

necessary, in many situations, to eliminate bias in the jury. Yet courts may well be reluctant to sustain challenges for cause based on these grounds; a holding that race, religion and nationality are legally acceptable causes for challenge would give too explicit a sanction to a type of discrimination elsewhere disapproved by the law. The peremptory challenge has avoided the necessity for such holdings; in the cases found, challenges based on the race, religion or nationality of veniremen seem to have always been peremptory.<sup>86</sup>

Another justification for the peremptory challenge may be suggested. The availability of peremptory challenges may be a means of satisfying litigants that they are being tried by an impartial jury. Allowing litigants to participate in the selection of their jury tends to prevent them from feeling that the composition of the jury is completely in the hands of the judge, in his allowance of challenges for cause. While perfect administration of a rational law of challenge for cause would guarantee impartial juries, there will inevitably be many cases in which complete impartiality is not achieved, and there will be even more cases in which parties feel that the jury was not impartial. It may seem unusual for the legal order to assume that one branch of the law will not be properly applied in a significant number of cases and will be considered by the parties in even more cases to have been applied unfairly. But the right to trial by jury is fundamental to our society, and in order to preserve this right it is important that litigants feel juries are impartial. The peremptory challenge tends to persuade litigants of the fairness of juries and thus has an important role to play in the preservation of the jury system.

<sup>86</sup> Hall v. United States, 168 F.2d 161 (App. D.C., 1948); People v. Roxborough, 307 Mich. 575, 12 N.W.2d 466 (1943), cert. denied 323 U.S. 749 (1944); State v. Logan, 344 Mo. 307, 126 S.W.2d 256 (1939); Whitney v. State, 43 Tex. Crim. 207, 63 S.W. 879 (1901).

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### NO-CONTEST WILL CLAUSES

The typical no-contest will clause provides that if a devisee or legatee contests the validity of any part of the will, the devise or legacy which he would otherwise receive shall pass to another.<sup>1</sup> The extent to which these

<sup>1</sup> Consult, e.g., In re Estate of Hartz, 247 Minn. 362, 363, 77 N.W.2d 169, 170 (1956) ("... Should any legatee herein directly or indirectly contest the validity of this Will and Testament in any manner, then any bequest, legacy and devise . . . hereinbefore made in favor of such person or persons shall be void and of no effect and such bequest, legacy and devise shall go to the St. Peter's and St. Paul's Catholic Church of Mazeppa, Minnesota, . . ."). In some jurisdictions if the no-contest clause fails to contain a limitation or gift over, the clause is said to be merely *in terrorem*. Consult, e.g., Ga. Code Ann. (1937) §113-820; Smithsonian Institution v. Meech, 169 U.S. 398, 413 (1898); Sherwood v. McLaurin, 103 S.C. 370, 88 S.E. 363 (1916). Professor Browder deprecates the *in terrorem* doctrine in his two articles, Testamentary Conditions Against Contest Re-examined, 49 Col. L. Rev. 320, 339 (1949) ("this medieval hoax"), and Testamentary Conditions Against Contest, 36 Mich. L. Rev. 1066, 1093 (1938) ("a grotesque fiction"). Consult Kertz, Contesting a Will in The Face of a Forfeiture Clause, 45 Geo. L. J. 200 (1957).

clauses are given effect is the subject of a disturbing split of judicial authority. The majority<sup>2</sup> of jurisdictions hold the gift forfeited by any beneficiary who litigates the validity of the testator's will;<sup>3</sup> a minority hold the no-contest clause to be effective only against the contestant who is unable to demonstrate good faith and probable cause.<sup>4</sup>

When judges announce either the majority or minority rule, they normally rely on considerations of public policy.<sup>5</sup> For example, if the court believes that the majority rule is necessary to aid the strong policy favoring unfettered testation,<sup>6</sup> it is likely to reject the minority rule and thereby more severely discourage a beneficiary from subverting the testator's plan of distribution. But solution should not be so easily reached, since there are other policies which must be reconciled with the policy of unfettered testation. Because the relevance of these policy factors varies with the reason or ground for attacking the will, it seems strange that the ground of attack is often not explicitly considered.<sup>7</sup>

