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In Terrorem Clauses in Wills

George A. Slater

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In Terrorem Clauses in Wills

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St. Ives Memorial Window
Presented by the American Bar
to the
Cathedral at Trégunter, Brittany
May 19, 1936
IN TERRORREM CLAUSES IN WILLS

GEORGE A. SLATER

It is unusual to find an *in terrorem* clause in a testamentary document. Many will ask, what is an *in terrorem* clause? The term has been applied by the courts to gifts that are made on condition subsequent, gifts that tend to inspire fear or dread. "*In terrorem*" means "by way of threat, terror or warning." What creates the terror is the fact that the legacy becomes null and void if the legatee fails to observe the condition and there is a gift over to persons other than through the residuary clause. It is a method of bringing pressure upon a person to induce the surrender of something.

*In terrorem* clauses are usually aimed at legatees who are next of kin, affecting their rights to contest a will, or in restraint of marriage. An *in terrorem* clause is lawful if properly drawn. Chief Judge Andrews in *Hogan v. Curtin* classified an *in terrorem* clause as but "a convenient phrase adopted by judges to stand in place of a reason for refusing to give effect to a valid condition." Here is where we have the first evidence of the doctrine of public policy.

As a general proposition, conditions subsequent not to dispute the validity of a will or certain provisions therein will be upheld in New York. To the extent of the bare statement of the rule, it is in accord with decisions obtaining in other jurisdictions. In this state the general tendency has been to hold such conditions void if they contravene established and well-founded principles of law, or conflict with a reasonable interpretation of rights of beneficiaries. There is no limit to the control of our courts in not giving effect to harsh, unreasonable or impolitic restrictions. The principal exceptions to the general rule may be classified thus:

† Surrogate of Westchester County, New York.
1. 88 N. Y. 164, 172 (1882).
1. Where the condition is indefinite or too broad, it will be held ineffective and the legatee will take nevertheless.\(^4\) In *Matter of Jackson*, the will provided that if "any person or society be dissatisfied with any gift herein made, then, in that case, said gift shall be wholly withheld."\(^5\) (Apparently there was no provision for a gift over). One of the legatees filed objections to probate for insufficiency of execution, and to the validity of certain provisions. It was held that "The language of the will relating to this subject [the provision] is so indefinite and uncertain that the testator's intention cannot, with any certainty, be ascertained. Apparently any dissatisfaction as to any gift therein made is sufficient to debar a legatee from taking a legacy. A condition so broad and sweeping, if intended, could not be enforced, for it could not be ascertained whether it has been violated."\(^6\) The court held that the contestant had not forfeited his legacy.\(^7\)

2. Where there is *causa probabilis litigandi* for a contest, or a construction of the will, the condition is ineffective.\(^8\) In *Jackson v. Westerfield* the Fourteenth clause of the will (without provision for gift over) provided:

"In case any one or more of the persons to whom I have hereby given or bequeathed any legacy or any portion of my estate, shall make any opposition or controversy in any court of law or otherwise, in relation to the validity of this my will and appointment, or in relation to any of the legacies or other matter therein contained, each and every person so making such opposition or controversy shall thereby forfeit every portion of my estate hereby given or bequeathed to him or her, and he or she shall be excluded from all participation in my said estate in any manner whatever."\(^9\)

It was contended that opposition by certain legatees to probate of the will on account of lack of testamentary capacity effected a forfeiture of legacies in their favor. The testatrix had once been duly declared incompetent and a committee appointed.

The court said:\(^{10}\)

". . . Clauses in wills which impose restraints upon proper inquiry into testamentary capacity and the legality and validity of property should not be favored."

". . . The clause in question is very broad, and if allowed to stand in its length and breadth I am not sure but that it would prohibit a legatee from suing for his legacy, as it might involve a controversy about the will, or from

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5. Id. at 381.
6. Ibid.
10. Id. at 407, per Van Vorst, J.
taking part in any litigation in which the will, ‘legacies or other matters therein contained,’ might be properly brought in question, as it would put in jeopardy whatever benefit the will secured to him. A clause in some respects similar to the above was under consideration in Rhodes agt. The Munswell Hill Land Co. (20 Beaven R., 560), and it was held to be absurd, inconsistent and repugnant. It has been held in times quite early that a condition of this kind attached to a bequest of personalty where there was no gift over to a third person is not obligatory, but in terrorem only, and if there is probabilis causa litigandi there will be no forfeiture [citing authorities].

