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Provisions in a Will Forfeiting the Share of a Contesting Beneficiary

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to lead to an overruling of at least one other earlier case on its facts, namely, the Anderson case,[57] where the defendant was engaged in handling the liquor but not in making actual sales, which evidence, under the facts of the case, seems just as direct proof of the knowledge of the conduct of the place for the purpose of the sale as an actual sale, it being borne in mind at all times that proof of an actual sale is not necessary to prove the defendant a jointist,[58] a fact which the court at times appears to have overlooked.[59] Moreover, the facts set forth in *State v. Perrin*[60] would almost appear to be such direct proof of knowledge as to exclude, under the present theory of the court, any additional circumstantial evidence to the same end.†

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PROVISIONS IN A WILL FORFEITING THE SHARE OF A CONTESTING BENEFICIARY[1]—Provisions in will forfeiting the share of a contesting beneficiary are not contrary to public policy[2] It is suggested by the English courts that no question of public policy is involved, that the court has no interest whatever apart from the interests of the parties themselves, and that it matters not to the state whether

[57] Note 36, *supra.*

[58] See note 45, *supra,* second paragraph.

[59] See note 33, *supra,* and especially *State v. Stuttard,* cited therein.

[60] 127 Wash, at pp. 194-195.

† After this note had gone to press, the court, in a decision handed down on March 19th, 1928, *State v. Wilson et al.,* 47 Wash. Dec. 120, held reputation evidence inadmissible as against the appellant, proprietor and operator of a hotel wherein sales were proved by employees; no sales were proved by the appellant although court below found that he participated in and had knowledge of the handling of liquor in the hotel. The opinion is short and relies upon a citation of the *Radoff* and *Espeland* cases and states: "Again we announce the rule that reputation evidence is not admissible in cases of this character, where there is direct and positive testimony showing knowledge on the part of the owner or proprietor." No attempt is made by the court to explain this holding, which without doubt, throws greater doubt upon the earlier cases, criticized above; the conclusion reached in the foregoing discussion seems to now have support in this decision, although, unfortunately, the court does not make more than a general statement supporting the opinion which it hands down.

[1] For form of clauses see: 1 CUTLER'S TIFFANY FORM BOOK 2139 (no provision for gift over) 1 NICHOLS' ANNO. FORMS 2267, sec. 157 *In re Chappel's Estate,* 127 Wash. 638, 221 Pac. 336 (1923) *In re Bergland's Estate,* 180 Cal. 629, 182 Pac. 277, 5 A.L.R. 1363 (1919) *In re Kitchen's Estate,* 192 Cal. 384, 220 Pac. 301, 30 A.L.R. 1008 (1923) *In re Keenan's Will,* 188 Wis. 163, 205 N. W 1001, 42 A.L.R. 836 (1925) *Cook v. Turner,* 15 M. & W 727, 71 Rev. Rep. 808 (1846).

[2] *Rogers v. Law,* 66 U. S. 253, 1 Black 253, 17 L. Ed. 58 (1862) *Smithsonian Institution v. Meech,* 169 U. S. 398, 18 Sup. Ct. 396, 42 L. Ed. 793 (1898) *In re Hite's Estate,* 155 Cal. 436, 101 Pac. 443, 21 L.R.A. (N.S.) 953 (1909) *In re Miller's Estate,* 156 Cal. 119, 103 Pac. 842, 23 L.R.A. (N.S.) 868 (1909) *In re Shirley's Estate,* 180 Cal. 400, 181 Pac. 777 (1919) *In re Bergland's Estate,* note 1, *supra, In re Kitchen's Estate,* note 1, *supra, Moran v. Moran,* 144 Ia. 451, 123 N. W 202, 30 L.R.A.

the devise or bequest is enjoyed by the heirs or the beneficiaries.[3] No court has held the forfeiture clause void *ab initio*.[4] In writing the opinion of the court in 1853 but in expressing a personal view not sanctioned by the majority, the chancellor of South Carolina said that such a clause is void as "trenching on 'the liberty of the law' "[5] This view has not been followed.