This comment will examine the relation between asserted policy factors on

<sup>2</sup> Donegan v. Wade, 70 Ala. 501 (1881); In the Matter of the Estate of Hite, 155 Cal. 436, 101 Pac. 443 (1909); Cohen v. Reisman, 203 Ga. 684, 48 S.E.2d 113 (1948); Hurlley v. Blakenship, 267 S.W.2d 99 (Ky. S.Ct., 1954); Beall v. Schley, 2 Gill (Md.) 181, 200-201 (1844) (dictum); Rudd v. Searles, 262 Mass. 490, 160 N.E. 882 (1928); Schiffer v. Brenton, 247 Mich. 512, 226 N.W. 253 (1929); Rossi v. Davis, 345 Mo. 362, 133 S.W.2d 363 (1939); Burtman v. Butman, 97 N.H. 254, 85 A.2d 892 (1952) (semble); Alper v. Alper, 2 N.J. 105, 65 A.2d 737 (1949); Bender v. Bateman, 33 Ohio App. 66, 168 N.E. 574 (1929); Whitmore v. Smith, 94 Okla. 90, 221 Pac. 775 (1923) (dictum); Elder v. Elder, 120 A.2d 815 (R.I. S.Ct., 1956); Massie v. Massie, 54 Tex. Civ. App. 617, 118 S.W. 219 (1909); Barry v. American Security & Trust Co., 135 F.2d 470 (App. D.C., 1943). What is here denominated as the *majority* rule, that is, the rule enforcing the no-contest clause, has been called the *minority* rule. See In re Estate of Hartz, 247 Minn. 362, 365, 77 N.W.2d 169, 171 (1956). Compare Barry v. American Security & Trust Co., 135 F.2d 470, 473 (App. D.C., 1943).

<sup>3</sup> The issue has arisen only where the beneficiary has contested *unsuccessfully*. In theory, however, the question of the enforceability of a no-contest clause could be presented where the contest was successful, e.g., where the beneficiary succeeded in demonstrating that only a portion of the will had been fraudulently altered, such portion not being the part directing the contesting beneficiary to take.

<sup>4</sup> South Norwalk Trust Co. v. St. John, 92 Conn. 168, 101 Atl. 961 (1917); Wells v. Menn, 158 Fla. 228, 28 So.2d 881 (1946) (semble); Ind. Stat. Ann. (Burns, 1953) §6-602; In re Estate of Cocklin, 236 Iowa 98, 17 N.W.2d 129 (1945); Wright v. Cummings, 108 Kan. 667, 196 Pac. 246 (1921) (dictum); In re Estate of Hartz, 247 Minn. 362, 77 N.W.2d 169 (1956); In re Smyth's Estate, 271 N.Y. 623, 3 N.E.2d 453 (1936); Ryan v. Wachovia Bank & Trust Co., 235 N.C. 585, 70 S.E.2d 853 (1952); Wadsworth v. Brigham, 125 Ore. 428, 259 Pac. 299 (1928); Friend's Estate, 209 Pa. 442, 58 Atl. 853 (1904); Rouse v. Branch, 91 S.C. 111, 74 S.E. 133 (1911); Tate v. Camp, 147 Tenn. 137, 245 S.W. 839 (1922); In the Matter of the Estate of Chappel, 127 Wash. 638, 221 Pac. 336 (1923); Dutterer v. Logan, 103 W. Va. 216, 137 S.E. 1 (1927); Will of Keenan, 188 Wis. 163, 205 N.W. 1001 (1925).

<sup>5</sup> See, e.g., In re Estate of Hartz, 247 Minn. 362, 366, 77 N.W.2d 169, 171 (1956); Barry v. American Security & Trust Co., 135 F.2d 470, 473 (App. D.C., 1943).

