as well as the others, once the defendant acted negligently peril was certain and imminent.

The dissenting opinion in the instant case cites *Ridge v. Jones* as the controlling authority for denying recovery under the humanitarian doctrine.[9] It bases its conclusion on the ground that the fact situations in the two cases are similar in nature. The majority of the court, though seemingly not certain as to where the position of peril began,[10] finds the facts so different from the facts in the *Ridge* case as to warrant holding that case no authority for refusing to apply the humanitarian doctrine.[11] This conflict in the court illustrates once more the difficulty of the Missouri courts in defining the position of peril, a fundamental task in delimiting the applicability of the humanitarian doctrine.[12]

A. M. E.

TRUSTS—NO-CONTEST CLAUSE—EFFECT OF PROBABLE CAUSE—CONTEST BY BENEFICIARY AS ADMINISTRATRIX—[Missouri].—Settlor by deed created a trust under which he was the life beneficiary, the defendant and others to be beneficiaries after his death. The deed provided that any beneficiary who contested its validity would forfeit his rights.[1] Upon the death of the settlor-life beneficiary, defendant, dissatisfied with her share as beneficiary, obtained appointment as administratrix of settlor's estate[2] and asked the probate court to discover the estate assets. The trust deed was contested by the administratrix so that the corpus of the trust might be declared assets of the estate; but the trust deed was upheld.[3] Trustees requested

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Ridge case, plaintiff was injured due to the negligent starting of an automobile while he had his hand on the handle after getting out of the car.

9. Duckworth v. Dent (Mo. App. 1939) 135 S. W. (2d) 28, 39. Ridge v. Jones has been cited for the rule that peril means something more than a possibility that injury may result. Kirkham v. Jenkins Music Co. (1937) 340 Mo. 911, 916, 104 S. W. (2d) 234, 236; Edwards v. Terminal R. R. Ass'n of St. Louis (1937) 341 Mo. 235, 238, 108 S. W. (2d) 140, 141. The minority certified the case to the Supreme Court because of the alleged conflict with the Ridge case.

10. The court holds that plaintiff was in a position of peril "especially at the time the defendant started to shove the empty car backward." Duckworth v. Dent (Mo. App. 1939) 135 S. W. (2d) 28, 36. *Quaere*, as to whether qualifying the position of peril by the use of the word "especially" confuses the issue.

11. Duckworth v. Dent (Mo. App. 1939) 135 S. W. (2d) 28, 36.

12. Note the separate dissents of Ellison, C. J., and Gantt, J., Frank, J., concurring, in Perkins v. Terminal R. R. Ass'n of St. Louis (1937) 340 Mo. 868, 886, 896, 102 S. W. (2d) 915, 924, 930, as to whether plaintiff in that case was in a position of peril.

1. Rossi v. Davis (Mo. 1939) 133 S. W. (2d) 363, 373, " 'Should *any of the parties* of the third part (of whom Mrs. Davis was one) * * * institute *any* action or proceedings *of any kind* in any court *at any time* for the purpose of setting aside this instrument, *on any ground whatsoever*, and be unsuccessful therein * * *.' " (Italics supplied.)

2. R. S. Mo. (1929) sec. 63.

3. Davis v. Rossi (1930) 326 Mo. 911, 34 S. W. (2d) 8.

the court to decide whether the defendant had thereby forfeited her rights as beneficiary under the trust. *Held*, that (1) the "no-contest" provision was valid and enforceable; (2) probable cause for attacking the instrument does not excuse any unsuccessful contest; (3) although the action was brought by the defendant as administratrix, yet she was bound personally as beneficiary.[4]

The testator, under the property doctrine which allows a person to dispose of his property as he sees fit,[5] may make capricious, conditional limitations in dispositions which are absurd and foolish, so long as they are not illegal, immoral, or contrary to public policy.[6] Subject to limited qualifications, the courts almost unanimously agree that the "no-contest" clause in wills is not repugnant to public policy.[7] The clause is held not to discourage resort to the courts, but primarily to prevent wasting of the estate[8] and the exposing of the eccentricities of the deceased.[9] The "no-contest" provision in the instant case is apparently one of first impression as to *inter vivos* trusts. In 1929, *In re Chambers*[10] upheld the validity of such a clause in a will but left some doubt as to the effect of *probabilis causa litigandi*.[11] The

4. Rossi v. Davis (Mo. 1939) 133 S. W. (2d) 363.

5. Id. at 372.

6. In re Kitchen (1923) 192 Cal. 384, 220 Pac. 301; Scott, Control of Property by the Dead (1917) 65 U. of Pa. L. Rev. 527, 536.

