Indiana Law Journal

Volume 3 | Issue 4 Article 1

1-1928

Non-Contesting Clauses in Wills

Sumner Kenner
Huntington Circuit Court

INDIANA LAW JOURNAL

Vol. III JANUARY, 1928. No. 4

NON-CONTESTING CLAUSES IN WILLS

By SUMNER KENNER*

The making of a will is one of the most solemn and consequential acts of a man's life. Upon its legal and proper preparation depends the future happiness and welfare of the persons and objects most dear to him. Although wills are often regarded as the simplest of instruments, they are never failing sources of litigation. It is an astonishing fact that most men spend their lives in accumulating a fortune for the use and enjoyment of surviving loved ones, but will delay the execution of this most important instrument until their thoughts have been insistently directed to the fact of the inevitable journey to the great beyond. At this time probably the mental faculties of the testator may have become so impaired by age or the ravages of disease that his act would only invite a contest. The fact that many testators attempt to draft their own wills without the aid of legal advice is another illustration of their lack of appreciation of the importance of the instrument.

Also, other testators employ a minister or a justice of the peace, because their services can be obtained at a less price than skilled services are worth, and, by so doing, usually get about what they pay for.

It may be said that a will is the most intricate as well as the most important of all legal documents. A man may make a deed or other written contract and it may be reformed or set aside on equitable grounds. Not so with a will after the testator's death. The court and parties must take it as they find it, and, if valid, abide by the intent embodied in it so far as that can be discovered.

There is no judicial power even to correct a will which extends beyond the field of construction and interpretation.

* See biographical note, p. 306.

In the law of wills, it is well settled that no precise form of words is necessary in order to create a condition, and that any expression disclosing the intention will have that effect.[1]

Conditions found in wills are either precedent or subsequent; in other words, either the performance of them is made to precede the vesting of an estate, or the non-performance to determine an estate antecedently vested.[2] There is no distinction in the way of technical words between conditions precedent and conditions subsequent. The distinction is a matter of construction, dependent upon the intention of the testator as manifested by the will.[3] As said by an early writer:

"Divers words there be, which by virtue of themselves make estates upon condition."[4]

The tendency of the Courts is to construe a condition as subsequent rather than as precedent, so as to give the devisee a present estate liable to be divested, rather than to defer the vesting.[5]

One form of condition which the practitioner frequently comes in contact with is that condition which provides for forfeiture of benefits on beneficiaries contesting the will. On account of the vast amount of litigation in the Courts of this country growing out of wills, many of which are contests thereof, there is a demand among clients wishing wills prepared, that the attorney insert some binding condition which will avert a future contest which so often brings to light matters of private life that ought never to be made public, and in respect to which the voice of the testator can not be heard, either in explanation or denial.

It is this demand that has resulted in there being more non-contesting clauses inserted in wills written today than ever before, and makes the question as to the legal effect of such clauses one of great importance to the active lawyer.

In the early cases, we find some courts holding provisions

---

[1] 2 Jarman in Wills, 5th Ed. pg. 1.

[2] As to conditions precedent, see: *Moore v. Perry*, 42 S. Car. 369, 20 S. E.200; *Fisher v. Fisher*, 80 Nebr. 145, 113 N. W. 1004; *Oetgen v. Diemmer*, 115 Ga. 1005, 42 S. E. 388; *Yale College v. Runkle*, 8 Fed. 576, 10 Biss. (U. S.) 300. As to conditions subsequent, see: Tappan's Appeal, 52 Com. 412, *Smith v. Smith*, 64 Nebr. 563, 90 N. W. 560.

[3] 4 Kent; Com.; 124; *Finlay v. King*, 3 Pet. 346; *Hopkins v. Smith*, 162 Mass. 444, 38 N. E. 1122.

[4] Littleton 328.