<sup>6</sup> Consult Atkinson, Wills §51 (2d ed., 1953); Page, Wills §35 (3d ed., 1941).

<sup>7</sup> Consult, e.g., Provident Trust Co. of Phila. v. Osborne, 133 N.J.Eq. 518, 33 A.2d 103 (1943), wherein the ground of attack was not even mentioned.

the one hand and grounds for will contest on the other.<sup>8</sup> The typical grounds for attack may be examined under four general categories: incapacity of the testator,<sup>9</sup> wrongful acts by strangers,<sup>10</sup> improper execution,<sup>11</sup> and violation of substantive policy by will provisions.<sup>12</sup> Throughout the discussion, only the beneficiary who contests in good faith with probable cause will be considered; every state enforces no-contest clauses against contestants who do not meet this preliminary standard.

*Incapacity of the testator.*—Where the ground of attack is the mental incapacity of the testator,<sup>13</sup> the probate court is faced with a dilemma in deciding which rule to apply, since application of either rule would to some extent frustrate the policy of giving effect to a decedent's testamentary intent.<sup>14</sup> In future cases if the prospective contestants are unwilling to risk forfeiture under a no-contest clause, the court's readiness to apply the majority rule increases the probability that instruments will be probated which do not in fact represent the deceased's intent. If, on the other hand, the court adopts the minority rule and a contest does not succeed, then the testator's intent has not been followed, to the extent that the contestant takes his legacy in violation of the no-contest clause. This dilemma may be mitigated by the

<sup>8</sup> Regardless of the contestant's ground of attack and of whether or not there is a no-contest clause, proponents of a will often attempt to establish an estoppel against the contestant; the argument is that one who has attacked the validity of an instrument is thereafter estopped from asserting to the contrary in order to claim a benefit under the instrument. See *Elder v. Elder*, 120 A.2d 815 (R.I. S.Ct., 1956); *Provident Trust Co. of Phila. v. Osborne*, 133 N.J.Eq. 518, 33 A.2d 103 (1943); *Bender v. Bateman*, 33 Ohio App. 66, 168 N.E. 574 (1929). Consult 1 Pritchard, *Wills and Estates* §341 (3d ed., 1955).

<sup>9</sup> E.g., *In re Estate of Hartz*, 247 Minn. 362, 77 N.W.2d 169 (1956).

<sup>10</sup> E.g., *Alper v. Alper*, 2 N.J. 105, 65 A.2d 737 (1949). Specific acts of wrongdoing would include undue influence, forgery, and alterations. Consult Atkinson, *Wills* §§55-57 (2d ed., 1953); Page, *Wills* §§175-94 (3d ed., 1941); Green, *Fraud, Undue Influence and Mental Incompetency*, 43 Col. L. Rev. 176 (1943); King, *Undue Influence in Wills in Illinois*, 2 U. of Chi. L. Rev. 457 (1935).

<sup>11</sup> E.g., *Barry v. American Security & Trust Co.*, 135 F.2d 470 (App. D.C., 1943).

<sup>12</sup> E.g., *In the Matter of the Estate of Chappel*, 127 Wash 638, 221 Pac. 336 (1923).

<sup>13</sup> See *Gilmer v. Brown*, 186 Va. 630, 44 S.E.2d 16 (1947). Consult Atkinson, *Wills* §§50-53 (2d ed., 1953); Page, *Wills* §§112-56 (3d ed., 1941); Bordwell, *Statute Law of Wills*, 14 Iowa L. Rev. 172, 177 (1929); Hutton, *Testamentary Capacity and Related Matters*, 58 Dick. L. Rev. 100 (1954); Green, *Proof of Mental Incompetency and The Unexpressed Major Premise*, 53 Yale L. J. 271 (1944). Although the argument would be weak, it might be urged that a distinction should be drawn between mental incapacity which may be demonstrated as a matter of fact and mental incapacity which is simply presumed because of the testator's minority. Certainly a person twenty years old could be just as competent mentally—if not more so—to express a testamentary intent as a person ninety years old. The force of the statute requiring that the testator live a certain number of years prior to the execution of a will in most cases would be found to exceed the public policy favoring the privilege of free testation. If a court applied the strict, majority rule, then a minor could lift himself up by his own bootstraps by using a no-contest clause.