7. Exceptions recognized by some courts are probable cause, failure of a gift over, and infancy. The latter two were not involved in the instant case. The clause has been upheld in the following cases: Donegan v. Wade (1881) 70 Ala. 501; Estate of Hite (1909) 155 Cal. 436, 101 Pac. 443, 21 L. R. A. (N. S.) 953; Moran v. Moran (1909) 144 Iowa 451, 123 N. W. 202, 30 L. R. A. (N. S.) 898; Rudd v. Searles (1928) 262 Mass. 490, 160 N. E. 882, 58 A. L. R. 1548; Schiffer v. Brenton (1929) 247 Mich. 512, 226 N. W. 253; In re Chambers' Estate (1929) 332 Mo. 1086, 18 S. W. (2d) 30, 67 A. L. R. 41; Hoit v. Hoit (1886) 42 N. J. Eq. 388, 7 Atl. 856; In re Brush's Estate (Surr. Ct. 1935) 154 Misc. 480, 277 N. Y. S. 559; Bradford v. Bradford (1869) 19 Ohio St. 546; Thompson v. Gaut (1884) 82 Tenn. 310; Massie v. Massie (1909) 54 Tex. Civ. App. 617, 118 S. W. 219; Smithsonian Institution v. Meech (1898) 169 U. S. 398; see also, Lobb v. Brown (1929) 208 Cal. 476, 281 Pac. 1010; Ayers' Adm'r v. Ayers (1926) 212 Ky. 400, 279 S. W. 647; Irwin v. Jacques (1905) 71 Ohio St. 395, 73 N. E. 683; Bender v. Bateman (1929) 33 Ohio App. 66, 168 N. E. 574; Whitmore v. Smith (1923) 94 Okla. 90, 221 Pac. 775; Bryant v. Thompson (1891) 59 Hun. 345, 14 N. Y. S. 28, aff'd (1891) 128 N. Y. 426, 28 N. E. 522; cf. In re Keenan's Will (1925) 188 Wis. 110, 205 N. W. 1001; Keegan, Provisions in Wills Forfeiting Share of Contesting Beneficiary (1926) 12 A. B. A. J. 236 (it should be noticed whether it is a forfeiture provision or a conditional limitation); Note (1923) 23 Col. L. Rev. 169. Ind. Burns Stats. Ann. (1926) sec. 3482, voids all such forfeiture conditions in wills.

8. Donegan v. Wade (1881) 70 Ala. 501; Estate of Hite (1909) 155 Cal. 436, 101 Pac. 443, 21 L. R. A. (N. S.) 953; Note (1926) 39 Harv. L. Rev. 628. When contests are frivolous, vexatious and in bad faith, the rule is sound and should be upheld. Goddard, Forfeiture Conditions in Wills as Penalty for Contesting Probate (1933) 31 U. of Pa. L. Rev. 267.

9. Rudd v. Searles (1928) 262 Mass. 490, 160 N. E. 882; see also, Smithsonian Institution v. Meech (1898) 169 U. S. 398.

10. (1929) 322 Mo. 1086, 18 S. W. (2d) 30, 67 A. L. R. 41.

11. After the decision the hope was expressed that the strict enforcement would not be followed. Comment (1930) 41 U. of Mo. Bull. L. Series 51.

instant case resolved that doubt as to *inter vivos* instruments and indirectly as to wills.[12]

The unanimous opinion of legal writers has favored the recognition of probable cause as a qualification to the rule that "no-contest" provisions are valid.[13] In the few jurisdictions which have passed on this question there is a close division of authority.[14] The probable cause qualification has been recognized by some courts to prevent fraud, undue influence, incompetency,[15] and forgery.[16] Certain persons by reason of their relationship to the testator may easily induce him to make provisions for them.[17] There is a temptation for such persons to see that a "no-contest" provision is made.[18] Since there is always a possibility of losing a contest,[19] another beneficiary may acquiesce in the trust deed or will rather than risk his interests. Consequently the strict enforcement of the "no-contest" provision may allow

12. The court applied wills principles in deciding the case. Rossi v. Davis (Mo. 1939) 133 S. W. (2d) 363, 367.

13. Among the most recent, Browder, Testamentary Conditions Against Contest (1938) 36 Mich. L. Rev. 1066; Goddard, supra note 8; Keegan, supra note 7; Kenner, Non-contesting Clauses in Wills (1928) 3 Ind. L. J. 269; Atkinson, *Wills* (1937) 357; Schouler, *Wills* (6th ed. 1923) sec. 1344; Note (1924) 12 Cal. L. Rev. 532; Note (1926) 39 Harv. L. Rev. 628; Note (1930) 67 A. L. R. 52; Comment (1930) 28 Col. L. Rev. 356; Comment (1928) 23 Ill. L. Rev. 405; Comment (1930) 41 U. of Mo. Bull. L. Series 51.

14. Each side claims the preponderance. Comment (1928) 23 Ill. L. Rev. 405. Goddard, supra note 8, suggests that the courts have been influenced by the facts in the first case coming before the court. Compare the facts in In re Chambers (1929) 322 Mo. 1086, 18 S. W. (2d) 30, 67 A. L. R. 41, where the court indicated a rejection of probable cause, and the facts in Tate v. Camp (1922) 147 Tenn. 137, 245 S. W. 839, upholding the exception; see also Browder, Testamentary Conditions Against Contest (1938) 36 Mich. L. Rev. 1066.

