[HIGH COURT OF AUSTRALIA.]

RAMSAY . . . . . APPELLANT;
PLAINTIFF,

AND

TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED AND OTHERS } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 5, 6;

SYDNEY, *Dec.* 14.

Latham C.J., Starke, Dixon, McTiernan and Williams JJ.

Will—Construction—Public policy—Illegality—Condition defeating gift—Effect on marital relations of donee—Gift to testator's son of income of fund so long as married to "his present wife"—Gift of corpus to son on termination of marriage—Gift over if son should predecease wife.

A testator by his will directed his trustees to convert his estate and to hold the proceeds in trust "to pay the income . . . to my son . . . for such period . . . as he shall remain married to his present wife . . . and on the termination of such period in trust for my . . . son absolutely provided however that should my . . . son predecease his said wife during such period my estate shall go to my . . . nephew . . . and my sister . . . in equal shares."

Held, by *Latham* C.J., *Starke* and *McTiernan* JJ. (*Dixon* and *Williams* JJ. dissenting), that this provision contained nothing which offended against public policy as having, or tending to have, an adverse effect on the son's marriage and it was wholly valid.

In re Caborne; *Hodge* v. *Smith*, (1943) Ch. 224, not followed.

Decision of the Supreme Court of Victoria (*Lowe* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

George Binnie Ramsay died on 23rd April 1946, leaving a will dated 12th March 1946. On 8th May 1947 letters of administration with the will annexed were granted to the Trustees Executors and Agency Co. Ltd. The will gave the testator's estate to his trustees on trust to convert and to hold the proceeds in trust to

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pay debts &c. and pecuniary legacies and " subject thereto to pay the income of my estate to my son George Binnie Ramsay for such period and so long as he shall remain married to his present wife Irene Ramsay and on the termination of such period in trust for my said son absolutely provided however that should my said son predecease his said wife during such period my estate shall go to my . . . nephew Robert Ramsay and my sister Mary Marshall Baillieu in equal shares."

The son took proceedings in the Supreme Court of Victoria by originating summons for the determination of questions relating to the provision set out above. The defendants to the summons were the administrator and the testator's nephew and sister named in the will. The summons asked the following questions :—(1) (*a*) Is the plaintiff entitled to an immediate absolute interest in the residuary estate of the testator ? (*b*) If the answer to part (*a*) is in the negative, what is the nature and extent of the interest in the said residuary estate given to the plaintiff by the words " to pay the income of my estate to my son George Binnie Ramsay for such period and so long as he shall remain married to his present wife Irene Ramsay and on the termination of such period in trust for my said son absolutely " ? (*c*) Is the gift in favour of the defendants Robert Ramsay and Mary Marshall Baillieu of any force and validity ? If yes, upon the happening of what event or events will such gift take effect ? (2) Has the testator died intestate as to any and what portion of his estate ?

The plaintiff's wife named in the will was still alive and the marriage still subsisted. It was contended for the plaintiff that the testator's attempt to dispose of the fund was invalid, wholly or in part, because of the restrictions imposed by relation to the plaintiff's marriage.

Lowe J. rejected this contention and answered the questions in the summons as follows :—(1) (*a*) No. (*b*) An interest in the income thereof so long as he lives and remains married to his present wife. (*c*) Yes. In the event of the plaintiff, George Binnie Ramsay, dying during the subsistence of the marriage to his present wife, the gift in favour of Robert Ramsay and Mary Marshall Baillieu will take effect. (2) No.

From this decision the plaintiff appealed to the High Court.

Hudson K.C. (with him *Voumard*), for the appellant. The law is correctly applied in *In re Caborne* ; *Hodge* v. *Smith* (1), which is

(1) (1943) Ch. 224.

