. 764; (1924) 30 id. 1014; (1924) 33 id. 601. At this stage the annotators seem ready to express an opinion, and in (1926) 42 A. L. R. 847 conclude that where the contest is made on probable cause and in good faith the contest does not work a forfeiture. This view is still stated in (1928) 52 A. L. R. 91. In the face of an adverse view by the Massachusetts Supreme Judicial Court the annotator sayeth neither yea nor nay (1929) 58 A. L. R. 1555.
fundamental principles of justice and policy to inhibit a party from ascertaining his rights by appeal to the tribunals established by the State to settle and determine conflicting claims. If there be any such thing as public policy, it must embrace the right of a citizen to have his claims determined by law. ... Such conditions trench on the 'liberty of the law'.”

On the other hand there are jurisdictions upholding all such conditions. If the contest succeeds of course the condition falls with the will. But if the will is upheld the contestant has lost his case and also the benefits provided for him in the will. A vigorous presentation of the reasons for this rule is found in the recent Michigan case, Schiffer v. Brenton. The court, after noting that all the cases “worthy of discussion” recognize the validity of such provisions in wills, but that some courts of high standing decline to enforce them unless the contest against the will is in bad faith, says:

“We cannot follow the logic, the result reached, or the policy of this line of reasoning. If the rule is that provisions of this character in wills are valid and enforceable, and practically every court speaking on the subject so holds, the rule is a rule of property and should be enforced irrespective of the good or bad faith of the contestant. Such provisions serve a wise purpose; they discourage a child from precipitating expensive litigation against the estate, and encourage and reward other children in their effort to sustain their parent's disposition of his property if such contest is precipitated; they discourage family strife, they discourage litigation, and the law abhors litigation. ... We hold unequivocally that provisions of the character of the one before us are valid and enforceable, that they apply both to devises of real estate and bequests of personal property, irrespective of whether there is a gift over or not, and likewise irrespective of good or bad faith.”

There is much force in the argument. It would simplify the law if it were a rule of property always to be applied. Its virtues are well set forth. They assume that the contest arises between a litigious, disobedient child, who gets his deserts by the forfeiture, and the faithful children who uphold the parent's will are fittingly rewarded at the expense of the unworthy. Such is often the case. But no allowance is made for cases in which a stranger is preferred to children, or in which one designing child secures great influence.

23 Chancellor Wardlow, speaking for himself and Chancellor Johnston, but not committing the court, in Mallet v. Smith, 6 Rich. Eq. 12, 19, 20 (S. Car. 1853). He relies on 1 Shep. Touch. 132, a comment on the “liberty of the law” having no reference to these forfeiture provisions. See also Re Keenan, 188 Wis. 163, 205 N. W. 1001 (1925), 42 A. L. R. 836 (1926).
25 Id. at 519, 226 N. W. at 255.
26 Referring to Re Friend, supra note 21.
27 In Cooke v. Turner, supra note 22, the losing contestant was the only child and heir of testator; in Dutterer v. Logan, supra note 12, the contestants seem to have been favored children of testator who would forfeit to a domineering, disrespectful, unloving son. Many another such case is to be found.
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\textit{Caveat} drawn. See also prepare for a contest was never held to amount to a contest. The contest had been with- and Moran v. Moran, \cite{Camp, 1923} XV. 647 App will because it was not signed at the end thereof, and in Bender v. Bateman supra.

\textit{HARV.} 231 \textit{XV. 647} App will because it was not signed at the end thereof, and in Bender v. Bateman supra.\textsuperscript{10} yet forfeiture provisions are strictly construed. Courts look with disfavor on forfeitures.\textsuperscript{11} Even in California an unsuccessful attempt to probate a later will was held not to be a contest making the proponent subject to the forfeiture clause of the prior will that was admitted.\textsuperscript{42}

\textsuperscript{39} As in \textit{Re Friend}, supra note 21.