Although not void *ab initio*, the other extreme has been reached in two states[6] and approached in two others.[7] The forfeiture clause is given effect under all circumstances when the will is contested. These courts[8] contend that no satisfactory reason has been advanced why a literal interpretation should not be given to the express intention in the will. To read in any exceptions to for

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(N.S.) 898 (1909) *Bryant v. Thompson*, 59 Hun. N. Y.) 546, 14 N. Y. Supp. 28, 37 N. Y. St. Rep. 431 (1891) *Whitehurst v.Gotwalt*, 189 N. C. 577, 127 S. E. 582 (1925) *Bradford v. Bradford*, 19 Ohio St. 546, 2 Am. Rep. 419 (1869) *Appeal of Chew*, 45 Penn. (9 Wright) 228 (1863) *Breithaupt v. Bauskett*, 18 S. C. (1 Rich.) Eq. 465 (1845) *Rouse v. Branch*, 91 S. C. 111, 74 S. E. 133, 39 L.R.A. (N.S.) 1160, Ann. Cas. 1913E, 1296, 12 Col. L. Rev 754 (1912) *Sherwood v McClaurin*, 103 S.C. 370, 88 S.E. 363 (1916) *Tate v. Camp*, 147 Tenn. 137, 245 S.W 839, 26 A.L.R. 755 (1922) *Ferry v. Rogers*, 52 Tex. Civ. App. 594, 114 S. W 897 (1908) *Massie v. Massie*, 54 Tex. Civ. App. 617, S.W 218 (1909) *Cook v.* Turner, note 1, *supra*, 28 R.C.L. 315, 40 Cyc. 1705, 2 Page on Wills 1920.

[3] *Cook v. Turner* note 1, *supra*. Approved in *Evanturel v. Evanturel*, 6 P.C.A. 1 (1873). Schouler claims that *Cook v. Turner* is dictum because the will had not been admitted to probate and would seem to be outweighed by *Rhodes v. Mauswell Hill Land Co.*, 29 Beav 560, 54 Eng. Rep. 745 (1861) Schouler on Wills (6th ed.) 1344. Jarman on Wills (6th ed.) 1549 says *Cook v. Turner* stands for the proposition that the condition is operative for realty if there is no devise over.

This, however, has been suggested by dictum in *Jackson v. Westerfield*, 61 Howard (N.Y.) Prac. 399 (1881) *Rhodes v. Mauswell Hill Land Co.*, note 3, *supra*, *In re Kathan's Will*, 141 N.Y. Supp. 705 (1913) See also *In re Keenan's Will*, note 1, *supra*, *Mallett v. Smith*, 6 Rich (S.C.) Eq. 12, 60 Am. Dec. 107 (1853) Dissenting opinion. *Moran v. Moran*. note 2, *supra*. For discussion see 7 Va. L. Rev. 64.

See note 4, *supra*. *Mallett v. Smith*, note 4, *supra*. The majority of the court held there was no gift over of the legacy and decided on the general rule applicable to legacies.

Chancellor Wardlow criticised *Cook v. Turner* note 1, *supra*, in regard to public policy. "It is the interest of the state that every legal owner should enjoy his estate."

Conditions of forfeiture "trenching on the liberty of the law" and contrary to public policy are those in restraint of trade, agriculture, marriage, and the like. For discussion of distinction see *Cook v. Turner* note 1, *supra*, *Hoit v. Hoit*, 42 N. J. Eq. 588, 7 Atl. 856, 59 Am. Rep. 43 (1886) *Rouse v. Branch*, note 2, *supra*.

[6] *In re Garcelon's Estate*, 104 Cal. 570. 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134 (1894) *In re Hite's Estate*, note 2. *supra*, *In re Miller's Estate*, note 2, *supra*, *In re Bergland's Estate*, note 2, *supra*, *In re Shirley's Estate*, note 2, *supra*, *In re Kitchen's Estate*, note 1, *supra*, *Moran v. Moran*, note 2, *supra*.

[7] *Hoit v. Hoit* note 5, *supra*, *Kayhart v. Whitehead*, 77 N. J. Eq. 12, 76 Atl. 241 (1910), Aff'd 78 N. J. Eq. 580, 81 Atl. 1133 (19113; *Bradford v. Bradford*, note 2, *supra*, *Thompson v. Gaut*, 82 Tenn. 310 (1884) But see *Tate v. Camp*, (Tenn.) note 2, *supra*.