<sup>14</sup> Consult Atkinson, *Wills* §1 (2d ed., 1953).

consideration that if a strong suspicion of mental incapacity exists, a legatee may bring a contest despite the court's readiness to enforce a no-contest clause; he may feel that the chances of success are great enough to justify the risk of forfeiture. However, the deterrent effect of the majority rule on contests which would have established incapacity may still be great, and it would seem that the policy in favor of encouraging detection of the invalidity of wills by reason of incapacity should outweigh the policy against disregarding that part of the testator's intent as expressed in a no-contest clause.

*Wrongful acts by strangers.*—A no-contest clause gives rise to a similar dilemma where the basis of contest is the wrongful act of a stranger—forgery, undue influence, fraud or alteration.<sup>15</sup> If no-contest clauses were allowed to be a complete deterrent to every effort to raise the issue of fraud, undue influence or forgery, a serious risk would be created of enforcing distributive schemes which are not those of the testator at all; this argument would seem especially compelling if it could be demonstrated that some wrongdoers know of the majority rule and its deterrent effect and inserted the clause to avoid detection of their mischiefs. If the testator included the no-contest clause voluntarily and only a dispositive section was inserted or altered by the stranger, application of the majority rule would still seem questionable.

Admittedly, in order to preserve his or the family's reputation,<sup>16</sup> a testator might use a no-contest clause to avoid litigation even to the extent of risking protection of a stranger's fraud. If it were demonstrated that this desire for privacy was especially pronounced, a court might apply the strict majority rule even to the successful contestant;<sup>17</sup> on the other hand, a court might allow a testator this privacy only so long as it does not inhibit the discovery of fraud.<sup>18</sup> Application of the minority rule results in the court holding that the policy encouraging discovery of fraud is superior to the testator's desire for privacy.

A testator might voluntarily insert a no-contest clause in order to prevent possible spoliation of his estate through extended litigation.<sup>19</sup> Although there would be a kind of spoliation if a wrongdoer, without detection, determined the distribution of part or all of the estate, a testator might feel that the risk of spoliation through litigation exceeds the risk of forgery. However, to apply the majority rule where a no-contest clause was voluntarily inserted might discourage contests in cases where the clause was wrongfully inserted but where a legatee does not wish to risk forfeiture in the event he cannot prove

<sup>15</sup> Consult note 10 supra.

<sup>16</sup> See, e.g., *Rudd v. Searles*, 262 Mass. 490, 500-01, 160 N.E. 882, 886 (1928); *Donegan v. Wade*, 70 Ala. 501, 505 (1881).

<sup>17</sup> *Ibid.*

<sup>18</sup> E.g., *Barry v. American Security & Trust Co.*, 135 F.2d 470 (App. D.C., 1943).

<sup>19</sup> See, e.g., *Donegan v. Wade*, 70 Ala. 501, 505 (1881) (“[Will contests] not unfrequently, too, waste away vast estates, by protracted and extravagant litigation.”).

such wrongful insertion. Consequently, it may be fair to conclude that a testator's desire to avoid contest here is not so strong as to override the policy of encouraging the discovery of fraud.