\textsuperscript{40} Donegan v. Wade, supra note 17, an early case in which the contesting son claimed a forfeiture in order to defeat the effort of a judgment creditor to get his share of the estate. The validity of the forfeiture clause was assumed and the question discussed was whether the acts of the son constituted a contest. \textit{Re Hite}, supra note 17. California is a leading state for the extreme rule upholding forfeiture provisions. See the later cases, \textit{In re Miller’s Estate}, 156 Cal. 119, 103 Pac. 842 (1909); \textit{In re Kitchen’s Estate}, supra note 11 (condition against presenting any claim against the estate); Lobb v. Brown, \textit{supra note} 17. A leading case is Moran v. Moran, supra note 10, with a strong dissenting opinion. Iowa and California are sometimes cited as the two out and out states for this rule, \textit{Note} (1926) 42 A. L. R. 547. Michigan must now be included, and Massachusetts as well, \textit{Rudd v. Searles, supra note} 6; \textit{Missouri v. Chambers’ Estate, supra note} 24; \textit{Sneible: Hoit v. Hoit, supra note} 10; \textit{Kayhart v. Whitehead et al., 77 N. J. Eq. 12, 76 Atl. 241 (1910); Guaranty Trust Co. v. Blume, 92 N. J. Eq. 538, 114 Atl. 423 (1921); all cases upholding conditions imposing on contestants costs of suit in case of contest. O’Donnell et al. v. Jackson et al., 102 N. J. Eq. 470, 141 Atl. 450 (1928); Bradford v. Bradford et al., 19 Ohio St. 546 (1869), a pioneer American case, approved in \textit{Irwin et al. v. Jacques et al., 71 Ohio St. 359, 73 N. E. 683 (1905)}, where such a forfeiture clause written in the margin was held to invalidate a will because it was not signed at the end thereof, and in \textit{Bender v. Bateman et al., 33 Ohio App. 66, 168 N. E. 574 (1929); Massie et al. v. Massie et al., 54 Tex. Civ. App. 617, 118 S. W. 219 (1909).}

\textsuperscript{39} Donegan v. Wade, supra note 17 (aiding and abetting a sister); Kayhart v. Whitehead, supra note 30. But appearing as a witness by one who has not otherwise aided the contest does not bring him within operation of the forfeiture clause. \textit{Haradon v. Clark, supra note} 17.

\textsuperscript{40} Wright v. Cummins, supra note 17; \textit{Ayers’ Adm’r v. Ayers et al., 212 Ky. 400, 279 S. W. 697 (1926); In re Chambers’ Estate, supra note 24; In re Fellon’s Estate, 132 Misc. 805, 231 N. Y. Supp. 90 (1928); In re Wall, supra note 2.

\textsuperscript{41} \textit{Re Bergland, supra note} 20. But offering a spurious (forged) will has been held such a dispute of a will as to work forfeiture. \textit{Re Kirholder, supra note} 17, and (1916) 28 \textit{Harv. L. Rev.} 337. As to acts which will and which will not constitute a contest see annotations in (1909) 21 L. R. A. (n. s.) 953 and Note (1920) 5 A. L. R. 1370. See also \textit{In re Hite’s-Estate, supra, note} 17; \textit{In re Kitchen, supra note} 11; Lobb v. Brown, supra note 17; and Moran v. Moran, supra note 10. Also Wright v. Cummins, supra note 17; \textit{In re Kicek-bush’s Estate}, 244 N. Y. 236. 155 N. E. 110 (1926), (1927) 27 Col. L. Rev. 887; Tate v. Camp, supra note 5. In Ayers’ Adm’r v. \textit{Yers et al., supra note} 40, the court said that to prepare for a contest was never held to amount to a contest. The contest had been withdrawn. See also \textit{In re McCahan’s Estate}, 221 Pa. 188, 70 Atl. 711 (1908), holding that a \textit{caveat} did not amount to a contest, and see Note (1924) 30 A. L. R 1014.
And it is generally held that an action to construe a will is not an attempt to defeat, but an effort to determine what is, the will. That the construction may be such as to invalidate the will does not matter, and in Iowa the forfeiture clause is not self-executing. It gave other beneficiaries no more than a right to claim the forfeiture, which they might waive.