[8] Note 6, *supra*.

feiture is to substitute the views of the court for a clearly express intent of the testator to the contrary [9]

These clauses, as conditions subsequent,[10] go to defeat a vested estate. Equity abhors a forfeiture, the law never enforces them when it can be avoided.[11] Although held valid,[12] subject to certain exceptions, the great weight of American authority holds that such forfeiture clauses are not favored and are to be strictly construed.[13]

A discussion, then, of their effectiveness devolves into a consideration of the exceptions and their application to devises and bequests. The cases are not in harmony,[14] nor can the conflicts be reconciled.

By the weight of authority, when the forfeiture clause treats of personalty, the contesting legatee forfeits his share when there is a *gift over*[15] of the bequest to the residuary clause or to a third person, providing the contest is not based upon *probabilis causa litigandi* and the contesting legatee is not an infant.

The condition requiring a *gift over* of the legacy before the clause is effective has slight foundation in logic. There is respectable authority denying the exception and holding that in the absence of a *gift over,* the clause is effective and not considered *in terrorem.*[16]

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[9] *In re Miller's Estate,* note 2, *supra.*

[10] *In re Hite's Estate,* note 2, *supra.*

[11] *Ayer's Adm. v. Ayer,* 212 Ky. 400, 279 S. W 647 (1926).

[12] Note 2, *supra.*

[13] *Ayer's Adm. v. Ayer* note 11, *supra, Jackson v. Westerfield,* note 4, *supra, In re Grote Estate,* 2 Howard (N. Y.) Prac. (N. S.) 140 (1885) *Woodward v. James,* 44 Hun. (N. Y.) 95 (1887) *In re Stewart,* 5 N. Y. Supp. 32 (1889) *Bryant v. Thompson,* note 2, *supra, In re Jackson's Will,* 20 N. Y. Supp. 380, 47 N. Y. St. Rep. 443 (1892) *In re Baradon's Estate,* 84 N. Y. Supp. 937 (1903) *In re Wall,* 136 N. Y. Supp. 452 (1912) *In re Kathan's Will,* note 4, *supra, Appeal of Chew,* note 2, *supra, In re White's Estate,* 2 Penna. Dist. Rep. 207 (1893) *In re White's Estate,* 163 Penna. 388, 30 Atl. 192 (1894) *Rouse v. Branch,* note 2, *supra, Dutter v. Logan.* 137 S. E. 1 (W Va. 1927).

[14] "Out of this confusion of authority there can come only a balanced negation, an equality of sounds which produces silence. There is a precedent for every inconsistent solution of the question, but prescript for none." Ketcham J., in *In re Wall,* note 3, *supra.*

[15] *Smithsonian Institution v. Meech,* note 2, *supra, Wright v. Cummins,* 108 Kas. 667, 196 Pac. 246, 14 A. L. R. 604 (1921), *Whitehurst v. Gotwalt,* note 2, *supra, Hoit v. Hoit,* note 5, *supra, Jackson v. Westerfield,* note 4, *supra, In re Reigle's Estate,* 32 N. Y. Supp. 168, 65 N. Y. St. Rep. 247 (1894) *In re Wall,* note 13, *supra, In re Arrowsmith,* 147 N. Y. Supp. 1016, 162 App. Div. 623 (1914) *In re Title Guaranty & Trust Co.,* 165 N. Y. Supp. 71 (1917) *In re Kozley,* 171 N.Y. Supp. 669 (1918) *In re Marshall's Estate,* 196 N. Y. Supp. 330 (1923) *Brown v. O'Barn,* 199 N. Y. Supp. 824 (1923) *Appeal of Chew,* note 2, *supra, Rouse v. Branch,* note 2, *supra, Sherwood v. McLaurin,* note, 2 *supra, Fifield v. Van Wyck Ex'r.,* 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745 (1897) *In re White's Estate,* note 13, *supra, Clevear v. Spurling,* 2 P. Wms. 526, 24 Eng. Rep. 846 (1729) *Lloyd v. Spillett,* 3 P. Wms. 344, 24 Eng. Rep. 1094 (1734) *Morris. v. Burroughs,* 1 Atk. 399, 26 Eng. Rep. 253 (1737).