indistinguishable from the present case and should be followed. The test is: Does the provision tend to encourage an invasion of the sanctity of marriage or is its effect to provide a real inducement or temptation to a spouse to desert his obligations arising out of the marriage? As to the application of the test, see *In re Wallace*; *Champion* v. *Wallace* (1); *Fender* v. *St. John-Mildmay* (2); *Halsbury's Laws of England*, 2nd ed. vol. 16, p. 715; also p. 612; *Cocksedge* v. *Cocksedge* (3); *Wilkinson* v. *Wilkinson* (4); *In re Moore*; *Trafford* v. *Maconochie* (5); *Egerton* v. *Brownlow* (6). Relevant considerations are the effect of the disposition as offering the appellant a financial inducement to bring about the termination of his marriage and providing a temptation (*a*) to commit a matrimonial offence; (*b*) to take advantage of any cause for divorce that might be given by the wife; (*c*) to refrain from any endeavour to become reconciled; (*d*) to assume an attitude to the wife calculated to break down the marriage; (*e*) to seek a collusive divorce. The gift of corpus to the appellant is subject to a condition precedent which is invalid. [He referred to *In re Hope Johnstone*; *Hope Johnstone* v. *Hope Johnstone* (7); *Re Thompson*; *Lloyds Bank Ltd.* v. *George* (8); *Wacker* v. *Bullock* (9); *In re Moore* (10); *In re Cuming*; *Nicholls* v. *Public Trustee* (*S.A.*) (11); *In re Piper*; *Dodd* v. *Piper* (12).]

Adam, for the respondent administrator, referred to *Caithness* v. *Sinclair* (13); *Fender* v. *St. John-Mildmay* (14).

Gilbert, for the other respondents. Three tests have been suggested to determine the validity of dispositions such as we have here—(1) Mere tendency to produce the obnoxious result; (2) a tendency which is substantial, real or effective; (3) an intention expressed by the testator to produce the result. Intention may be a guide to the effectiveness of the tendency. The scheme of the will here is a gift of income followed by alternative gifts. This indicates that the intention was to exclude the wife from deriving any benefit from the corpus. No intention is shown that the marriage be brought to an end. As to the test of tendency, the

(1) (1920) 2 Ch. 274, at pp. 278, 283, 287, 288, 297.
(2) (1938) A.C. 1, at pp. 12, 13, 18, 25, 26, 29.
(3) (1844) 14 Sim. 244, at p. 246 [60 E.R. 351, at p. 352].
(4) (1871) L.R. 12 Eq. 604.
(5) (1887) 39 Ch. D. 116.
(6) (1853) 4 H.L.C. 1, at p. 174. [10 E.R. 359, at p. 428.]
(7) (1904) 1 Ch. 470, at pp. 474, 478.
(8) (1939) 1 All E.R. 681.
(9) (1935) N.Z.L.R. 828, at pp. 833, 834.
(10) (1887) 39 Ch. D., at pp. 128, 131.
(11) (1945) 72 C.L.R. 86.
(12) (1946) W.N. 187.
(13) (1912) S.C. 79, at p. 84.
(14) (1939) A.C., at p. 24.

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true test is that there must be an effective tendency, that is to say, such that in the generality of cases the temptation would be succumbed to (*In re Fry*; *Reynolds* v. *Denne* (1)). The test in *Egerton* v. *Brownlow* (2) as to tendency must now be read subject to *Fender* v. *St. John-Mildmay* (3). Here there is no such tendency as answers to the test. It is true that divorce would enlarge the appellant's interest in the fund, but it cannot reasonably be said, on this account, that there is any likelihood that the marriage will be destroyed.

Hudson K.C. in reply referred to *In re Morgan*; *Dowson* v. *Davey* (4).

Cur. adv. vult.

Dec. 14. The following written judgments were delivered :—

LATHAM C.J. This is an appeal from an order of the Supreme Court of Victoria (*Lowe* J.) with respect to the validity of a provision contained in the will of the late George Binnie Ramsay. The testator directed that his property be sold and converted into money and after providing for certain legacies the will continued :— "Subject thereto to pay the income of my estate to my son George Binnie Ramsay for such period and so long as he shall remain married to his present wife Irene Ramsay and on the termination of such period in trust for my said son absolutely provided however that should my said son predecease his said wife during such period my estate shall go to my said nephew Robert Ramsay and my sister Mary Marshall Baillieu in equal shares." Thus the testator gave the income of his estate to his son during the period of his then existing marriage and upon the termination of that marriage the corpus was given to the son if he were alive, but, if the period of the marriage were terminated by reason of his death before the death of his wife, the corpus was given to the nephew and sister. If the provision is valid the son becomes entitled to the corpus in the following events : (1) if his wife (still being his wife) dies before him ; or (2) if his marriage is terminated by divorce. If, however, the son predeceases his wife during their marriage the corpus goes to the testator's nephew and sister. Upon an originating summons taken out by the son it was held by the learned judge that the son was not entitled to an immediate absolute interest in the residuary estate of the testator, that his present interest was an interest in