[5] Thompson on Wills, p. 250.

of this nature in wills invalid from the standpoint of public policy.[6]

There is also a well defined line of cases holding such clauses of no force where there is probable or reasonable ground existing for the contest or dispute of the will.[7]

There are also cases holding such clauses invalid where the condition is annexed to a legacy without any provision for a gift over on breach of such condition.[8] It has also been held that such clauses are inoperative against infants.[9]

In regard to personal property, provisions providing for forfeiture in case of a contest have been construed as a mere threat, held *in terrorem* over the legatee, but not intended to deprive him of his interest.[10]

Upon the question as to whether the conditions under consideration are void, as against public policy, we may gather the argument advanced in support of such a contention from the following quotation:

"The condition," they say, "is void, whether there be a devise over or not, as trenching on the liberty of the law, Shep. Touch. 132, and violating public policy. It is the interest of the state that every legal owner should enjoy his estate, and that no citizen should be obstructed by the risk of forfeiture from ascertaining his rights by the law of the land. It may be politic to encourage parties in the adjustment of doubtful rights by arbitration or by private settlement; but it is against the fundamental principles of justice and policy to inhibit a party from ascertaining his rights by appeal to the tribunal 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."[11]

---

[6] *Mallet v. Smith*, 6 Rich. Eq. 12, 60 Am. Dec. 107, see dissenting opinion; Schouler on Wills, 2nd ed. sec. 605; see dissenting opinion of Evans, Ch. J. in *Moran v. Moran*, (Iowa) 123 N. W. 202; *Massy v. Rogers*, Ir. L. R. 11 Eq. 409.

[7] *In re Friends Estate*, 209 Pa. 442, 58 Atl. 853, 68 L. R. A. 447; *Fifield v. Van Wyck*, 94 Va. 557; 27 S. E. 446, 64 Am. St. 745; *Black v. Herring*, 79 Md. 146, 28 Atl. 1063; *Tate, et al., v. Camp, et al.*, (Tenn.) 245 S. W. 839.

[8] *Fifield v. Van Wyck*, 94 Va. 557, 27 S. E. 446, 64 Am. St. 745; *Cochran v. Cochran*, 127 Pa. 486, 17 Atl. 981; *Re Vandevort*, 62 Hun. 612, 17 N. Y. Supp. 316. These holdings are to the effect that the condition against contest is merely *in terrorem* where there is no gift over and not effective to shut out the contestant from sharing under the will.

[9] *Bryant v. Thompson*, 59 Hun. 545, 14 N. Y. S. 28, 37 N. Y. St. 431.

[10] 2 Jarman on Wills, 5th Ed. p. 57; *Donegan v. Wade*, 70 Ala. 501; *In re Arrowsmith*, 162 App. Div. 623, 147 N. Y. S. 1016; *Fifield v. Van-Wyck*, 94 Va. 557, 27 S. E. 446, 64 Am. St. 745; *Brown v. O'Barn*, 199 N. Y. Supp. 824; *Re Marshall's Estate*, 196 N. Y. Supp. 330.

[11] Dissenting opinion in *Mallet v. Smith*, 6 Rich. Eq. 12, 60 Am. Dec. 107.

In a rather recent case in Iowa[12], the Chief Justice in dissenting from the majority opinion, advances the argument most used against non-contesting clauses. The learned judge said:

"I am convinced . . . . that such provision in a will is contrary to public policy, unless it be limited in its application to those contests wherein an element of bad faith enters. Under the law, no will can become effective in any of its provisions until it shall have been admitted to probate by the Court. Before admitting it to probate, it is the duty of the Court to investigate the facts and circumstances attending its execution and bearing upon its validity, and to find judicially therefrom that such will was executed in due form, voluntarily, and understandingly by the proposed testator. If the court should find otherwise, it must reject the will and refuse its probate. . . . . If the court is to learn the truth from outside sources of information, it is manifestly important that the highway of information to the court be kept open, and that there shall be no lion in the way. But here is a forfeiture provision in the purposed will itself, which may be a roaring lion intended to terrorize every beneficiary of the will. Its demand is that no adverse evidence be volunteered. Its tendency is necessarily to suppress material facts, and thus to impede the administration of the law according to its true spirit."