[16] *In re Hite's Estate,* note 2, *supra, Moran v. Moran,* note 2, *supra, In re Stewart.* note 13, *supra, Bradford v. Bradford.* note 2. *supra, Thompson v. Gault,* note 7, *supra, Massie v. Massie,* note 2, *supra.*

The majority of the courts hold that a *gift over* is sufficient evidence of the intention of the testator that the clause was not to be *in terrorem,* and, since the estate vests in the residuary legatee on the happening of the contest, the court will not act to divest title. If the intent of the testator is to control, it is difficult to say that he meant the clause to be *in trrorem* since he failed to express a *gift over*

The fallacy in the reasoning is apparent when it is noted that the same courts give effect to the forfeiture *without gift over* when it is attached to realty There is no basis in logic for the distinction. It is an anomaly in the laws of wills. Its introduction into the common law and the reason for its adoption is historical.[17] In England legacies could be sued for and recovered in the ecclesiastical courts which followed the rules of the civil law requiring a *gift over* When jurisdiction over legacies was also assumed by Chancery, the civil law was followed as to legacies while the common law was adopted as to devises in order that there might not be a conflict of decisions in the two courts.[18] The reason for the distinction does not exist in the United States. It should not be followed.

Keeping in mind that forfeiture clauses are to be strictly construed,[19] the requiring of a *gift over* of personalty is valuable in furnishing the court with an excuse for not enforcing the forfeiture when, under the facts before it, its enforcement would be inequitable. The position a court will take when considering the question for the first time, will be influenced, no doubt, by the peculiar facts presented in the first case. A careful analysis of the cases shows that the equities involved in the facts in the first case before each court have had more weight than the academic abstract logic as to the reasonableness of the theoretical distinction between realty and personalty [20]

Interpreted in the light of strict construction, it has been held that not only is a residuary clause insufficient *gift over,*[21] but that a declaration that a forfeiture legacy is to fall into the residue is also not sufficient.[22] The courts of Pennsylvania and North Carolina have expressed themselves to the contrary and suggested that the testator's direction that a forfeited legacy is to fall into the residue of his estate is sufficient *gift over* [23] Granting that a *gift over* is necessary, it is submitted that an express gift to the residue meets the requirement and gives effect to the testator's wish.

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[17] See cases cited in note 16, *supra.* See also note, 68 L. R. A. 451.

[18] See *In re Dickson's Trust,* 1 Sim. (N. S.) 37, 61 Eng. Rep. 14 (1850)

[19] See note 13, supra.

[20] See 12 Am. B. A. J. 236.

[21] *In re Arrowsmith,* note 15, *supra, In re Title Guaranty & Trust Co.,* note 15, *supra.*

[22] *Brown v. O'Barn,* note 15, *supra, Fifield v. Van Wyck's Ex'r.,* note 15, *supra.*

[23] *Whitehurst v. Gotwalt,* note 2, *supra, Appeal of Crew,* note 2, *supra,* but see *In re White's Estate,* note 13, *supra.*

When the legatee has *probabilis causa litigandi* for contesting the will, even though such contest is unsuccessful, it does not work a forfeiture.[24] This exception has been adopted by ten jurisdictions, impliedly rejected by one;[25] and definitely refused by two.[26] The majority contend that to hold otherwise would not only work manifest injustice but would accomplish results no rational testator would ever contemplate. If undue influence or fraud is successfully exerted over one about to execute a will, that same influence will write into it a clause which will make sure its disposition of the alleged testator's property If the testator is insane or unduly influenced, then the instrument is not his will and his intention is not defeated by allowing a contest. The legitimate object of the forfeiture clause is to prevent vexatious litigation. It has been suggested[27] that a devisee who takes under a will knowing or having reasonable grounds to suspect that the will is a forgery, becomes, morally a *particeps criminis,* and yet, being unwilling to so remain silent, he is confronted with the alternative of forfeiting his benefit for sponsoring a disclosure. The law prescribes who may make, and in what manner a will may be made. Whether the law has been followed is a question for the court. In bringing a contest based upon *probable cause,* the contestant is aiding the court to determine the validity of the alleged will. The court must have the true facts from those who are in the best position to know them.[28]

The authorities to the contrary[29] are not without reason. To permit contests breeds family antogonisms, exposes family secrets better left untold, in many cases attacks the character of the testator when he is unable to defend himself, and squanders the estate itself. No such exception as *probabilis causa litigandi* is mentioned in the mill. To permit it is to allow the court to substitute its view for a clearly expressed intent of the testator to the contrary In criticizing the leading Pennsylvania case[30] sup-