“I cannot say that the opposition to the probate of the will was not interposed in good faith, or that it was vexatious. In fact, I think there was probable cause to justify an inquiry into the testamentary capacity of the testatrix. She had once been adjudged—in a proceeding instituted for the purpose of inquiring into her mental condition—of unsound mind, and a committee of her person and estate had been appointed. The result in the surrogate’s court, however, upheld the will, I do not think that the persons who took part in such opposition have forfeited their legacies, but are entitled to receive the same.”

In Woodward v. James, plaintiff, an infant, by his guardian, brought action for construction of a will which provided, inter alia, that:

“I give, devise and bequeath to my legal heirs, except as herein provided otherwise, the reversion and ownership of all my estate and property, after the death of my wife, with the reservation, exception and direction that in the event of any of my legal heirs making any attempt, directly or indirectly, in any manner or form, to interfere with or restrain, in any manner, my beloved wife from the full enjoyment, use, management, direction and disposition of the property and income of my estate as herein devised, then and in that event, such one of my legal heirs as shall do or perform or aid or abet the performance of such an act, or cause the same to be done, shall be forever debarred from any part, parcel, interest or ownership or inheritance to any of my property, and be excluded from sharing in the same, and the share that would otherwise have gone to him or her shall be divided among the remaining heirs, according to law.”

There was a gift over in the event of forfeiture. Macomber, J., concluded:

“The only remaining question is whether or not the plaintiff, by bringing this action, has debarred himself from sharing in the property under the prohibitory clauses of the will. Although this position is taken in the printed briefs, yet we do not understand counsel to have insisted, upon the oral argument, that a declaration of this court to that effect should be made.

11. Citing 1 ROPER, LEGACIES (2d Am. ed.) 795; 1 JARVIS, WILLS (3d Am. ed.) 713, 850; 2 WILLIAMS, EXECUTORS 1093; Powell v. Morgan, 2 Vern. 90, 23 Eng. Reprints 669 (Ch. 1688); see Morris v. Burroughs, 1 Atkyns 399, 404, 26 Eng. Reprints 253, 256 (Ch. 1737); Lloyd v. Spillet, 3 P. Wms. 344, 345, 24 Eng. Reprints 1094, 1095 (Ch. 1743).

12. 44 Hun 95 (N. Y. 1887).

13. Id. at 97.
Indeed, were it otherwise, we should feel constrained, under the circumstances, to overrule it, not only upon the ground stated by the learned trial judge, namely, that the plaintiff is an infant, but upon the further ground that the action itself was not, in its scope and purpose, intended to defeat the known and established intention of the testator, but to obtain an adjudication as to what the intention was. This is not an interference with the legal rights of the executrix and trustee.

“Had the action been based upon an allegation of undue influence in procuring the will, or of the mental incapacity in the testator, or of duress, and the plaintiff had been defeated upon the issues, a different question would probably arise. Indeed, the fact that we feel constrained to differ from the trial judge in relation to the extent of the interest of the infant in the estate is sufficient to show that the action was not brought without a semblance of a just claim.”

3. Where the condition is repugnant to the devise or bequest, it is void.\textsuperscript{16} Dorland v. Dorland\textsuperscript{16} held in substance: (1) That where the gift of a legacy is absolute, a subsequent direction to the executors to put the money at interest for the support of the legatee does not in any manner revoke, or qualify, the donation. It merely relates to the investment, and being inconsistent with the absolute title before given to the legatee, it is null and void. (2) That there can be no valid qualification, subsequently attached, to a fee simple absolute in lands, or to a full title to personal property. (3) That a direction in a will, that the executors shall pay to a legatee such part of a legacy previously given in absolute terms, as may appear proper to them, is inconsistent with the absolute gift, and is therefore void.

Staples v. Hawes\textsuperscript{17} held, with respect to a repugnant provision that, when a trust created by will is in violation of the statute prohibiting the suspension of the power of alienation beyond certain periods, the heir will not, by electing to take under the will, waive the right to contest such void trust.