A Pennsylvania case[13] stands as perhaps the strongest exponent among the courts of last resort in favor of the exception to the operation of the condition on the ground of *probabilis causa litigandi.* In that case there was a provision in the will that should any of the children or grandchildren contest the validity of the will or attempt to vacate, alter or change any of its provisions, then he should be deprived of any beneficial interest thereunder and his share should go to others, naming them. One of the children contested the admission to probate of the will on the ground that its execution had been procured by undue influence. After this unsuccessful attempt, it was claimed that he had forfeited all claim under the will by virtue of the non-contesting clause above set out. This contention was not sustained by the Court below and on appeal the court held that as the son had probable cause for instituting the proceedings to contest the will, he had not forfeited the interest which his mother gave him in her estate. Mr. Justice Brown, speaking for the Supreme Court, says:

"It is not to be questioned that it was competent for the testatrix possessing the absolute power to dispose of what she possessed just as she pleased, to impose the condition upon which the appellants rely in asking that their brother shall be deprived of all interest in her estate; and it is equally clear, in view of his attempt to annul her will, that the burden

12 *Moran v. Moran,* (Iowa) 123 N. W. 202.

13 *Re Friend,* 209 Pa. 442, 68 L. R. A. 447.

is upon him to show that he now ought to have what it gives him. Such conditions to testamentary gifts and devises are universally recognized as valid, and, by some Courts, enforceable without exception. The better rule, however, seems to us to be that the penalty of forfeiture of the gift or devise ought not to be imposed when it clearly appears that the contest to have the will set aside was justified under the circumstances, and was not the mere vexatious act of a disappointed child or next of kin. A different rule,—an unbending one,—that in no case shall an unsuccessful contestant of a will escape the penalty of forfeiture of the interest given him, would sometimes not only work manifest injustice, but accomplish results that no rational testator would ever contemplate. This is manifest from a moment's reflection, and is illustrated by the class of cases to which the one now before us belongs, in which there is an allegation of undue influence which procured the execution of the will. If, as a matter of fact, undue influence is successfully exerted over one about to execute a will, that same influence will have written into it a clause which will make sure its disposition of the alleged testator's property. He who will take advantage of his power to unduly influence another in the execution of a will, will artfully have a care to have inserted in it a clause to shut off all inquiry as to the influence which really made the will; and, if the rule invoked by the appellants is to be applied with no case excepted from it, those who unscrupulously play upon the feelings of the testator may, with impunity, enjoy the fruits of their iniquity, and laugh in scorn at those whom they have wronged."

This question was before the Supreme Court of South Carolina in the year 1912, and in holding that a devisee or legatee might contest the will on the ground of forgery, notwithstanding a non-contest clause, that court said:

"No case has been cited, and we do not believe any can be found, sustaining the proposition that a devisee or legatee shall not have the right, upon probable cause, to show that a will is a forgery, without incuring the penalty of forfeiting the estate given to him by the will. The right of a contestant to institute judicial proceedings upon probable cause, to ascertain whether the will was ever executed by apparent testator, is founded upon justice and morality. If a devisee should accept the fruits of the crime of forgery under the belief, and upon probable cause, that it was a forgery, he would thereby become morally a *particeps criminis*, and yet, be confronted with the alternative of doing so, or of taking the risk of losing all under the will, in case it should be found not to be a forgery. Public policy forbids that he should be tempted in such a manner. This is far more obnoxious to public policy than a condition in the will against marriage."[14]

In a Tennessee case, the Court holds that a contest in good faith and for probable cause will not cause a forfeiture under a provision in a will that if any person shall enter any contest of the will upon any ground whatever, such person shall forfeit the provisions made for him. It was there held that an only

[14] *Rouse v. Branch*, (S. C.) 74 S. E. 133, 39 L. R. A. (N. S.) 1160.

child devoting his life to his father's business for a meager salary, who is on the best of terms with his father, and in whose favor a will has been made leaving practically the whole estate to him, has probable cause for contesting another will made two years later, when the father is eighty-one years of age and in poor health, in favor of a relation with whom he was living.[14½]

The Supreme Court of North Carolina has recently held that condition of forfeiture in devise of real estate, if devisee shall dispute will, does not work a forfeiture if there is probable ground.[14¾]

An eminent legal writer,[15] in discussing this matter, says:

"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. As for construction proceedings, the testators own language may have rendered them necessary."