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[24] *In re Chappel's Estate,* note 1, *supra, Smithsonian Institution v. Meech,* note 2, *supra, South Norwalk Trust Co. v. St. John,* 92 Conn 168, 101 Atl. 961, Ann. Cas. 1918 E, 1090 (1917) *Whitehurst v. Gotwalt,* note 2, *supra, Jackson v. Westerfield,* note 4, *supra, Appeal of Chew,* note 2, *supra, In re Friend's Estate,* 209 Penn. 442, 58 Atl. 853, 68 L. R. A. 447 (1904) *Rouse v. Branch,* note 2, *supra, Tate v. Camp,* note 2, *supra, Dutter v. Logan,* note 13, *supra, Powell v. Morgan,* 2 Vern. 90, 23 Eng. Rep. 668 (1668) *Lloyd v. Spillett,* note 15, *supra, Morris v. Burroughs,* note 15, *supra.*

[25] *Hoit v. Hoit,* note 5, *supra, Kayhart v. Whitehead,* note 7, *supra.*

[26] *In re Miller's Estate,* note 2, *supra, In re Bergland's Estate,* note 2, *supra, Moran v. Moran,* note 2, *supra.*

[27] *Rouse v. Branch,* note 2, *supra.*

[28] *South Norwalk Trust Co. v. St. John,* note 24, *supra, see dissenting* opinion *Moran v. Moran,* note 2, *supra.*

[29] See notes 25 and 26, *supra.*

[30] *In re Friend's Estate,* note 24, *supra.*

porting *probable cause,* Justice Angellotti of California said:[31] "It is a mere attempt at an artificial distinction to avoid the force of a plain and unambiguous condition against contest."[32] The Iowa court[33] points out that the question the legatee has to decide is the ordinary one which arises in nearly every business transaction—whether the thing offered is worth the price demanded.

What constitutes *probabilis causa litigandi* is a mixed question of law and fact.[34] The question only arises after an unsuccessful contest. It follows, if the exception is adopted, that unsuccessful litigation does not conclusively prove the contest vexatious. Advice of counsel,[35] and the testator having previously been adjudged insane,[36] have been held sufficient *probable cause* to prevent for feiture. What *probable cause* is turns on the facts of each case. No general rule has been laid down for its determination.

It is submitted that to deny forfeiture when the contest is made in good faith is the better rule and protects the testator against fraud, undue influence, and forgery, while at the same time, it more nearly effects his intent. It is the rule adopted in Washington.[37]

Only two jurisdictions have passed on the exception of holding the forfeiture clause inoperative when the contestant is an infant.[38] The New York court supports it on the theory that it would be contrary to public policy to deprive the court of the duty placed upon it by law for the protection of its infants. In Kentucky this distinction has been refused. It is pointed out that it is within the discretion of the court to refuse or to permit the guardian to sue for the infant. By the guardian's election to take under the will, the infant is not precluded from contesting

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[31] *In re Miller's Estate,* 156 Cal. 119. 103 Pac. 842, at page 844, 23 L. R. A. (N. S.) 868 (1909).

[32] See *In re Bergland's Estate,* note 2, *supra,* where the California court was forced to hold that the forfeiture provision had no application to an attempt made in good faith, although unsuccessful, to probate what purported to be a later will. The doctrine of probabilis causa litigandi would have saved embarrassment. See *In re Kirkholder's Estate,* 117 N. Y. Supp. 37 (1916).

[33] *Moran v Moran,* note 2, *supra, Massie v. Massie,* note 2, *supra.*

[34] *Stewart v. Sonneborn,* 98 U. S. 184, 8 Otto 187, 25 L. Ed. 116 (1879).

[35] *Dutter v. Logan,* note 13, supra.

[36] *Jackson v. Westerfield,* note 4, *supra.*

[37] *In re Chappel's Estate,* note 1, *supra.*

[38] *Moorman v. Louisville Trust Co.,* 181 Ky. 30, 203 S. W 856 (1918), Opinion extended. 181 Ky. 566, 205 S. W 564 (1918) *Woodward v. James,* (dictum), note 13, *supra, Bryant v. Thompson,* note 13, *supra.*

upon attaining majority as such is a personal right. He will, however, have to render an accounting for benefits previously received under the will.