4. Where the rights of an infant are violated, the condition is ineffective.\textsuperscript{18} In Bryant v. Thompson there was a condition forfeiting

\begin{footnotes}
\item[14] Id. at 100.
\item[16] 2 Barb. 63 (N. Y. 1847).
\end{footnotes}
the legacy if any legatee contested probate of the will. In the course of the opinion, O'Brien, J., pointed out that:

"The Special Term held that the contest before the surrogate, by and in the name of the special guardian, was not a contest by the daughter in person or by another within the meaning of the clause in the codicil expressing the conditions upon which the legacy should vest and that she was entitled to the bequest. The General Term affirmed the judgment, but upon the ground that the daughter, being an infant and having merely submitted her rights to the court the revoking clause was, as to her, an attempt to subvert the course of judicial proceedings and to deprive the court of the right and duty imposed upon it by law in all cases to institute, of its own motion, proper proceedings for the protection of infants, and that as to the daughter the condition was void as against public policy. It held that the contest must be deemed to have been made by the daughter, although the actual steps were taken by the guardian."

The appeal was dismissed and the point was not passed on directly because the appellants had no standing in the court.

*Matter of Storey* was a construction proceeding involving a will in which it was provided that any beneficiary who should "bring suit to nullify, change or attack this will, or in any way interfere with the foregoing provisions, or join with any party in any attempt to do any of the foregoing . . ." caused forfeiture. In an action initiated by an executor, a special guardian for an infant made certain opposition, but the court concluded that a legatee does not forfeit his rights where the proceedings do not come within the scope and meaning of the condition and ". . . the special guardian on behalf of the infants could not on any reasonable construction be deemed to come within the intent or wording of this clause." *Vandevort's Estate* held in substance that the rights of infant remaindermen of the life tenant's family were unaffected by a contest by the life tenant despite the fact that the will so provided. In *Matter of Andrews* the court refused to countenance a provision characterized as unconscionable and absurd.

5. Where the condition is contrary to established principles of common law, or to the statutes, it is void. In the *Kathan Will Case* Surrogate Fowler wrote an illuminating opinion regarding the common and testamentary law concerning the validity or invalidity of conditions. The subject was treated with considerable thoroughness and it was held in substance that, although a testator may limit a devise upon any condition that is lawful, yet if the condition that a devisee shall not dispute is used in order to sustain illegal devises or bequests, it cannot be enforced. In commenting on this point, the court said:

23. Bryant v. Thompson, 59 Hun 545, 14 N. Y. Supp. 28 (1891), aff'd, 128 N. Y. 426,
"That a testator has the power to provide that his beneficiaries take or hold only on condition that such beneficiary shall not dispute the will, in whole or in part, is to some reasonable extent determined. But such a general statement requires modification. In any limitation testator must see to it that the condition, as expressed in his will, does not violate the common law governing conditions; otherwise, the condition is void. By the common law it is conclusively established that no condition contrary to the duty or legal obligation of the donee, or contra bonos mores, or contrary to public order or policy, is enforced . . . ."24

With respect to rights of infants, *Bryant v. Thompson*25 was cited with this comment:

"In *Bryant v. Thompson* the court held in substance that a condition that an infant beneficiary should not contest a will was contrary to public policy."226

6. Where the condition subjects the legatee to a forfeiture for doing that which is his duty, it is void.27 The importance of a *bona fide* contest is illustrated in *Matter of Kirkholder*. A clause in the will provided for forfeiture if a legatee should engage to "controvert, dispute or call in question the validity of this will." The plaintiff, an adult, had fraudulently written and offered for probate a will demonstrated to be spurious. The court held that under the clause the legatee "does not forfeit his legacy by presenting for probate an alleged later will which is denied probate, provided he acts in good faith with probable cause to believe that such later will is a genuine instrument and is entitled to probate."28 Further on in the opinion Judge Foote stated that, if the later will had been genuine, "It would be against public policy to subject her [the legatee] to a penalty of forfeiture for doing what it was her duty to do."229 The lower court, which was affirmed, had stated that "... a contest made by a special guardian has not prevented the infants from receiving a bequest, the minor not being held responsible for the act. The forfeiture clause has been held invalid when it clearly appears that the contest was justifiable, and not the mere vexatious act of a disappointed beneficiary."230


26. 59 Hun 545, 14 N. Y. Supp. 28 (1891); aff'd, 128 N. Y. 426, 28 N. E. 522 (1891).


29. *Id.* at 155, 157 N. Y. Supp. at 39.