On the question as to who should decide whether the facts developed show a probable cause for the contest, we find a scarcity of adjudications. It has been held, however, that this question must, in every case, be for the Court distributing the estate of the testator, and that this probable cause must clearly appear from the evidence, and if it is not clear, or if it is doubtful whether there was a probable cause, then the will of the testator should be regarded as supreme, and his direction to forfeit carried out, and it has further been held that advice of counsel is not of itself sufficient to show probable ground for the contest of a will, so as to avoid the effect of a clause forfeiting the interest of a legatee who institutes such contest.[16]

An exception to the operation of the condition where there is no gift over upon breach in regard to a legacy has been regarded as established early in the English decisions.[17] It is claimed that it came to be recognized in England by the chancery courts to preserve uniformity, since legacies could be sued for and recovered in the ecclesiastical court, which followed the rules of the civil law. It was held that as regard to personal property, that the provision for forfeiture would be construed

---

[14½] *Tate et al. v. Camp et al.*, (Tenn.) 245 S. W. 839, 26 A. L. R. 755.

[14¾] *Whilehurst v. Golwalt et al.*, (N. C.) 127 S. E. 582.

[15] Schouler on Wills, 2nd ed. sec. 605.

[16] *Re Friend*, 209 Pa. 442.

[17] *Powell v. Morgan*, 2 Vern. 90; *Loyd v. Spillet*, 3 P. Wms. 344; *Morris v. Burroughs*, 1 Atk. 404; *Cleaver v. Spurling*, 2 P. Wms. 528.

as a mere threat, held *in terrorem* over the legatee, but not intended to deprive him of his interest. Only in the event that the will made provision for a gift over would the conclusion be adopted that the testator intended a forfeiture. Following the English rule are found many American decisions holding the condition of no effect in the absence of a gift over[18] and these use the same arguments above referred to in reference to the English cases.

It has been held that a non-contest clause in a will is inoperative as against an infant disputant. In a New York case,[19] in so holding, the court said:

"Any provision in a will which, in its application, comes in conflict with the organic or statutory law of the state, by which it is made the duty of the Courts to look after the rights of infants, irrespective of the fact whether they are of tender years or not, must be deemed to be illegal and void as being against public policy. A testator cannot be permitted thus to obstruct, by any clause in his will, the necessary steps prescribed by law for the conduct of judicial proceedings in the case of infants, where the paramount duty of the Court is to act in behalf of its wards, and for their best interests. No penalty or forfeiture can be worked against such a party who has done nothing more than to submit his rights to the adjudication of the Courts. Any other rule as applicable to infants would work serious mischief."

On the other hand, Kentucky holds an infant bound by the forfeiture clause, in so far that a court in its discretion may refuse to allow a guardian to bring suit to contest a will which has a non-contesting clause.[19½]

Notwithstanding some holdings to the contrary, the decided weight of authority supports the validity of non-contesting clauses in wills, as against the argument that they are against public policy and against "the liberty of the law." A leading case upon this question is *Cooke v. Turner*.[20] The question in that case arose upon a condition in a will to the effect that, if a devisee should dispute the will, or the competency of the testator to make it, the devise thereby given to her should be re-

[18] *Pray v. Belt*, 1 Pet. 670, 7 L. ed. 309; *Parsons v. Winslow*, 6 Mass. 169, 4 Am. Dec. 107; *McAlvaine v. Gethen*, 3 Whatt. 575; *Mallet v. Smith*, 6 Rich. Eq. 12, 60 Am. Dec. 107; *Maddow v. Maddox*, 11 Gratt. 810; *Binnerman v. Weaver*, 8 Md. 517; *In re Hamilton's Will*, 165 N. Y. Sup. 71; *Cochran v. Cochran*, 127 Pa. 486, 17 Atl. 981.