When contests are merely frivolous, vexatious and in bad faith the rule imposing forfeiture is sound and should be upheld even where there may be sympathy for slighted children. Until and only so far as the law requires provision for children or wife can there be justification for the court to seek to provide for them contrary to the desire of testator as shown by his will, and even when the law requires provision it is not secured by construction of the will but by taking out of the estate what the law prescribes and then allowing the will to operate as nearly as possible in accord with testator's intent.

In case of contests on probable cause many cases hold forfeiture clauses void. It might be more accurate to say they are of no effect. In that sense they are void. This rule is most vigorously supported by the recent Wisconsin case Will of Keenan. The court even goes so far as to refuse to declare either valid or void conditions for forfeiture on contest if there is no probable cause. This does not commit it to any rule as to frivolous contests, but it does show lack of sympathy with efforts by testator to prevent beneficiaries from resorting to the courts for determination of their asserted rights. After an interesting discussion of principal cases for each view the court notes that the constitution of Wisconsin provides that,

"'Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.' This is a basic and valuable guaranty that the courts of the state should be open to all persons who in good faith and upon probable cause believe they have suffered wrongs. Is it not against public policy to permit one person to deprive another from asserting his rights in court? And especially so before it is ascertained that the prohibition against contest is in fact that of the testator and not that of one exercising undue influence over him, or that he was mentally competent to make it? That was the inquiry in this case when the will was presented for probate. . . . We deem that it is contrary to the public policy of our state to require a litigant to forfeit a substantial sum in case he is not successful in the prosecution in court of a bona fide claim of right, and this is especially so as to the probate of a will."

Note:
- "South Norwalk Trust Co. v. St. John, supra note 4; In re Fellion's Estate, supra note 41.
- "De Rousse v. Williams et al., 181 Iowa 379, 164 N. W. 896 (1917)."
- "Supra note 33; Note (1925) 42 A. L. R. 847.
- "Id. at 176, 205 N. W. at 1006, commented on in (1926) 11 CORN. L. Q. 573, (1926) 12 VA. L. REV. 431."
The decision then refers to the analogous cases in which the United States Supreme Court had held void legislation by the states making it a condition of doing business in the state that foreign corporations shall not resort to or transfer cases to the federal courts, and reaches the conclusion that "a sound public policy dictates that the truth of a disputable claim shall be ascertained as the law provides; that, since courts are instituted to administer justice within the state, there should be no penalties attached to the performance of that function". This is not to deny that a testator has a right to attach whatever lawful conditions he sees fit to a legacy or devise, nor is it to add to the condition the words "without probable cause". It is simply saying that conditions against public policy are void. "Nothing is added to or taken from the letter of the will."  

The writer believes that if exceptions to forfeitures are to be made this is the true and only basis on which distinctions must rest. The clear-cut question is whether on grounds of public policy the intent of the testator shall be disregarded or even defeated. All courts agree that there are conditions invalid on this ground; the question is whether these forfeiture conditions are of that class.


The following are the principal American cases holding that contests upon probable cause and in good faith do not result in forfeiture: South Norwalk Trust Co. v. St. John, *supra* note 4, at 176, 101 Atl. at 963, holding that the law is vitally interested in having property transmitted by will as the law prescribes. "Courts cannot know whether a will; good on its face, was made in conformity to statutory requirements, whether the testator was of sound mind, and whether the will was the product of undue influence, unless these matters are presented in court. And those only who have an interest in the will, will have the disposition to lay the facts before the court. If they are forced to remain silent, upon penalty of forfeiture of a legacy or devise given them by the will, the court will be prevented by the command of the testator from ascertaining the truth. . . . a right of devolution which enables a testator to shut the door of truth and prevent the observance of the law is a mistaken public policy." The case might have said not merely that those only who have the disposition, but those who alone can, as competent parties, lay the truth before the court will usually be those on whom the penalty of forfeiture would fall. If they are silent the court is usually bound to admit the propounded instrument to probate.