A contemporaneous comment on this case was as follows:

"But the validity of such conditions [not to dispute a will] is still much in dispute. On this broader question, some jurisdictions hold that even a contest on reasonable grounds works a forfeiture. Others, however, will not permit a reasonable contest to forfeit the gift, because of the public policy against affording protection to possible fraud, coercion, or forgery. This policy appears to exist, and wherever possible conditions should be construed to apply only to unreasonable contests. If, however, a condition seems clearly intended to apply to all contests, it is submitted that it must be held entirely inoperative."

_Matter of Bratt_ held that to take part in the proceedings incident to the probate of a will, or opposing its probate by filing objections, does not necessarily forfeit the share of a legatee, because such legatee has "simply aided the surrogate in the performance of his bounden duty." It is the statutory duty of the surrogate to inquire particularly into all the facts and circumstances, and to satisfy himself of the genuineness, and the validity of its execution. There must be something more to void a legacy. The rule in _Matter of Forte_ negatives the effect of any provision which compels the violation or encourages the omission of any duty.

7. Where there is no gift over of personalty in the event of breach, the condition is void despite a residuary clause. In connection with the construction of conditions not to dispute a will the courts were repelled by their harshness and the manifest injustice they often caused. Judges cast about for a reason to void them, and applied the rule that such a condition in a will is to be strictly construed in favor of the beneficiary if it is possible to do so without rendering the language fantastic or without putting an unauthorized construction on the words. Often the courts found this rule of construction insufficient for the purpose of avoiding conditions. They fastened upon the possibilities offered in requiring that there must be a gift over of personalty to make the condition valid. A residuary clause was insufficient.

32. Citing Smithsonian Institute v. Meech, 169 U. S. 398 (1898); _In re Miller's Estate_, 156 Cal. 119, 103 Pac. 842 (1909); Moran v. Moran, 144 Iowa 451, 123 N. W. 202 (1909).
34. 10 Misc. 491, 32 N. Y. Supp. 168 (Surr. Ct. 1394).
The will in *Matter of Arrowsmith*\(^8\) provided:

"SIXTH: If any relative contests the probate of my will, or makes any attempt to prevent the carrying out of my intentions, as herein expressed, that I direct that such relatives shall lose and forfeit any claim or interest he or she may have therein, under any of the above provisions."

A legatee commenced action for the purpose of invalidating the will on the ground of undue influence and incompetence, but acquiesced in judgment of dismissal. The court said:\(^{30}\)

"As to when a legacy is forfeited under such a clause in a will as the one quoted above there is no little confusion in the cases, with little that can be said to be authoritative. The approved rule seems to be that in case of a legacy of personal property such a provision is merely *in terrorem* and not enforcible unless there be a gift over\(^40\) in case of breach and that a general gift of the residue is not a gift over. The rule seems to be otherwise in case of a devise of realty, but in this case the direction to the executor to sell the real estate was imperative and worked an equitable conversion so that the gift to the home was of personalty."

8. Where there is a condition in restraint of a legal marriage or to interfere with an existing marriage, it is void.\(^{41}\) This exception to the general rule is expressed in *Hogan v. Curtin*:

"A condition prohibiting marriage before twenty-one without consent, is by the common law valid and lawful. It is otherwise of conditions in general restraint of marriage, they being regarded as contrary to public policy, and the 'common weal and good order of society' . . . .

"It is a clear proposition, therefore, that, according to the settled law of England, the legacy in this case, if it be regarded as a purely personal legacy, was not forfeited by the marriage of the testator's daughter without consent. There was no devise over on breach of the condition. The only gift over was in the event of the daughter's dying unmarried before twenty-one. It has been frequently decided that a general gift of a residue is not a gift over within the rule. . . .

"On the ground, therefore, that the condition in this case was lawful; and that there is no personal estate to pay the legacy; and that it cannot be enforced as a charge against the real estate by reason of the breach of the condition, we think the judgment [that the legatee had forfeited the legacy by reason of the marriage without consent] should be affirmed."\(^{42}\)

In *Matter of Haight*\(^{43}\) the testator bequeathed income from his estate up to $2,000 annually to his son so long as the son's wife lived, or so

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42. Hogan v. Curtin, 88 N. Y. 164 (1882).
43. 51 App. Div. 310, 64 N. Y. Supp. 1029 (2d Dep't 1900).
long as the son shall be lawfully bound to her as her husband and at her death, or in case he should cease to be bound to her as her husband, then the whole income to be paid to the son. The son contended that the provision which made his enjoyment of the whole of the income dependent on the termination of his marriage relation was void as against good morals and public policy. The court agreed and held that an illegal or void condition subsequent, annexed either to a devise of realty or a bequest of personalty, will be disregarded and the estate or interest given will be considered as vested, absolute, and relieved of the condition.