When the forfeiture clause is annexed to a devise, it is effective unless there is a *probabilis causa litigandi* or the contestant is an infant. There need be no *gift over* [39] This is not only recognized by the states refusing the distinction between personalty and realty,[40] but also by those jurisdictions requiring a *gift over* in the case of personalty [41] It is submitted that since there should be no distinction between realty and personalty in enforcing or refusing a forfeiture, and since no logical reason exists in America for requiring a *gift over* when annexed to a bequest, the rule as stated for devises should be the true one applicable to both devises and bequests. The exceptions of *probable cause,* and the contestant being an infant, apply in the same manner to devises as to bequests.

The determination of whether the will has been contested or not within the meaning of the forfeiture clause, is dependent, to a great extent, upon the particular equities involved in the facts of each case, and, upon the attitude of the court regarding the validity of the clause in general. Courts which have previously committed themselves by favoring the clause and permitting forfeiture, escape their position in certain cases by holding that no contest, within the meaning of the testator, has taken place. The word "contest" is given legal significance.[42]

It is generally held that a suit for the the construction of a will is not a contest.[43] Its object is to determine the intent of the testator—not to defeat it. The filing of a *caveat* is not sufficient *contest.*[44] Although a legatee who aids and abets a contestant forfeits his share under the will,[45] a legatee does not incur a for-

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[39] *Wright v. Cummins,* note 15, *supra, Sackett v. Mallory,* 42 Mass. 355 (1840) *Hoit v. Hoit,* note 7, *supra, In re Arrowsmith,* note 15, *supra, Whitehurst v. Gotwalt,* note 2, *supra, Thompson v. Gaut,* note 7, *supra, Massie v. Massie,* note 2, *supra, Dutter v. Logan,* note 13, *supra.*

[40] See cases cited in note 16, *supra.*

[41] See cases cited in note, 15, *supra.*

[42] *In re Hite's Estate,* note 2, *supra,* Contra: *Moran v. Moran,* note 2. *supra.*

[43] *Black v. Herring,* 79 Md. 146, 28 Atl. 1063 (1894) *Perry v. Perry,* 175 N. C. 141, 95 S. E. 98 (1918) *Woodward v. James,* note 13, *supra.*

[44] *Drennen v. Heard,* 198 Fed. 414 (1912) *In re McCahan's Estate,* 221 Penna. 188, 70 Atl 711 (1908)
(1877).

[45] *Drennen v. Heard,* note 44, *supra, Donegan v. Wade,* 70 Ala. 501 (1877).

feiture by voluntarily testifying in favor of a contesting heir and admitting that he was in sympathy with him.[46] Presenting a subsequent will, in good faith, which is rejected, is not a *contest.*[47] Filing a petition of contest which is later dismissed or withdrawn, either with or without a settlement, is a contest within the meaning of the clause.[48] In Washington it has been held that one holding property by deed does not forfeit that same property by contesting a will simply because it is also devised to him in a will made after the deed.[49] A claim against the estate is not a *contest.*[50] A widow's unsuccessful suit for dower is not a breach of the forfeiture clause because had she recovered, the will would not have been broken.[51] The beneficiaries under the will are the only ones able to claim a forfeiture. If they do not so claim, the executor cannot object.[52] In general, a contest within the meaning of the forfeiture clause is that which goes to defeat the testator's intention.[53]

In summary, a provision in a will forfeiting the share of a contesting beneficiary is not contrary to public policy When such a provision treats with personalty, the contesting legatee forfeits his share when there is a *gift over* of the bequest to the residuary clause or a third person providing the contest is not based on *probabilis causa litigandi,* and the contesting legatee is not an infant. A few jurisdictions deny the exceptions. When the forfeiture clause is annexed to a devise, it is operative unless *probable cause* exists, and the contestant is not a minor. The *probable cause* exception has been refused by two jurisdictions.