(1) (1945) Ch. 348.
(2) (1853) 4 H.L.C. 1. : See pp. 160, 161 [10 E.R. 359 : See pp. 423, 424].
(3) (1938) A.C. 1.
(4) (1910) 26 T.L.R. 398.

the income thereof so long as he lived and remained married to his present wife, and finally, that if he died during the subsistence of that marriage the gift in favour of the nephew and sister of the testator would take effect. It was argued for the son that the interest in the corpus was given upon an illegal condition because the form of the gift provided an inducement to the son to bring about a divorce so as to satisfy the condition contained in the words " on the termination of such period," whereupon he would obtain an absolute right in the corpus. The evil feature which produces the illegality is said to depend upon the alternative gift of the corpus (which is not a " gift over ") to the nephew and sister. They take only if the son should predecease his wife during their marriage. This provision is attacked as providing an inducement to the son to bring his marriage to an end so that the condition upon which the nephew and sister would take can never be satisfied. If it is invalid the son would, it is argued, be entitled to the income first and then to the corpus and, under the rule in *Saunders* v. *Vautier* (1), to the whole interest in the corpus absolutely and immediately.

In my opinion the provisions which require to be interpreted are not provisions containing either conditions or conditional limitations—the latter term being strictly applicable only to real estate. The income of the estate is given for a specified period, namely the period of the marriage of the son to his present wife. The gift of the corpus is not subject to any condition, but is an executory interest which merely awaits the termination of the preceding interest. But the decision of the question as to the legality of the provision does not depend upon whether a particular provision is a condition precedent or a condition subsequent, or whether it falls within any other technical legal description. It is entirely a question of the substance of the provision: see *Egerton* v. *Brownlow* (2): " This is not a technical question, but must be considered on general principles, with reference to the practical effect of the condition."

The provision is challenged on the ground that it provides an inducement to the son to procure a divorce either by giving cause therefor to his wife, or by persuading or goading her to give him such cause, and by discouraging reconciliation if the parties should quarrel. The law approves marriage and, it is argued, disapproves divorce, although it provides for divorce.

(1) (1841) Cr. & Ph. 240 [41 E.R. 482].

(2) (1853) 4 H.L.C. 1, at p. 160 [10 E.R. 359, at p. 423].

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Lowe J. first examined several statements of the general principle under which contracts or gifts have been held to be invalid as contrary to public policy. In his reasons for judgment the learned judge shows that there is an unsatisfactory variation in the statements of the principle. It is sufficient to say, without repeating the references which his Honour made to a series of authorities, that sometimes the intention, object, purpose or desire of the parties to the contract, or of the testator in the case of a will, has been regarded as the crucial feature in determining whether a provision is invalid as contrary to public policy. In other cases, however, the tendency of the challenged provision as affecting conduct after the contract or the will has come into operation has been regarded as the important element. In my opinion the two lines of authority can be reconciled by adopting the tendency of a provision as the test, but also recognizing that where it is evident that the object &c. of the parties or the testator is to bring about an illegal or otherwise reprehensible act, it would be difficult to deny that the provision had that tendency.

I agree with *Lowe* J.—and the contrary has not been argued upon this appeal—that the provision in this particular case was intended (so far as intention is important) to secure an income to the son during the marriage, and to prevent his wife obtaining any interest, either directly under the father's will, or indirectly through her husband's will, in the corpus. There is nothing illegal in such an intention—it is simply a case of a testator choosing his beneficiaries.

What then is the tendency of the provision as affecting the conduct of the son? In applying the principle which was called in argument "the tendency test," what is to be considered is the general tendency of the provision, and not the particular circumstances or characteristics of the persons concerned: see *In re Wallace*; *Champion* v. *Wallace* (1). The learned judge applied the test as stated by Lord *Atkin* in *Fender* v. *St. John-Mildmay* (2) in his consideration of the validity of an agreement for marriage to take place after a decree nisi should be made absolute. The agreement was attacked as tending to lead to immorality in the form of irregular sexual relations during the period before the decree was made absolute. Lord *Atkin* said (3):—"But assuming, as we must, that the harmful tendency of a contract must be examined, what is meant by tendency? It can only mean, I venture to think, that taking that class of contract as a whole the contracting parties will generally, in a majority of cases, or at any

(1) (1920) 2 Ch. 274, at p. 278.
(2) (1938) A.C. 1.
(3) (1938) A.C., at p. 13.

rate in a considerable number of cases, be exposed to a real temptation by reason of the promises to do something harmful, i.e., contrary to public policy ; and that it is likely that they will yield to it. All kinds of contracts provide motives for improper actions, e.g., benefits deferred until the death of a third party, and contracts of insurance. To avoid a contract it is not enough that it affords a motive to do wrong : it must surely be shown that such a contract generally affords a motive and that it is likely to be effective."