9. Where there is a condition providing for forfeiture of a bequest if a claim is presented against the estate, it will be disregarded if the claim is legitimate and the legacy is not in lieu of payment thereof.\textsuperscript{44} \textit{Matter of Cronin}\textsuperscript{45} held that, where a will directed payment of a testator's lawful debts, the presentation by a legatee of a note, signed by the testator to the executrix for payment, did not void a legacy under a condition that any person named in the will who made any claim against the estate should forfeit all right or benefit thereunder. These exceptions to the general rule find exceptions in other states and in England.\textsuperscript{46} Where decisions have seemed to be to the contrary, the conditions were in the nature of being precedent to the acceptance of the bequest or there was involved a devise of real property and not a bequest of personalty. However, courts which refused to follow the general rule, with exceptions, appear to be in the minority, and such decisions have not been followed, or have been overruled.

I have presented a synopsis of the law in this state with respect to conditions not to dispute a will or its provisions. In none of these cases, however, was there any condition pointedly designed to prevent disputing the administration of a trust, and from research I am unable to determine that such a situation has ever been directly passed upon in this jurisdiction.

The recent case of \textit{Matter of Andrus}\textsuperscript{47} was a construction proceeding. The testator attempted a control of the disposition, administration and investment of property forming the corpus of certain \textit{inter vivos} trusts through the insertion in his will of a condition subsequent in the nature of an \textit{in terrorem} clause requiring the testamentary beneficiaries, without question, to acquiesce in and to ratify the administration of such trusts on penalty of forfeiture of testamentary benefits.\textsuperscript{48}

\begin{itemize}
\item \textsuperscript{45} \textit{Ibid.}
\item \textsuperscript{46} \textit{E.g., Chew's Appeal, 45 Pa. 228 (1863); In re Williams, [1912] 1 Ch. Div. 399.}
\item \textsuperscript{47} \textit{156 Misc. 268, 281 N. Y. Supp. 831 (Surr. Ct. 1935).}
\item \textsuperscript{48} Cases in other jurisdictions which may reflect upon the matter decided in the
\end{itemize}
A testator has the right to attach to a bequest or devise made by him any condition, whether sensible or futile, provided only that it is not illegal or opposed to public policy. While a condition in general restraint of marriage is inoperative, a condition which is merely in special restraint of marriage is ordinarily valid. It was held in Matter of Salomon that the condition prescribed was not in general restraint of marriage and not illegal.

In terrorem conditions may offend the public policy of the state or fall within a line of cases where the condition imposed is ordinarily valid. In the Andrus Case the condition was aimed to prevent fiduciaries from exercising their property rights affecting two inter vivos trusts made some ten years before the will took effect. The question presented to the court was, did the condition infringe upon public policy? It was contended that it was the public policy of the state of New York to protect persons in their right of property; that it is against such policy to permit a person to bargain away such right; that it is against such public policy to substitute the ideas of a person in place of the law, or to permit the impairment of the power of the judicial process.

Public policies in general are those considerations of public interest and morality which the state enforces by legislation, or by judicial action. The earliest trace of this principle in the English law reports is found in a case decided in the reign of Henry V in 1414, when a dyer had contracted not to use his art within a certain town for a certain time, and the court went upon the principle that it was not good for the realm, that it was against public policy for men to bind themselves not to exercise their trades. The principle of public policy has never been repudiated and its application has varied with changing conditions and public opinion. It is applied in avoiding contracts, for the stifling of criminal prosecution, or the perversion of justice in civil suits.

The principle of public policy owes its existence to the very sources

Andrus Case may be found in Lee v. Colston, 21 Ky. 238 (1827); Lloyd v. Spillet, 3 P. Wms. 344, 24 Eng. Reprints 1094 (Ch. 1734); Adams v. Adams, 45 Ch. Div. 426 (1890), aff'd, 1 Ch. Div. 369; In re Williams, [1912] 1 Ch. Div. 399.