It is submitted that there should be no difference in the rules applicable to realty and personalty No reasons present themselves to justify the distinction of requiring a *gift over* in one instance and not in the other. The better and more logical rule for all property is that applicable to devises, repudiating the necessity of a *gift over* for personalty, and recognizing the exceptions

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[46] *Haradon v. Clark,* 190 Ia. 798, 80 N. W 868 (1921) *Richards v. Piefer* 229 Mich. 609, 201 N. W 877 (1925) *Scott v. Ives,* 32 N. Y. Supp. 168 (1898) For *conspiring to contest,* see *In re Largue's Estate,* 198 Mo. App. 261, 200 S. W 83 (1918)

[47] *In re Bergland's Estate,* note 2, *supra, In re Kirkholder's Estate,* note 32, *supra.*

[48] *In re Arrowsmith,* note 15, *supra, Tate v. Camp,* note 2, *supra.*

[49] *White v. Chellew,* 108 Wash. 628, 185 Pac. 621 (1919).

[50] *Wright v. Cummins,* note 15, *supra.*

[51] *Harber v. Harber* 158 Ga. 274, 123 S. E. 114, 33 A. L. R. 598 (1924)

[52] *Williams v. Williams,* 83 Tenn. (15 Lea.) 438 (1885).

[53] See notes in 5 A. L. R. 1370· 14 *ibid.* 609· 26 *ibid.* 764.

of *probable cause* and minor contestants. However, if the will is so worded as to make acquiescence to the will by the legatee a condition precedent to the bequest, the *probable cause* exception is not applicable because the provision against contest is not a forfeiture provision but a conditional limitation upon making the bequest in the first place.[54] This offers also a means of evading the arbitrary rule applicable to bequests in requiring a *gift over*

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RECENT CASES

AUTOMOBILES—DUTY OF CITY TOWARD UNLICENSED AUTOMOBILE TO MAINTAIN SREETS. The plaintiff brought suit against the city to recover for personal injuries sustained in an automobile accident alleged to have been caused by the failure of the city to provide sufficient guard rails on a bridge. The automobile was not registered as required by law, and consequently its operation on the highway was in violation of the statute providing that no motor vehicle should be so operated until properly registered. *Held:* The plaintiff was a trespasser on the highway to whom the city owed no duty to keep the streets reasonably safe, and in the absence of such duty, the fact that there was no causal connection between the illegal operation of the vehicle and the injury was immaterial. *City of La Junta v. Dudley*, ..., Colo. ....., 260 Pac. 96 (1927).

This case follows the doctrine laid down in Maine in the leading case of *McCarthy v. Inhabitants of Leeds*, 115 Me. 134, 98 Atl. 72, L. R. A. 1916E, 1212 (1916) and reaffirmed by the same court on several occasions. In Maine, as in the principal case, recovery is denied only in actions against municipal corporations or other public bodies charged with the duty of maintaining the highway in a safe condition. Massachusetts extends the rule so as to deny recovery in all cases. *Doherty v. Ayer*, 197 Mass. 241, 83 N. E. 677, 14 L. R. A. (N. S.) 816 (1908). Cases holding the contrary of both the Maine and Massachusetts doctrines are: *City of Huntsville v. Phillips*, 191 Ala. 524, 67 So. 664 (1914), *Church v. Kansas City*, 280 S. W 1053 (Mo. App. 1926) *Phipps v. Perry*, 178 Iowa 173, 159 N. W 653 (1916) *Hersman v. Roane County Court*, 86 W Va. 96, 102 S. E. 810 (1920).

No case squarely in point has as yet been decided in Washington. On similar facts recovery has been had against private parties in *State v. Switzer*, 80 Wash. 19, 141 Pac. 181 (1914) and *Johnnsson v. American Tug Boat Co.*, 85 Wash. 212, 147 Pac. 1147 (1915). In *Koch v. Seattle*, 113 Wash. 583, 194 Pac. 572 (1921), the plaintiff recovered from the city, but the defense involved the violation of a city ordinance requiring a driver's permit for persons under the age of eighteen. The present Washington statute, Rem. Comp. Stat. § 6362 (P C. § 234-2) differs slightly from the one in the principal case by providing that any violation of the licensing law shall be a misdemeanor, rather than expressly prohibiting use of an unregistered vehicle. Some distinction has been drawn in some of the decided cases between these different types of statutes, but this would seem to be an unwarranted refinement of interpretation. Considering the fact that licensing laws were passed primarily for purposes of revenue and identification, it logically follows that both prohibitory and punitive statutes were meant to effect enforcement of the law, rather than govern

[54] *Cook v. Turner*, note 1, *supra*, See 12 Am. B. A. J. 236.