Moorman v. Louisville Trust Co., *supra* note 16 (apparently sympathetic, though decided on another point); Whitehurst v. Gotwalt, *supra* note 14, holding there was no probable cause. Both rules are quoted, and it is not certain which is approved. Wadsworth v. Brigham, *supra* note 50; *Re Friend*, *supra* note 21, is perhaps the leading case for this doctrine. The facts of the case are peculiarly appropriate for the application of the doctrine. One son had attained great influence over his mother, and he boasted of it. She willed him most of her property. The finding on contest was that the influence was not undue, and yet the court found there was *probabilis causa litigandi*. The court tried to square its rule with the rule that the intent of the testator must govern. "No testator, if he could speak from his grave, would declare such to have been his intention when he wrote his will and tried to protect it from assault." This is assuming a good deal, probably far too much in the case of Mrs. Friend, and it overlooks the fact that the intent that governs is not the intent the court thinks the testator would have had, but his intent as found in the four corners of the will. It seems far better to rest the exception frankly on public policy with entire disregard of intent. See also Chew's Appeal, 45 Pa. 228 (1863). Often cited are, Rouse v. Branch, 91 S. C. 111, 74 S. E. 133 (1912) commented on in (1912) 12 Col. L. Rev. 754, (1912) 25 Harv. L. Rev. 145, and Note, 1913E Ann. Cas. 1296; Mallet v. Smith, *supra* note 33, in which Chancellor Wardlaw, without committing the court to that extent, in very strong terms expressed his disapproval of such forfeiture provisions. His opinion has been much
In the majority of jurisdictions then it seems that excuses are found by making exceptions or by strict construction, for disregarding the condition in some cases and enforcing forfeiture in others. In none has it been held that all such forfeitures are invalid, though in South Carolina and in Wisconsin they find little sympathy from the courts.

A few jurisdictions are difficult to classify. Other exceptions than for probable cause have been grafted on the general rule, but the reasons are hard to justify. This is especially true in New York where there are numerous cases, none of them carried to the Court of Appeals with a clear pronouncement by that court as to any general rule or exceptions to such rule. In *Bryant v. Thompson* the reluctance of the court to apply the forfeiture was shown in a case where the contest was by a guardian *ad litem* of an infant just under twenty-one years of age. Though the public has no concern with the effect of such a contest by a party of full age, yet it becomes a question of public policy and brings into discussion entirely new considerations where the condition is such as to subvert the course of judicial proceeding, and to deprive the court of the right and duty imposed by law to protect the infant's rights. New York cases vigorously objecting to the extreme rule upholding such forfeiture conditions as unjust and impolitic are not wanting, but most of the New York cases are based on the English distinctions as to legacies, holding such conditions *in terrorem* only if there is no gift over on forfeiture.

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quotation. He regarded such conditions as trenching on the "liberty of the law". See also Tate v. Camp, *supra* note 4, and *In re Chappell's Estate*, 127 Wash. 638, 221 Pac. 336 (1923), Smithsonian Inst. v. Meech, *supra* note 10, has often been claimed on both sides. The court quotes with apparent approval 1 Roper, *On Legacies* (2d Am. ed. 1848) 795, to the effect that in the case of legacies if there exist *probabilis causa litigandi* the non-observance of the conditions will not be forfeitures. But the latter part of the opinion regards it good law and good morals to uphold conditions put in the will to operate powerfully to prevent bringing out the family skeleton by a will contest. The case was remanded and apparently the forfeiture was to be enforced. A very recent case is *Dutterer v. Logan*, *supra* note 12.

*Supra* note 15, approved in *In re Vandervort's Estate*, 62 Hun 612, 17 N. Y. Supp. 316 (1892). The decision in *Bryant v. Thompson* might rest upon the ground that as the guardian is appointed by the court and is answerable to the court the contest is in reality instituted by the court, and not by the infant. The court, however, expressly found that this was a contest by the infant herself. This view as to forfeiture in case of infant beneficiaries is forcefully criticised in *Moorman v. Louisville Trust Co.*,* supra* note 16, and the same conclusion was reached in *Perry v. Rogers*, *supra* note 9. On appeal of *Bryant v. Thompson* the Court of Appeals held that if the beneficiary waived the forfeiture the executors could not set it up; 128 N. Y. 426, 28 N. E. 522 (1891). But cf. *South Norwalk Trust Co. v. St. John*, *supra* note 4.