[19] *Bryant v. Thompson*, 59 Hun. 545, 14 N. Y. Sup. 28. See also along the same line *Woodward v. James*, 44 Hun. 95; *Re Vandevort*, 62 Hun. 612, 17 N. Y. Sup. 316; *Bryant v. Tracy*, 27 Abb. N. C. 183; Thompson on Wills, sec. 290; 40 Cyc. 1706.

[19½] *Moorman v. Louisville Trust Co.*, (Ky.) 203 S. W. 856.

[20] *Cooke v. Turner*, 15 Mees. & W. 727.

voked. It was argued in that case that such a condition was void, as against public policy, because having a tendency to set up the wills of insane persons by restraining heirs named therein as devisees from contesting such wills, but the court in answer to this argument, said:

"The conditions said to be void, as trenching on the liberty of the law, are those which restrain a party from doing some act which it is supposed the state has, or may have, an interest to be done. The state, from obvious causes, is interested that its subjects should marry; and therefore it will not in general allow parties, by contract or by condition in a will, to make the continuance of an estate depend on the owner not doing that which it is or may be the interest of the state that he should do. So, the state is interested in having its subjects embarked in trade or agriculture, and therefore will not allow a condition defeating an estate, in case its owner should engage in commerce, or should plough his arable land, or the like. The principle on which such conditions are void are analogous to that on which conditions defeating an estate, unless the owner commits a crime, are void. In the latter case the condition has a tendency to the violation of a positive duty; in the former, to prevent the performance of what partakes of the character of a duty of imperfect obligation. But in the case of a condition such as that before us, the state has no interest whatever apart from the interest of the parties themselves. There is no duty on the part of an heir, whether of perfect or imperfect obligation, to contest his ancestor's sanity. It matters not to the state whether the land is enjoyed by the heir or the devisees; and we conceive, therefore, that the law leaves the parties to make just what contracts and what arrangements they may think expedient, as to the raising or not raising questions of law or fact among one another, the sole result of which is to give the enjoyment of property to one claimant rather than another."

In a more recent case[21] the Supreme Court of California uses the following language along the same line of reasoning:

"Preliminarily, it is to be observed that a condition such as this not only does no violence to public policy, but meets with the approval of that policy. Public policy dictates that the courts of the land should be open, upon even terms, to all suitors. But this does not mean that it invites or encourages litigation. To the contrary, it deplores litigation. *Interest reipunlicoe ut sit finis litium*, and the great statute of frauds and perjuries, and the laws limiting the time of the commencement of actions, with many other of its rules and doctrines, are all designed to give repose and security by preventing litigation."

In upholding the forfeiture clause in a latter decision, the same court said:[21½]

"Appellant's contention is that she had probable ground for contest. . . . . No such exception is contained in the will, and we know of no principle that authorizes us to declare it. To do so, would be to substitute

[21] *Re Hite*, (Cal.) 101 Pac. 443, 21 L. R. A. (N. S.) 953.

[21½] *In re Miller's Estate*, 156 Cal. 119, 103 Pac. 842.

our own views for a clearly expressed intent of the testator to the contrary."[22]

The case of *Smithsonian Institution v. Meech*,[23] being a decision of the Supreme Court of the United States, is cited as a leading case upholding clauses forbidding contest of wills, but a careful study of that case will disclose the fact that the clause in the will there in question was held to be of the nature of a conditional limitation, and the acquiescence of the legatee in the provisions of the will was held to be a material ingredient or part of the gift, which was in the nature of a condition precedent to his acquiring any right thereunder. The will in that case did not forbid a contest, but the bequests were made on the condition that the legatee acquiesce in the will and there was a gift over in case of a dispute to the residuary legatee. In the opinion on the case, Mr. Justice Brewer said:

"When legacies are given to persons, upon conditions not to dispute the validity of or the dispositions in wills or testaments, the conditions are not in general obligatory, but only *in terrorem*. If, therefore, there exists *probabilis causa litigande*, the non-observance of the conditions will not be forfeitures (citing cases). The reason seems to be this: a court of equity does not consider that the testator meant such a clause to determine his bounty, if the legatee resorted to such a tribunal to ascertain doubtful rights under the will, or how far his other interests might be affected by it; but merely to guard against vexations. But when the acquiescence of the legatee appears to be a material ingredient in the gift, which is made to determine upon his controverting the will or any of its provisions, and in either of those events the legacy is given over to another person, the restriction no longer continues a conditional limitation. The bequest is only *quousque*, the legatee shall refrain from disturbing the will, and if he controvert it, his interest will cease and pass to the other legatee."