*Improper execution.*—For contests waged on the grounds reviewed so far it appears that the policy of following the testator's intent in a no-contest clause should be overridden. Some serious doubt over such a result, however, is raised as to contest on the ground that the testator failed to execute his will with all the statutory formalities.<sup>20</sup> The primary reason for such requirements as attestation by disinterested witnesses and mutual observation of the act of testation appears to be prevention of fraud upon the testator, that is, wrongful acts by strangers.<sup>21</sup> In the normal case, however, a contest on the ground of improper execution need not include an allegation of fraud. It is thought proper for general security's sake to insist upon compliance with the formalities prescribed by law; unprovable fraud may have been made possible by the improper execution in any particular case, and insistence on the formalities may deter future improper execution. However, in no-contest clause cases the issue is not whether contests which successfully establish any kind of improper execution should prevent probate; clearly they should. The issue is whether the testator's intent that contestants shall forfeit—an intent the expression of which has survived an unsuccessful contest—should be overridden on the ground that the formalities are so important as to justify disregarding such intent in order not to discourage future contests alleging improper execution. It would seem that a court would not be warranted in overriding a no-contest clause merely to foster future will contests alleging execution to be improper in only minor points. And in future cases where execution is so grossly improper that there is serious danger of unprovable fraud or of a probate which would encourage laxity in execution, it would seem that legatees would have such a good chance of succeeding in a contest that they would not be discouraged by a rule which requires them to forfeit if the contest fails. In many cases where the impropriety is gross but difficult to prove, there will be probable cause for alleging fraud, possibly taking the case out of the improper execution category and enabling the court to apply the minority rule.<sup>22</sup>

Strict compliance with formalities is also important in that a court may thereby be more certain of the presence of testamentary intent.<sup>23</sup> The argument is that if the testator took the pains necessary to have his instrument attested, it is more probable that he intended the instrument to be his will

<sup>20</sup> Consult, e.g., Ill. Rev. Stat. (1955) c. 3, §194.

<sup>21</sup> Consult Atkinson, Wills §62 (2d ed., 1953).

<sup>22</sup> Consult discussion at 765 *infra*.

<sup>23</sup> Consult Rheinstein, Cases and Other Materials on the Law of Decedents' Estates 62-3 (1947); Ritchie, Alford, Effland, Cases and Materials on Decedents' Estates and Trusts 98 (1955).

than a first draft or mere musings. However, formalities are not the only means of forcing the testator to give a final thought to his seriousness in executing a testamentary plan. Since a no-contest clause may indicate that the testator did not execute his will with any misgivings, the enforcement of no-contest clauses will rarely result in the probate of instruments executed without testamentary intent.

*Violation of substantive policy by will provisions.*—Apparently the least popular ground for attacking a will is the alleged violation of a substantive policy such as the rule against perpetuities or the rule invalidating undue restraints upon alienation. Whether or not a defect of this type should be permitted to be demonstrated to the court without fear of enforcement of a no-contest clause depends on the comparative vitality of the prohibition violated and the policies favoring no-contest clauses.

For example, the issue may be whether or not the policy of free testation and the testator's desire for privacy and preservation of assets shall be made subject to that policy opposing deferred vesting, embodied in the rule against perpetuities.<sup>24</sup> Apparently no state has ventured to hold the majority rule applicable where the violation of such a rule has been alleged. Rather, in the two states where the issue has been presented, the courts have chosen to deny forfeiture.<sup>25</sup> A more specific test than the mere balancing of conflicting policies has not been formulated; and it seems improbable that courts can be spared the uneasy task of comparison unless they arbitrarily apply one rule regardless of the ground of attack.

*Multiple grounds for contest.*—Where a contest alleges several grounds, and to some of the grounds it is felt proper to apply the majority rule while for the others the minority rule is considered applicable, there is a question of which rule should apply. In answering this question courts cannot escape the necessity of balancing the relative desirability of each rule—these rules themselves resulting from a balancing of conflicting policies. If a court decides to apply the minority rule in cases of conflict resulting from a multiplicity of alleged grounds of contest, it should be noted that contestants could not automatically obtain application of the rule by artful pleading: where probable cause for an allegation is lacking, the no-contest clause would be enforced.