*In re Marshall's Estate*, 119 Misc. 407, 196 N. Y. Supp. 330 (1922) (citing many New York cases); *In re Kozlcy*, 104 Misc. 120, 171 N. Y. Supp. 669 (1918); *Matter of Armwood*, 162 App. Div. 623, 147 N. Y. Supp. 1016 (1914), aff'd 213 N. Y. 704, 108 N. E. 1089 (1915); *Matter of Vom Saal's Will*, 82 Misc. 531, 145 N. Y. Supp. 387 (1913); *In re Wall*, *supra* note 2; *In re Vandervort's Estate*, *supra* note 51. See also *Unger v. Loewy*, *supra* note 18; *In re Title Guarantee Trust Co.*, 100 Misc. 72, 165 N. Y. Supp. 71 (1907), holding that such a condition cannot deprive the wife of availing herself of Decedent Estate Law giving her half the estate as against a gift to charity, and *In re Byrne's Estate*, 141 Misc. 346, 252 N. Y. Supp. 587 (1931), holding that such a condition cannot avail against a widow's right of election against the will. This no gift over exception has not been confined to New York. *E. g.* *Fifield v. Van Wyck*, *supra* note 10.
What is the conclusion of the whole matter? The law abhors litigation. The testator has a right to abhor having his name and character dragged through a bitter, nasty contest, family feuds and hatreds set up, and his estate wasted in riotous litigation. In the absence of fraud and as applied to an instrument that has clearly been executed as required by statute, by a testator of undoubted mental competency, who is free from undue influence, the doctrine that the state is not concerned seems sound. In such a case there is no good legal reason why the court should not be guided by the clear terms of the instrument, though the result may seem harsh or unjust, silly or even vicious. Until the statute requires a will to be generous, just, wise and virtuous the courts have no right to thwart the will of a competent testator if it appears that it is his will. We may go farther and admit that public policy may well favor enforcing forfeitures in such cases. But even so there is reason to pause. "The law abhors litigation," but it abhors forfeitures as well. It abhors litigation and yet it permits it, else there would be no courts, no work for courts to do. It abhors forfeitures, but it permits them—in some cases, in others not. And so we find all the courts approving strict construction of the language of the will, and of the acts of the beneficiary in order to avoid a forfeiture, though that is not to say that the court may, under the guise of construction, set aside the clearly expressed intent of an instrument. So much for the clear case of a valid will.

When, however, we consider the case of a testator who has been found by a commission to be a lunatic, as in Cooke v. Turner, or whose mental competency is very doubtful, or who has been surrounded by influences that might very well have been undue, as in Dutterer v. Logan, where a very old and feeble man made a will in favor of a domineering son who had no particular affection for his father and who procured and burned a previous will making a distribution between his children "as nearly equal as possible", and especially when there is ground to believe that the will was not duly executed, or that it was forged or procured by fraud, the case is not so clear. To say that the state has no concern as to whether a will in such a case shall be judicially inquired into is dubious. To say that the state has no concern to make any inquiry where there is so much to indicate fraud or even crime is startling to say the least. The Connecticut court thinks the law is vitally interested in such a case, and the only way to find out in many a

64 Supra note 12. See also Lobb v. Brown, supra note 17, in which a sudden change in her will by an old woman, which took a large part of her estate from those she had loved and provided for in previous wills and bestowed it upon an almost total stranger, was almost too much even for the California court. It found a way by means of strict construction to avoid forfeiture in that case.

65 South Norwalk Trust Co. v. St. John, supra note 4. Even in California, the extremest state for the other rule, the court in Lobb v. Brown, supra note 17, scans "with the minutest and closest scrutiny" any provision in a will which would "tend to thwart or defeat" a full and complete opportunity to test the validity of such a testamentary document. Public policy demands so much. This comes very near to proving the California rule to be against public policy.
case is for a party who stands to suffer a forfeiture if the decision goes against him to make a contest of the will. The Kentucky court made the common sense remark that the court will take judicial notice that there is always a chance to lose.56

Such doubtful cases, with which the books are well supplied and of which there are a countless number that never get into the books, suggest that there should be some line of distinction between situations in which forfeiture clauses will and cases in which they will not be held valid. To be more accurate, the distinction should be between forfeiture clauses which will and those which will not be enforced, rather than between those which are valid and those which are void.