The appellant contends that this rule was properly applied in the case of *In re Caborne* ; *Hodge* v. *Smith* (1). This decision of *Simonds* J. was the basis of the appellant's argument. In that case the court considered the validity of a provision which was different in form, but was identical in substance with that to be found in the present case. The only difference was that there was an absolute gift in the first instance to a son of a testatrix which was cut down to a gift of income if his then wife was still alive and married to him. It was held (2) that this provision could fairly be represented " as a direct encouragement, either himself to commit those acts which would enable his wife to proceed against him " [for divorce], " or to take advantage of his wife's offences. The decision was that the provision was void.

The question whether a case falls within the prohibited class must be determined by a consideration of its general tendency, as Lord *Atkin* said, to provide a temptation and an estimate of the risk that persons would yield to that temptation. This question must be decided without evidence : *In re Wallace* ; *Champion* v. *Wallace* (3). There is no doubt that in the case of some persons a gift of this character would have a tendency to bring about a divorce. In exactly the same way there is no doubt that in the case of some persons the gift of property to A for life and then to B would lead B to kill or to try to kill A so as to accelerate his interest. But normal human beings do not kill others to get property, and it has never been held that gifts coming into operation upon the death of a person are unlawful as providing encouragement to murder. *Crompton* J. said in *Egerton* v. *Brownlow* (4) :— " It seems to me extremely dangerous to limit the power of disposition on any general notion of impolicy, without some definite rule or principle being shown to apply to the case. The principle that no disposition could be allowed which might hold out a temptation to commit crime is clearly much too general to be

(1) (1943) Ch. 224.
(2) (1943) Ch., at p. 229.
(3) (1920) 2 Ch., at pp. 302-303.
(4) (1853) 4 H.L.C., at pp. 68, 69 [10 E.R., at p. 387].

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supported. It would embrace almost every disposition and contract where a party is to expect a benefit from the death of another, nor can it be the true test whether impure or corrupt means may possibly be used. Although it may be impossible to lay down any definite rule which should include every case, that which was suggested by Mr. Rolt in his argument seems to me a truer and less objectionable test—whether there is anything illegal in the object to be attained, and whether, if not illegal, that object is either necessarily or according to the course suggested by the party to be attained by wicked or illegal means. If the object be illegal, as murder, theft, or other crime, of course the stipulation is illegal. So if the object can only be obtained by corruption or wickedness, the stipulation will be illegal and void; and even if the object be laudable, and may be attained by honourable means, still if it can be attained by improper means, and the party creating the condition makes such means the mode of performing it, the condition will be illegal and void." *Crompton* J. was one of the nine (out of eleven) judges whose advice was not taken by the four learned lords who constituted the majority of the House of Lords, but the judgment in the House of Lords does not conflict with the statement of principle which I have quoted from the answers of *Crompton* J. to the question submitted to the judges.

In *In re Hope Johnstone*; *Hope Johnstone* v. *Hope Johnstone* (1) a settlement provided for the payment of certain rents to a wife for life, or so long as she should continue the cohabiting wife or the widow of the settlor. The settlor took an interest upon the determination of the trust in favour of the wife. *Kekewich* J. held that the provision was good and rejected the argument that the interest of the husband arising on the cesser of the annuity might induce him so to treat his wife as to provoke a separation. He said (2) " such an argument, to my mind, is altogether wanting in substance. Policy of the law ought not, I think, to be pressed into the service of highly improbable contingencies." Reference was made to the opinions of the judges who advised the House of Lords in *Egerton* v. *Brownlow* (3) as being entitled to great weight in the consideration of the general question what is against the policy of the law and in the application of the principle to particular facts.