53. See Matter of Cook, 244 N. Y. 63, 69, 154 N. E. 823, 825 (1926).


from which the common law is supplied.\textsuperscript{56} Private rights are shaped by public policy. When we speak of the public policy of the state, we mean the law of the state, whether found in the constitution, the statutes, or judicial records.\textsuperscript{57} In a judicial sense, public policy does not mean simply sound policy, or good policy, but it means the policy of a state established for the public weal, either by law, by courts, or by general consent.\textsuperscript{58} Public policy is necessarily variable. It changes with changing conditions. It is evidenced by the expression of the will of the legislature contained in statutory enactments. The power to determine what the policy of the law shall be rests with the legislature within constitutional limitations, and, when it has expressed its will and established a new policy, courts are required to give effect to such policy. A result which is against public policy is not to be condoned because the act was done with an innocent intent.\textsuperscript{59} What is against public policy is to be determined in particular instances upon facts which may be found to be against substantial public interest.

The power of the state to regulate the tenure of real property within its limits, the modes of its acquisition and transfer, the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. For instance, the rights of dower and curtesy may be wiped out altogether, or modified, as has been done by the recent Decedent Estate Law. Trusts may not be created beyond two lives in being, and a fraction over. Testamentary gifts to charitable and religious associations of more than one-half of the testator's estate are prohibited. The privilege to acquire property and to will it is granted by the laws of the state. The right to make a will is a privilege. However, the right of the heir or devisee is protected in his right to property by the state and federal constitutions. The statutes of the state enacted to protect persons in the right of property, and in the administration thereof, are laws enacted from the viewpoint of public interest. They take on a state interest and all fall within the doctrine of public policy. The basic principle of this doctrine is the good of the whole people. The laws of the state founded upon public policy control our everyday acts and rights. The state tells us what we may do and how we may be protected in our persons and property rights. The legislature may change the principles of

\textsuperscript{56} Ballantine, Law Dictionary (1930) 1048; Winfield, Public Policy in the English Common Law (1928) 42 Harv. L. Rev. 76.
\textsuperscript{57} See People v. Hawkins, 157 N. Y. 1, 12, 51 N. E. 257, 260 (1898).
\textsuperscript{59} Comment (1933) 19 Corn. L. Q. 157.
public policy as they affect various conditions of life from time to time. For instance, prior to the amendment of Section 17 of the Decedent Estate Law made in 1929, it was the public policy of the state to control testamentary gifts by those who sought to give their estates to certain named charitable corporations. They permitted a gift of only one-half to such corporations, not because there is a legislative policy against corporations but because there is a public policy enunciating in favor of those near and dear to the testator—the preferred class. The preferred class, as well as the heirs and next of kin, has a property right in the excess. This was changed, however, by the insertion of a clause stating that the validity of a devise or bequest for more than such one-half may be contested only by the preferred class.  

This amendment suspended the right of distributees to take; at least, only the right of contest was exercised by the preferred class.

There are many decisions of the courts evidencing examples of public policy. These laws are samples of Anglo-Saxon concepts of governmental

60. N. Y. Laws 1929, c. 229. § 3.

Matter of Hutchins, 147 Misc. 462, 263 N. Y. Supp. 896 (Surr. Ct. 1933) held that a condition tending to disrupt a marital status was contrary to public policy and void. Matter of Seaman, 218 N. Y. 77, 112 N. E. 576 (1916). What the law condemns is an unreasonable restraint on marriage or a condition annexed to a gift which encourages or induces a separation. Such condition and restraint are void because they violate sound public policy. The policy of the state has been to refuse to recognize as binding a decree of divorce obtained in a court of a sister state not the matrimonial domicile. See Hubbard v. Hubbard, 228 N. Y. 81, 84, 126 N. E. 508, 509 (1920).

A settlor, regardless of residence, cannot establish a trust to be administered in this state which offends our public policy. See Hutchinson v. Ross, 262 N. Y. 381, 394, 187 N. E. 65, 70 (1933). Agreements limiting jurisdiction of courts, as by an agreement not to sue in a particular court, are void as against public policy. Doyle v. Continental Ins. Co., 94 U. S. 535 (1876); 3 Williston, Contracts (1920) § 1725. The same is true of an agreement to deprive parties of their rights. See (1932) 32 Col. L. Rev. 367, 377. A contract which binds one of the parties to do that which is contrary to the policy of the state or nation is void, no matter how solemnly it may have been made. Matter of Hughes, 225 App. Div. 29, 232 N. Y. Supp. 84 (4th Dep’t 1928), aff’d, 251 N. Y. 529, 168 N. E. 415 (1929).