It may be said that if the contest succeeds, as it may be assumed it will if the will is under any of the above infirmities, then the forfeiture falls with the will and no harm is done. It is only when the contest fails, i. e., only when it appears that the will is the valid expression of the testator's desires that the forfeiture works. It does not operate against justifiable contests. But this takes no note of the fact that not all justifiable contests succeed. The contest may fail only because proof is too difficult. While as to a particular case courts must treat the judgment reached as settling the facts as between the parties, there is no reason for the law to be blind to the undoubted fact that for various reasons the party having the better case often loses and that fraud and crime not infrequently do get by. The wrongdoer is often able to cover his tracks, or the party in the right is often unable to get his proofs, or does not have his case well presented; why in seeking a wise general rule should not what everyone knows be frankly said, viz., that juries do not always reach correct conclusions? All of which, and much beside, goes to the question whether the law should discourage the effort to prevent probate of a so-called will in a case where there is probable cause to believe it is not the will of the deceased, by compelling the only party having an interest to have the matter tried, or who can appear as a contestant in court, to do so on peril of losing everything given him in the will if he fails to prove his case to the satisfaction of court or jury.

If doubtful cases, or cases of suspicious or malevolent influence which nevertheless is found not to be undue, were rare, the rule might well disregard them. But there are multitudes of cases in which it is beyond doubt that influence was used, in which determination of whether influence has been undue is exceedingly dubious, and in which the dispositions of the will as between the natural objects of testator's bounty and those actually chosen are beyond all understanding, shock one's sense of justice, and raise a strong presumption of improper influence, fraud, or even crime. Of course, if contestants by ever so little fail to make out a case they must lose and the prop-

PROPERTY be distributed as the will directs. The law gives the testator the right to make such distribution if that is his will. But why not favor a rule that, in such disputable cases, shall without penalty permit an inquiry to make sure, if possible, that it is really his will? Is it not public policy in such dubious cases to have the suspicious facts considered by a court of justice before making an award of distribution that so outrages one's sense of right? May we not go farther and provide for inquiry whether a dubious will is really testator's desire, even if the dispositions are not shocking?

But the most serious objection to upholding such forfeiture clauses is not found in any speculation as to whether contests are always decided aright; it lies in the fact that undue influence, fraud and crime will often get by without contest because fear of forfeiture will prevent a contest. As often pointed out, one who is interested in establishing a spurious or fraudulent will, if he be really clever, will see that a forfeiture clause is put in the will. Unless he is too grasping to play safe he will also make a substantial provision for such persons as would have a right to make a contest, so that he compels them to incur a real hazard if they oppose the so-called will. Has the state no interest in whether a rule shall be adopted making probable the success of such frauds or crimes? Admitting a will to be a forgery, has the state no interest in a rule which often prevents anyone from raising the question? The question seems to answer itself. It would be an extraordinary doctrine that the state has no interest in preventing distribution under a forged will, and yet the only persons likely to put the matter in issue and furnish evidence in the case, indeed the only parties who have a right to appear in court on the matter, may be deterred by fear of loss of all their benefits under the will.

To sum up the case, the authorities are in confusion or hopeless conflict. Even the weight of authority is not clear. There is much respectable authority on both sides. On the weight of reason much may be said for the arguments \textit{pro} and \textit{con}. Disputes between parties who think themselves entitled to benefits under a will are nearly always distressing, and contests in court even more so. And yet the reasons stated seem to justify the following propositions:

1. Conditions in a will providing for forfeiture of benefits thereunder by any one contesting the will are valid, except in cases involving public policy.

2. No exception should be made because of any supposed intent that such conditions are merely \textit{in terrorem}, or were not to be enforced in the particular case, or involved personal property and not realty.

3. On grounds of public policy forfeiture should not be enforced against contestants who affirmatively establish probable cause for contest.