In spite of what is said in *In re Caborne* (4) I can see no adequate reason for presuming that it can be said generally of beneficiaries under a will that they would be likely to use wrongful methods in order to obtain a divorce so as to get money. The question is

(1) (1904) 1 Ch. 470.
(2) (1904) 1 Ch., at p. 478.
(3) (1853) 4 H.L.C. 1 [10 E.R. 359].
(4) (1943) Ch. 224.

whether such provisions would, in general, present a temptation to a man to destroy his marriage by improper means to which it would be likely that he would yield. The fact that it would be known that he would obtain a pecuniary advantage by bringing his marriage to an end would in itself be an element which would deter most persons from setting out to destroy their own marriages. Some persons, however, would not be influenced by consideration of what might be called social sanctions as distinct from moral considerations, but, on as good a judgment as I can form on the matter, I am not prepared to adopt the view of mankind which was applied in *In re Caborne* (1). The result of that view would be that if a father had a married daughter and provided in his will for the payment of an allowance to her if her husband died before her or if she were unfortunate enough to be divorced from him, the provision would be invalid because it would tempt her to terminate her marriage in order to get the allowance. Where certain grounds exist a person is entitled under the law to a divorce. In the present case the mere existence of the provision in question in the father's will would lead a court to scrutinize very carefully the evidence in any divorce proceedings to which the son was a party. In my opinion it is not to be assumed that persons will, notwithstanding all deterrents, do unlawful or corrupt acts in order to obtain a divorce so as to get money. The argument of the appellant in this case asks the court to determine the validity of the challenged provision by reference to what may not unfairly be described as "highly improbable contingencies."

In my opinion the appeal should be dismissed.

STARKE J. By his will George Binnie Ramsay gave all his estate to his trustees on trust for conversion and out of the proceeds of the estate to pay his debts, funeral and testamentary expenses and certain pecuniary legacies and subject thereto to pay the income of his estate to his son George Binnie Ramsay for such period and so long as he should remain married to his present wife Irene Ramsay and on the termination of such period in trust for his son absolutely provided however that should his son predecease his said wife during such period his estate should go to his nephew Robert Ramsay and his sister Mary Marshall Baillieu in equal shares.

Now it has been contended that the gift to the testator's son both as to income and corpus and the proviso or gift to his nephew and sister or in any case the proviso or gift are contrary to public

(1) (1943) Ch. 224.

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Starke J.

policy and therefore void. It is thus sought to establish an intestacy or the invalidity of the proviso or gift to his nephew and sister and the consequent result that the testator's son becomes entitled to the testator's estate.

A disposition by will is contrary to public policy if it is injurious to public interests or has a tendency to injure public interests (*Fender* v. *St. John-Mildmay* (1)). Some provisions are recognized as harmful in themselves, for instance, provisions in general restraint of marriage or provisions requiring the separation of husband and wife. Others have a tendency to injure the public interests of which *Egerton* v. *Brownlow* (2) is an example. But it must be a general tendency to injure public interests ; to do something harmful to public interests having regard to human nature and not the character of particular individuals. The tendency must be " substantial and serious ", " a real temptation . . . to do something harmful, i.e. contrary to public policy " (3) and one to which parties are likely to succumb.

The question whether such a tendency exists is one of law for the court and depends upon the provisions of the will and any relevant surrounding circumstances. It is clear that the testator desired to exclude his son's wife, so far as he could, from any benefit from his estate. But testators frequently, I am afraid, cut off their children with the proverbial penny for marrying against their will. Dispositions of this character, unjust though they may be, do not infringe any rule of public policy. But what are the harmful tendencies of the present will ? It was not seriously suggested that the general tendency of the will would operate as an inducement to the son to get rid of his wife by criminal means. Such a suggestion would be " fanciful and unreal " and has even been described as " ridiculous." But it was contended that the general tendency of the will would operate as a direct encouragement to the son either to commit matrimonial offences which would enable his wife to divorce him or to take advantage of his wife's offences. It is not, as Lord *Atkin* observed (4), contrary to public policy that married persons should be divorced. The contention ignores, I think, the moral standards and conduct of decent and ordinary members of the community and concludes that these standards would be wholly insufficient to withstand the temptation of the pecuniary advantage arising under the terms of the will. It should be observed that the termination of the marriage by means of divorce could not be achieved without the active participation of

(1) (1938) A.C. 1.
(2) (1853) 4 H.L.C. 1 [10 E.R. 359].
(3) (1938) A.C., at p. 13.
(4) (1938) A.C., at p. 17.

the wife in the proceedings. And if the husband and wife acted in concert to procure a divorce they might easily defeat their ends and lay themselves open to a charge of conspiracy. The contention that the provisions of the will have a tendency to induce departure from the standards of ordinary moral and decent persons for a pecuniary advantage is, I think, unreal and fanciful.

