Marquette Law Review

Volume 10
Issue 3 *April 1926*

Article 11

Wills: Condition in a will, requiring a forfeiture of substantial sum in case of contesting, is against public policy, where there exists probable cause and good faith

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The words of the court are sufficient to detail the situation which came into existence on the footsteps of this decision. Considering the number of foreign motorists who visit the state during the summer months, the complications that might result would be many Unscrupulous traffic officers could lead innocent drivers into serious situations and subject them to unjust court actions without incurring more than a *moral* obligation. The court is to be commended for calling attention to the gravity of the question.

The suggestion to the Legislature was well received for on May 22. 1925, section 85.01, subd. 3 was amended to read as follows

Every such operator or driver shall keep to the right of the center of highway intersections when turning to the right and shall pass to the right of such center when turning to the left, EXCEPT WHERE MARKERS OR SIGNS SHALL HAVE BEEN PLACED BY THE PUBLIC AUTHORITIES HAVING JURISDICTION OF THE HIGHWAY OR STREET, INDICATING OR DIRECTING THAT PUBLIC TRAVEL SHALL FOLLOW A DIFFERENT COURSE.

This amendment adjusts the former apparently unfair condition and foreign, as well as local, drivers of automobiles can follow the orders and directions of traffic officers without fear of violating the law In a state like Wisconsin, which is visited yearly by thousands of tourists, the law as it now stands is as it should be, and the Legislature is to be congratulated for having acted so promptly after the suggestion given by our Supreme Court.

H. U. A.

Wills Condition in a will, requiring a forfeiture of substantial sum in case of contesting, is against public policy, where there exists probable cause and good faith.—In a recent Wisconsin case. *In Re Keenan's Will,*[1] the will contained a provision that if any legatee opposed the probate of the will, that person's legacy should be forfeited. The legatee contested on the ground of lack of testementary capacity of the testatrix, and the lower court, ignoring the advisory verdict of the jury which found that at the time of the execution of the will the testatrix did lack testamentary capacity, admitted the will to probate. The Supreme Court affirmed the lower court.[2] Subsequently, the executor petitioned the county court for a construction of the will to determine whether or not the contestant had forfeited his legacy, and the court, adhering to the terms of the will found that he had. On appeal, the Supreme Court reversed this ruling, and held that, because our constitution provides for every person's right to the remedies of the law, and the right to obtain justice freely and without being obliged to purchase it, completely and without denial[3]—to allow a condition of this kind would be contrary to public policy in the view of such constitutional provision and the statutes which make it the duty, under heavy penalty, of the county judges, executors, and all other persons who have possession of wills to present them for probate.[4] After

[1] 205 N.W 1001 (Nov. 1925).

[2] 171 W 94.

[3] Art. 1, Sec. 9, Wis. Const.

[4] Sec. 310.01, 310.03, Wis. Stat.

enumerating the statutory steps required for the probate of a will, the court said, "They evince a clear recognition and declaration of the legislature that there is public policy involved in the establishment of every legally executed will." Since the subject of wills and the succession of property is of interest to even the layman, it may be of value to compare Wisconsin's position with that of other jurisdictions.

In *Cooke v Turner* (1846)[5] the will incorporated a forfeiture clause substantially similiar to the instant case. The court held the clause valid because the state is not interested in whether the heir or devisee takes the property, leaving the parties alone to make their own contracts. The case was approved in *Eventural v. Eventural,*[6] and in *Donegan v. Wade*[7] a provision in a will declaring a forfeiture in the event of a contest was held binding, as was also held in *Bradford v. Bradford,*[8] which was decided largely on *Cooke v. Turner* The Supreme Court of California has affirmed *Cooke v Turner* in *In Re Kite,*[9] and *In Re Miller*[10] sustained a will with a forfeiture clause where their existed probable cause.

From most of the cases cited it was impossible to determine whether or not there was probable cause, but in the following cases, as in the case under comment, there was probable cause. *Morris v Borroughs*[11] held the provision "in terrorem" only and no forfeiture, and *Jackson v. Westerfield*[12] also held no forfeiture where there existed probable cause. The New York case, *In Re Kathan's Will,*[13] sustained the same ruling, and the authorities are reviewed at considerable length. The rule of the instant case is also approved in *Whitehurst v. Gotwalt,*[14] *Rouse v Brunch*[15] and *In Re Friend.*[16]

Werner, in his authentic work *The American Law of Administration*[17] quotes *In Re Friend (supra)* to the effect that if there is *probabiles causa litigandi* the forfeiture cannot be enforced. In his work on wills, Shouler says

> To exclude all contests of the probate on reasonable ground that the testator was insane or unduly influenced when he made the will, 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.[18]

Chancellor Wardlow of South Carolina in *Mullet v Smith*[19] says, "A condition subsequent of this description is void whether there is a

[5] 15 Meeson and Welsby's Reports.
[6] 6 Privy Council Appeals 1 (1873).
[7] 70 Ala. 501 (1881).
[8] 19 Ohio St. 546 (1866).
[9] 155 Cal. 436 (1909), 101 Pac. 443.
[10] 156 Cal. 119 (1909), 103 Pac. 842.
[11] 1 Atkyns 404 (1739).
[12] 61 How Prac. (N.Y.) 400 (1881).
[13] 141 N.Y.S. 705.
[14] 127 S.E. 582 (1925).
[15] 91 S.C. 111, 74 S.E. 133.
[16] 209 Pac. 442.
[17] Third Ed., Vol. 3, par. 1, 1503.
[18] Sixth Ed., Vol. 2, par. 1344.
[19] 6 Rich Eq. 12.

devise over or not, as touching on the 'liberty of the law.'" A note in *40 Cyc 1705* remarks that some jurisdictions recognize that probable cause bars forfeiture. In a note in *68 L. R. A. 452* the above exception is reiterated.

Whether we recognize *Cooke v. Turner* as the general rule or not, there are a number of jurisdictions which recognize *In Re Friend (supra)*, and if we say *Cooke v. Turner* is the general rule, then the answer must be that *In Re Friend* and the cases following it are exceptions. In view of the fact that it is desirable for the courts to have all the facts before them, and since courts are instruments of justice, it would be against public policy for the courts to sanction one person's preventing another from having his day in court, when that other's litigation is based upon probable cause.

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