15. Friend's Estate (1904) 209 Pa. 442, 58 Atl. 853, 68 L. R. A. 447; Lewis' Estate (1909) 19 Pa. Dist. Rep. 695; Dutterer v. Logan (1927) 103 W. Va. 216, 137 S. E. 1, 52 A. L. R. 83; In re Keenan's Will (1925) 188 Wis. 163, 205 N. W. 1001, 42 A. L. R. 836; Tate v. Camp (1922) 147 Tenn. 137, 245 S. W. 839, 26 A. L. R. 755; South Norwalk Trust Co. v. St. John (1917) 92 Conn. 168, 101 Atl. 961 (express ground not stated). Contra, Donegan v. Wade (1881) 70 Ala. 501; Estate of Hite (1909) 155 Cal. 436, 101 Pac. 443, 21 L. R. A. (N. S.) 953; Estate of Miller (1909) 156 Cal. 119, 103 Pac. 842, 23 L. R. A. (N. S.) 868. The following contra cases, which indicate but do not express the grounds of their decision, seem to contain one of the above factors. Schiffer v. Brenton (1929) 247 Mich. 512, 226 N. W. 253; In re Chambers (1929) 322 Mo. 1086, 18 S. W. (2d) 30, 67 A. L. R. 41 (dicta); O'Donnell v. Jackson (1928) 102 N. J. Eq. 470, 141 Atl. 450.

16. Rouse v. Branch (1911) 91 S. C. 111, 74 S. E. 133, 39 L. R. A. (N. S.) 1160 ("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, * * *."). Comment (1930) 28 Col. L. Rev. 356.

17. Scott, supra note 6.

18. If undue influence is successfully exerted in the execution of a will, that same influence will have written into the will a clause which will make sure its disposition of the property. In Re Friend's Estate (1904) 209 Pa. 442, 58 Atl. 853, 68 L. R. A. 447; Note (1924) 12 Cal. L. Rev. 532, 534.

19. Moorman v. Louisville Trust Co. (Ky. 1918) 203 S. W. 856.

crime and fraud to go unchallenged.[20] Therefore some courts declare there is a public interest in avoiding a forfeiture where probable cause for contest exists.[21] There is even stronger reason for recognizing the probable cause qualification in deed cases, for a will is at least presented to a court for inspection, while a deed may never be presented.

Where recognized as a qualification, *probabilis causa litigandi* must appear clearly from the evidence.[22] In the instant case the same result could have been reached even though this qualification had been recognized on the ground that probable cause did not appear clearly from the evidence.[23]

Because the administratrix had a personal interest in the result of the contest,[24] the court found that her appointment was obtained solely for the purpose of attacking the deed. This was a refusal to permit her to do indirectly that which she could not do directly. However, the broad language of the deed as to what would violate the clause made it easier to declare a forfeiture.[25] If a case arises in which a violation of a "no-contest" clause is more narrowly defined by the instrument, the court may use such language as a basis for a distinction.

W. K.

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20. See Southern Norwalk Trust Co. v. St. John (1917) 92 Conn. 168, 101 Atl. 961; In re Friend's Estate (1904) 209 Pa. 442, 58 Atl. 853, 68 L. R. A. 447; Rouse v. Branch (1912) 91 S. C. 111, 74 S. E. 133, 39 L. R. A. (N. S.) 1160; Goddard, supra note 8; Schouler, *Wills* (6th ed. 1923) sec. 1344; Note (1930) 67 A. L. R. 52; Note (1926) 39 Harv. L. Rev. 628.

21. Rouse v. Branch (1912) 91 S. C. 111, 74 S. E. 133, 39 L. R. A. (N. S.) 1160; In re Keenan's Will (1925) 188 Wis. 163, 205 N. W. 1001; Browder, supra note 14; Schouler, *Wills* (6th ed. 1923) sec. 1344; Note (1930) 67 A. L. R. 52; see dissenting opinion in Moran v. Moran (1909) 144 Iowa 451, 123 N. W. 202, 30 L. R. A. (N. S.) 898.

22. Kenner, supra note 13.

23. Rossi v. Davis (Mo. 1939) 133 S. W. (2d) 363, 372. "There was no evidence in this case, in fact no contention, that Simon D. Rossi was not of sound mind and free from undue influence when he executed the trust instrument here involved." The lower court found the defendant procured her appointment with intent to contest the instrument and that she knew that there was no property subject to administration unless the instrument could be upset.

24. Directly on point of double liability, Fouche v. Harison (1887) 78 Ga. 359, 3 S. E. 330; Jenkins v. Nolan (1888) 79 Ga. 295, 5 S. E. 34; Corcoran v. Chesapeake & Ohio Canal Co. (1877) 94 U. S. 741 (trustee).

25. See language of clause quoted supra, note 1.