This review of the grounds for will contest and of relevant policy factors suggests that the rational approach to the problem of enforceability of no-contest clauses would be to avoid initial, arbitrary choice of one rule for all situations. It may be argued that the minority rule should always be applied where the original contest was based on the testator's mental incapacity or

<sup>24</sup> Consult Gray, *Rule Against Perpetuities* 191 (4th ed., 1942).

<sup>25</sup> In the Matter of the Estate of Chappell, 127 Wash. 638, 221 Pac. 336 (1923); South Norwalk Trust Co. v. St. John, 92 Conn. 168, 101 Atl. 961 (1917).

on the wrongful act of a stranger. And unless the evidentiary purposes of the Statute of Wills are deemed of supreme importance, the majority rule should be applied to contestants asserting mere non-compliance without any allegation of fraud. In all other situations, a court should not avoid a careful evaluation of the comparative importance of each policy factor as it is relevant to the reason for the original contest.<sup>26</sup>

<sup>26</sup> Professor Rheinstein wishes to add the following dissenting opinion as an expression of his views:

I do not regard it as practicable to differentiate between those different policies which stand behind those rules of law, the alleged violation of which may constitute a ground to oppose a petition to admit an alleged testamentary instrument to probate or to raise a will contest. While it is a policy of our legal order in the distribution of the assets left behind by a deceased property owner to respect that property owner's own intentions, it is an equally strong policy that these intentions are to be treated as irrelevant if they have not been formed maturely, or are impaired by fraud, or if they have not been expressed exactly in the manner prescribed by the law. It is obvious that an alleged testamentary scheme is not to be given effect as that of a testator if the signs in which it has been expressed have not been made with the knowledge and approval of the testator but rather constitute the result of a forgery. Since no forger ought ever to be allowed to exclude the discovery of his forgery by a no-contest clause, an opposition to probate based on a suspicion of forgery ought never to deprive the opponent of that benefit which is provided for him in the instrument if that instrument turns out to be genuine.

I see no reason why the policies of not enforcing an alleged testamentary disposition which has been affected by coercion, fraud, immaturity or other mental incapacity should be treated in any other way.

The issue of lack of formality may seem to give rise to some fire-side equities. Many people are shocked when admission to probate is refused because of a "mere" lack of formality, to an instrument which was obviously meant seriously by its author. However, any policy which tends to weaken the enforcement of the statutory formalities is bound to encourage litigation. Furthermore, the statutory formalities are prescribed not only to protect a testator from fraud and forgery but also to serve as a mark of finality. The legislature has declared that no testamentary scheme should be enforced as such unless it has been expressed under full compliance with the formalities prescribed by the legislature. Where a no-contest clause is contained in a will which was executed in a defective manner, that clause itself is defective and of no force and effect. Why should anyone be deterred from raising in good faith the question of whether or not in a given case the statutory formalities have been complied with, where justified suspicion exists as to their non-compliance?

In dealing with the problem of the effect to be given to no-contest clauses, one ought also to consider that whenever admission to probate is applied for, the burden of proof is incumbent upon the proponent. Unless the probate court has been fully satisfied that the instrument purporting to be the will of a certain decedent actually is that decedent's will, it has to deny its admission to probate. This duty is based upon the court and it has to perform it on its own motion, without having to wait for any one opposing the admission of the instrument to probate. If a jurisdiction adopts the rule that every unsuccessful contestant will lose his benefit because of a no-contest clause, even though he has pursued his contest in good faith, the probate courts should be particularly cautious in the performance of their duty not to admit to probate any will with respect to which justified suspicions might exist. The fact that the courts of a jurisdiction do adopt the rigorous rule may well cause the probate courts to become more reluctant in admitting wills to probate so as not to expose possible contestants to the danger of forfeiture. The result of the rigorous rule would thus be a weakening of the effect of wills rather than the strengthening which the no-contest clause tries to achieve.