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Wills--Conditions Tending to Disruption of Domestic Relations--Public Policy (Matter of Rothchild's Will, 66 N.Y.S.2d 573 (1st Dep't 1946))

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not discuss the measure of damages, but since it stated that the second cause of action was a good one, it can be implied that the failure to allege specific customers and sales lost is not a bar to recovery, actual damage having been shown by a general decline of business.

The court has made forward strides in providing a remedy for a just complaint which could be fitted into no particular tort heading. Instead of barring recovery and consigning this action to the ranks of *damnum absque injuria,* the court applied a broad legal principle to a new set of facts, giving legal redress where it was badly needed, and considering justice rather than the narrow interpretation of legal principles which have not grown with our economy.

H. P.

WILLS — CONDITIONS TENDING TO DISRUPTION OF DOMESTIC RELATIONS—PUBLIC POLICY.—The motion made by appellants, is to take testimony before trial as to the motive and purpose of the testatrix in Articles Seventh and Eighth of her will. The proceeding in which the trial is to be had and for which the examination is sought is for determination of the validity of said articles of the will.

Article Seventh creates a trust and gives the income for life to the testatrix's son and, upon his death, gives the principal to his widow and issue other than his then wife or issue of said wife, and provides that if there be no such widow or issue the principal is to be distributed among several charities. Article Eighth expresses the "purpose and will that under no circumstances shall any portion of my estate" be paid to the then wife of the testatrix's son or any issue of said wife.

Appellants, being the son and disinherited wife and issue, attack these provisions of the will as being against public policy in that testatrix's purpose was to induce the son to divorce his wife. Appellants state that the evidence they propose to elicit from the witnesses sought to be examined before trial will disclose such purpose on the part of testatrix. *Held,* denial of motion affirmed. The intention of the testatrix, whatever it may have been, is immaterial because the will does not tend to induce a divorce and is thus not contrary to public policy. The testimony sought is, therefore, inconsequential. Mr. Justice Callahan and Mr. Justice Glennon dissented on procedural grounds. *Matter of Rothchild's Will,* — App. Div. —, 66 N. Y. S. (2d) 573 (1st Dep't 1946).

A condition attached to a legacy, the evident purpose of which was to induce the legatee to secure a divorce, is void in contravention of good morals and public policy.[1] However, to offend public

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[1] Cruger v. Phelps, 21 Misc. 265, 47 N. Y. Supp. 61 (Sup. Ct. 1897).

policy the provision of the will must be such that its manifest object is to induce a divorce and that the means employed are calculated to promote it.[2] Where the means employed have no tendency to induce a divorce the provision of a will is not to be invalidated.

A condition which is annexed to a testamentary gift is invalid and inoperative, if its tendency is to induce the devisee or legatee to secure a legal separation, or to live apart from husband or wife;[3] and no forfeiture is incurred as a consequence of a breach thereof,[4] the condition being a condition subsequent.[5] Some courts have held that this does not apply to divorces to be procured in a legal manner.[6] This is upon the ground that a divorce sanctioned by a court cannot be deemed against public policy. Courts so holding have taken the position that there seems to be little reason for declaring inoperative conditions encouraging divorces when divorces are sanctioned and regulated by the legislature. To condition a gift upon the doing of what the state treats by its legislation as promotive of the public interest and its own prosperity, cannot be against public policy.[7]

The court distinguishes the case at hand from the *Haight* case[8] upon which appellants place principal reliance. There the income provided the son under the will was to be larger in case he ceased to be married to his wife. The court held that the condition attached to the gift the evident purpose of which was to induce the son to secure a divorce was void in contravention of good morals and public policy. But other language of the opinion makes it clear that to offend public policy the provision of the will must be such that its "manifest object" is to induce a divorce and that the "means employed are calculated to promote it." Thus, an efficient means must accompany a manifest intent.

While this is the first time the courts of New York State have had a case like the one at bar, the courts of other states have had occasion to pass upon provisions of wills identical to or stronger than those in the instant case and have held the provisions valid.[9]

In the instant case there is nothing in the articles under attack tending to induce the son to secure a divorce. The provision for him

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[2] Matter of Haight, 51 App. Div. 310, 64 N. Y. Supp. 1029 (2d Dep't 1900).

[3] Paider v. Suchy, 159 App. Div. 232, 144 N. Y. Supp. 252 (1st Dep't 1913); Wright v. Mayer, 47 App. Div. 604, 62 N. Y. Supp. 610 (1st Dep't 1900).

[4] Whiton v. Harmon, 54 Hun 552, 8 N. Y. Supp. 119 (Sup. Ct. 1889).

[5] O'Brien v. Barkley, 60 St. Rep. 520, 28 N. Y. Supp. 1049 (Sup. Ct. 1894).

[6] Born v. Horstmann, 80 Cal. 452, 22 Pac. 169 (1889); Daboll v. Moon, 88 Conn. 387, 91 Atl. 646 (1914).

[7] Daboll v. Moon, 88 Conn. 387, 91 Atl. 646 (1914).

[8] Matter of Haight, 51 App. Div. 310, 64 N. Y. Supp. 1029 (2d Dep't 1900).

[9] Sisson v. Tenafly Trust Co., 133 N. J. Eq. 497, 33 A. (2d) 298 (1943); Williams v. Hund, 302 Mo. 451, 258 S. W. 703 (1924).

is constant and would not be affected in the slightest by any change in his marital relationship. The only consequence of a change would be in the inheritance of others after he is gone. We cannot conceive of a man being prompted to divorce his wife, break up his home, leave his children and create a new family, for the purpose of qualifying for a remote inheritance, in which he can never share, and which will become effective only after he is dead. The contention of appellants, that this condition is to be considered as an inducement to the breaking up of a marriage, is entirely too remote, since, as has been pointed out, there is no consideration or benefit which could reasonably be regarded as an inducement to the person who would be the one to bring about a dissolution of the marriage.

M. T.