After quoting from decisions upholding conditional clauses, the court concludes:

"The propositions thus laid down fully commend themselves to our approval. They are good law and good morals. 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, ... 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 should operate most powerfully to accomplish that result. And when a testator declares in his will that his several

[22] Cases may be found where provisions against contest are so worded as to be held void on account of being too broad or indefinite. See *Rhodes v. Muswell Hill Land Co.*, 29 Beav. 560; *Re Jackson*, 47 N. Y. S. R. 443, 20 N. Y. Sup. 380.

[23] *Smithsonian Inst. v. Meech*, 169 U. S. 398, 42 L. ed. 793, 18 Sup. Ct. Rep. 896.

bequests are made upon the condition that the legatees acquiesce in the provisions of his will, the court wisely held that no legatee shall without compliance with that condition receive his bounty, or be put in a position to use it in the effort to thwart his expressed purposes."

We have noticed the distinction drawn by several of the Courts between real and personal property in considering the validity of non-contest clauses, and many courts hold that there must be a gift over before such clause would be valid as to personal property. There is a tendency in the recent decisions to wipe out any distinction between personal and real property in a consideration of this matter. A leading case which considers carefully this phase of the subject was decided by the Supreme Court of California in the year 1909.[24] The will there in question contained a clause which provided that if any of the heirs or devisees or anyone else contested the will, then they should receive no part of the estate, and it further provided that if such an event happened that he revoked any devise or bequest to such contestant.

It will be noted that there was no provision made for a gift over and one of the contentions of the attorneys for contestants was that the clause was void for want of a gift over. In holding against this contention, the higher court said:

"Respondent next urges that, even if it be held that the acts of Etta Gross amount to a contest, yet, as she was a legatee, and there was no gift over, of her legacy in the event of a contest, no forfeiture results. It is recognized that a forfeiture of land devised will result, under such circumstances, without a specific devise over. That decisions in abundance may be found holding that the same rule does not apply in cases of legacy, is an anomaly of the law of wills. It rests upon no substantial distinction, and, where recognized, it is adopted in deference to the weight of earlier adjudications. It was not a part of the common law, as such, but came to be recognized in England by the chancery courts to preserve uniformity, since legacies could be used for and recovered in the ecclesiastical courts, which followed the rules of the civil law. By the civil law, the fiction was introduced that, unless there was a gift over of such legacy, a forfeiture would not be decreed. . . . . In this state the question is *res integra*. We are not embarrassed in its consideration by any adjudication of our own, and are at liberty to decide in accordance with sound reason. If it be that the rule anciently rested for its support upon the doctrine of public policy, we find, even in England, where the rule prevails, that such support has been withdrawn. If it rests, as it seems to have rested in England, upon the desire of the chancery court to conform to the decisions of the ecclesiastical court, such a reason does not, in this state obtain. In brief, no reason can be found why such a rule, founded neither upon public policy, nor the dictates of the common law, should by us be given recognition."

[24] *Re Hite* (Cal.) 101 Pac. 443, 21 L. R. A. (N. S.) 953.

The matter is summed up by Judge Redfield,[25] in the following language:

"The rule of the English law, as to conditions against disputing the will, annexed to some bequests, seems to be in a most absurd state of confusion. It is held that such a condition is entirely valid as to real estate, whether there be any gift over or not. And it is agreed that there is no substantial ground for any distinction in this respect between real and personal estate. Hence, we assume that, in this country, any such condition which is reasonable, as one against disputing one's will surely is, as nothing can be more in conformity to good policy than to prevent litigation, will be held binding and valid."