The Workmen’s Compensation Law was enacted for the public welfare of the state. Matter of Jensen v. Southern Pac. Co., 215 N. Y. 514, 109 N. E. 600 (1915). The Arbitration Law is a new public policy of the State of New York. Public policy has decreed the rent laws, emergency laws, and such laws as the Banking, Education, Judiciary, Insurance, Labor, Public Health Laws, and others. In the public interest, the state has ever deemed it essential that certain obligations should attach to a marriage contract, amongst which is the duty of a husband to support his wife. See Tirrell v. Tirrell, 232 N. Y. 224, 229, 133 N. E. 569, 570 (1921). The fundamental public policy is perceived to be that rights lawfully vested shall be everywhere maintained. See Loucks v. Standard
protection to society and mankind, and a testator is not permitted at his pleasure to violate law laid down as an evidence of public policy. The individual must be subordinated to the community; at least, in regard to public policy.

The Legislature of the state of New York has indicated the adoption of a public policy in reference to the courts of the state. They are granted powers and given jurisdiction for the purpose of protecting and safeguarding the vested rights of property. Public policy requires the enforcement of such laws.

The *in terrorem* clause in the Andrus will affected the public policy of the state in its lodgment of power and jurisdiction in the courts to control matters of administration of estates and trust estates. The type of *in terrorem* clause in the Andrus Case went far and beyond any other that has been brought to my attention. The will-maker attempted to become superior to the law and the public policy of the state. When the jurisdiction of an important court is at issue, the duty of the court is plain. The public interest would be in danger by the non-enforcement of the rights of property accorded by the constitution and the statute law of the state. When the rule of public policy has been ascertained by the courts, it becomes their duty to refuse to give effect to a private contract, or testamentary provision, which violates the rule, and which would, if judicially enforced, prove injurious to the community.

The late Mr. Justice Oliver Wendell Holmes of the United States Supreme Court says: "Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis."

In *Matter of Carpes* the condition subsequent was held void because the conditions were "so coupled with harsh and cruel penalties that they are undeniably against public policy and void." In the

Oil Co., 224 N. Y. 99, 113, 120 N. E. 198, 202 (1918). There are other restraints phrased in either the disabling or the forfeiture form. There is a rule of public policy against the validity of a gift which interferes with descent in event of a failure to alienate. Schnelby, *Restrains Upon the Alienation of Legal Interests* (1935) 44 Yale L. J. 1186.

64. This principle is found in *Cardozo, The Nature of the Judicial Process* (1925) 96.
English case of *Rhodes v. Muswell Hill Land Co.*⁶⁸ the will “further declared” and provided for a forfeiture in the event that the devisees commenced or instituted proceedings at law or in equity in relation to the property devised to them. It was held that the “matter of things” referred to were the “estate and effects” and that the condition of forfeiture was void as it would prevent the devisee taking any legal proceeding necessary for the protection of his rights. The Master of the Rolls, Sir John Romilly, in respect to this provision, said in part: “The testator says, I give you the property, but if you resort to any proceedings whatever respecting it, even to secure its enjoyment, I give it to someone else; the thing is absurd. . . . The consequence is, that this provision is absurd, inconsistent and repugnant, and I have not hesitation in saying, that it constitutes no objection to the title.”

If an *in terrorem* clause of the type used in the *Andrus Case* should be sustained, courts of equity would be ousted of jurisdiction to hold trustees accountable and to control their acts. The cloak of an *in terrorem* provision cannot shield honest trustees any more than it can cover up and protect an unscrupulous trustee. The test is not between honest and dishonest, or negligent and non-negligent trustees. The test is between the desires of men and the rights flowing from the Constitution and the laws of the state. There can be no doubt as to the supremacy of the organic laws and the declared public policy of the state. A testator cannot be permitted to thwart the provisions of such laws and overcome the powers and jurisdiction of a court which controls the administration of a trust, by the insertion of an *in terrorem* clause in his will. The public policy of the state is that the administration of trusts shall be under the supervision of the courts.⁶⁹