In an Ohio case, a condition in a will whereby the testator excludes any one of his heirs who "goes to law to break his will" from any part of share of his estate, is valid and binding; and effect will be given to it, as well in respect to bequests of personalty, as to devises of real estate. A legacy forfeited by the breach of such a condition will pass to the general residuary legatees named in the will without express words to that effect in the will.[25½] The question often arises in cases of this kind as to whether there really was a contest of the will. This must be determined by the facts and circumstances in each case, although it has been held that the mere filing of a caveat will not be construed as a contest of a will,[26] nor will instituting an action to obtain the construction of a will be so considered.[27]

From the conflicting authorities, it is difficult to deduce principles, but the following seem to be established and should be followed in view of the unsettled condition of the law.[28]

---

[25] 2 Redf. Wills, sec. 679.

[25½] *Bradford v. Bradford*, 19 Ohio St. 546, 2 Am. St. Rep. 149.

[26] *McCahan's Estate*, 221 Pa. 188, 70 Atl. 711. See also *Bergland v. Bergland*, (Cal.) 192 Pac. 277 and note to 5 A. L. R. 1370.

[27] *Black v. Herring*, 79 Md. 146, 28 Atl. 1063; *Woodward v. James*, 44 Hun. 95; *Matter of Vom Saal*, 145 N. Y. S. 307, but see *Hoit v. Hoit*, 42 N. J. Eq. 388, 7 Atl. 586.

[28] See the following recent authorities on the various phrases of this subject: *Matter of Kirkholder*, 149 N. Y. S. 87; *Sherwood v. McLaurin*, 88 S. E. 363; *In re Kathan*, 141 N. Y. S. 705; *Lewis' Est.*, 19 Pa. Dist. 432; *Matter of Arrowsmith*, 147 N. Y. S. 1016; *Brennen v. Hoard*, 211 Fed. 336, 128 C. C. A. 14; *Pray v. Belt*, 26 U. S. 1 Pet. 680; *Massie v. Massie*, 54 Tex. Civ. App. 617, 118 S. W. 219; *Perry v. Rogers*, 52 Tex. Civ. App. 594, 114 S. W. 897; *Bradford v. Bradford*, 19 Ohio St. 546; *Donegan v. Ware*, 70 Ala. 501; *Re Wall*, 136 N. Y. Sup. 452; Schouler on Wills, Executors and Administrators, 6th ed., and 1926 Sup., Secs. 1344, 2414, 3171; Borland on Wills and Administration, pp. 361-363; Remson on Preparation and Contest of Wills, pp. 218-220; Tucker's Notes on Wills, pp. 178-184; Lewis' Preparation and Construction of Wills, pp. 325-345; Articles in 23 Columbia Law Review, 169; 13 Columbia Law Review, 557; 28 Harvard

1. Conditions annexed to legacies and devises, providing for forfeiture in case the will is contested, are valid.

2. In case of a legacy, it is best to provide for a gift over of the subject matter of the legacy in case of a breach of the condition.

3. Where the will is contested on behalf of an infant legatee or devisee, the forfeiture will not be decreed, irrespective of whether there was a gift over or not.

4. In the preparation of the clause against contest, it is advisable, if practicable, to make the condition precedent so that the gift will not vest until the condition is performed, or in other words, make the bequests upon the condition that the legatees acquiesce in the provisions of the will.

5. It would seem that the probable cause exceptions should be recognized as it comes most nearly approximating justice in all cases, both from the standpoint of public policy and from the probable intention of the testator. It would give effect to the intentions of a rational testator in so far as it would prevent the perpetration of such fraud and at the same time exclude vexatious contests brought in bad faith without probable cause, and which the testator probably wanted to guard against.[29]

Law Review, 153; American Bar Assn. Journal, Vol. 12, No. 4, page 236. Rood on Wills, p. 416; 28 R. C. L. 315, Note in 5 A. L. R. 1370; Page on Wills, sec. 683; *Trust Co. v. St. John*, (Conn.) 101 Atl. 961.

[29] The state of Indiana has a statute providing that all non-contesting clauses in wills shall be void and of no effect. Burns' Ann. Statutes, Sup. of 1918, sec. 3154a. This law has never been tested and its validity is doubtful.