In cases where forfeiture clauses have been sustained, the state has had no particular interest as to whether one claimant or another takes under a will. None of these reasons is present in the *Andrus Case*. If the state has no particular interest as to whether one claimant or another takes under a will, it is readily understandable why the courts have held it good policy to sustain forfeiture clauses which provide for forfeiture in the event of a contest of a will. None of the reasons which tend to make it a good policy can be ever present or applied to the provisions of a will which has for its purpose the removing of the administration of a trust from the jurisdiction of courts of equity. Here, the state has a real interest in having these courts of equity supervise trusts of administration, and it becomes bad policy to permit a testator by the device of an *in terrorem* clause to circumvent the

⁶⁸. 29 Beav. 560, 563, 4 Eng. Reprints 745, 746 (Rolls Ct. 1861).
⁶⁹. 1 BOGERT, TRUSTS AND TRUSTEES (1935) § 161.
state's declared policy.\textsuperscript{70} The right of a party to legal redress is jealously guarded by the courts.\textsuperscript{71} There is ample authority for holding that whatever may be attempted to be done to violate the public policy of the state is void. Where the testator's intent is apparent, it obtains; provided, however, such intent does not offend public policy, or some positive rule of law. A device to render trustees free to administer trusts without respect to the law of the state cannot receive judicial sanction.\textsuperscript{72} The right to acquire, and the personal exercise of power and dominion over property while the blood of life courses through the veins, must end when men pass into the unknown. At such time property passes into new ownership and control, and denial to such new owners of the right to litigate questions concerning it, the giver cannot bring about. The law—the law of public policy—the Constitution—sees to that.

The court also found in the \textit{Andrus Case} that the condition subsequent is violative of constitutional rights of beneficiaries. There is analogy between the cases in the field of law wherein the state trades a right granted for one given up, and they have been decided not unfavorably to the rights of property. Neither the state nor an individual may compel the surrender of a constitutional right of property as a condition of a favor. The provisions of Article 1, Section 6 of the Constitution of this state, as well as the Fourteenth Amendment to the Constitution of the United States, provides for the protection of the life, liberty and property of persons. In \textit{Home Insurance v. Morse}\textsuperscript{73} the court wrote: \textquote{Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights. . . . In \textit{Scott v. Avery}, the Lord Chancellor says: 'There is no doubt of the general principle that parties cannot by contract oust the ordinary courts of their jurisdiction.'}\textsuperscript{74}

A condition requiring the abstention of a constitutional right is always unconstitutional. It is against the public policy to condition a gift by compelling the beneficiary to forego a legal right. He is deprived of the right of free choice as to future conduct. It is the right to impose the condition, not the motive, which is the test to be resorted to for the purpose of determining whether it offends public policy. For a testator to exercise such authority would permit him to deprive of fundamental

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\item \textsuperscript{70} Matter of von Saal, 82 Misc. 531, 145 N. Y. Supp. 307 (Sur. Ct. 1913).
\item \textsuperscript{71} 3 \textsc{Wellston, Contracts} (1920) § 1725; \textsc{Jadlin, Wells} (6th Eng. ed. 1893) 1550; Billings v. Marshall Furnace Co., 210 Mich. 1, 177 N. W. 222 (1920); Rhodes v. Muswell Hill Land Co., 29 Beav. 560, 54 Eng. Reprints 745 (Rolls Ct. 1861).
\item \textsuperscript{73} 87 U. S. 445 (1874).
\item \textsuperscript{74} 5 H. L. Cas. 811, 846, 10 Eng. Reprints 1121, 1135 (1856).
\end{itemize}
rights those entitled to the protection of the Constitution. It was held in *Frost Trucking Co. v. R. R. Comm.*,\(^7\) that a state may not impose conditions which require the relinquishment of constitutional rights. Such a right would strip the citizen of rights guaranteed by the Constitution. The court said through Mr. Justice Sutherland: "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."\(^7\)

The courts, in the exercise of their judicial function, are without power to deprive a person of his property or his right of property, unless by due process of law.\(^7\)

Individuals can have no greater right or prerogative than the courts. Informed reason and public conscience are the guide for the protection of public policy. No effacement or impairment of property rights of men will be countenanced. The rights of infants are placed in the same category and controlled by the same law of public policy as affects the rights of adults.\(^7\)

It seems clear, from the decisions of courts that have come down through the years, that the general tendency is to hold *in terrorem* clauses void if they contravene the public policy of the state. Upon the facts of each case, the courts will ascertain whether or not this great principle of our laws written for the whole body politic is involved.

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75. 271 U. S. 583 (1926).
76. Id. at 594.