So far I cannot think that the public interests are in any way impaired or harmfully affected by the terms of the will.

Next it was contended that the provisions of the will are contrary to public policy because they tend to weaken the *consortium vitae* of matrimony—the matrimonial relations of husband and wife, to foster inharmonious relations between husband and wife.

This contention is also, I think, unreal and fanciful. I cannot accept the view that the provisions of the will expose persons to the temptation of destroying or weakening the serenity, comfort and affections of their home life for the pecuniary advantages provided in the will. The contention envisages a standard of morality and conduct so strange that I dismiss the notion that ordinary and decent members of the community might by reason of the provisions of the will destroy or weaken the *consortium vitae* of matrimony.

But the case of *In re Caborne*; *Hodge* v. *Smith* (1) was relied upon. It is not identical in terms with the present will but I agree that in effect it is indistinguishable from the present case and is contrary to the view I have expressed. The case is not binding upon this Court and, with respect, I am unable to adopt the conclusion there reached. To adopt Lord *Atkin's* phrase it affords "another instance of the horrid suspicions to which high minded men are sometimes prone" (2). The "unruly horse" (3), public policy, got away, I am afraid, with the learned judge and carried him off the course.

This appeal should be dismissed and the decision of *Lowe* J. affirmed.

DIXON J. The question for determination in this appeal concerns the validity of a condition upon which a gift depends.

The estate consists of personalty. After a direction to convert and to pay debts and two small pecuniary legacies the will declares trusts of the residue. There is a trust to pay the income to the testator's son for such period and so long as he shall remain married to his present wife and on the termination of such period a trust for

(1) (1943) 1 Ch. 224.
(2) (1938) A.C., at p. 16.
(3) (1938) A.C., at p. 10.

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DIXON J.

the son absolutely, that is, of a full interest in corpus. If the limitations stopped there the son would take absolutely because the gift of income and the gift of corpus would combine to create in him an absolute interest. But the will does not stop there. There is a gift over in the form of a proviso. It provides that should the testator's son predecease the son's said wife during such period the estate should go to the testator's nephew and sister in equal shares. The effect of the limitations is to confer upon the testator's son a full interest in corpus and income subject to a gift over in the event of his dying before his wife without either of them obtaining a decree of dissolution of marriage. Thus divorce is made an essential part of a compound event upon which is made to depend a condition defeating a gift and giving rise to an executory limitation over. The question is whether such a condition is invalid as contrary to the policy of the law. I have come to the conclusion that it offends against a principle deeply rooted in our law. The principle is expressed in a dictum of Lord *Hatherley* which occurs in the case reported as *H.* v. *W.* (1): "It is forbidden to provide for the possible dissolution of the marriage contract, which the policy of the law is to preserve intact and inviolate." It offends against this principle because dissolution of the marriage contract between the donee and his wife is an event or object the condition is framed to encourage. The event, the occurrence of which will prevent the operation of the condition to defeat the gift, is one which it is against the policy of the law to choose for such a purpose. It is therefore not a question how far a gift in such a form is or is not likely to contribute actually to bringing about the event. Conditions subsequent are not to be framed for the purpose of divesting the interest given unless a divorce is secured. This is the decision of *Simonds* J., as he then was, in *In re Caborne*; *Hodge* v. *Smith* (2), following that of *Farwell* J. in the unreported case of *In re Friedman*. These decisions are directly in point and necessarily govern the present case unless the Court is of opinion that they are wrong and should not be followed. The judgment of Lord *Simonds* in *In re Caborne* (2) is well considered and is based on an examination of the case law. There is every ground why its authority must be high. But independently of the persuasive force of his Lordship's decision, it appears to me to be an application of a principle forming part of the policy of the law settled long ago and one which has not been affected either by the passage of time or by the spread of a somewhat different outlook upon marriage

(1) (1857) 3 K. & J. 382, at p. 387; [69 E.R. 1157, at p. 1159].

(2) (1943) Ch. 224.

or by the alteration of the divorce laws or by the existence of judicial misgivings concerning the actual harmfulness of conditions or provisions favouring or contemplating divorce. It can hardly be doubted that it is still the policy of the law to preserve and maintain marriage. The reason why conditions of the kind now in question are considered inconsistent with that policy is because they amount to a use of the testamentary power of disposition in opposition to the maintenance of the marriage. To frame a limitation so that property goes over unless the donee's marriage with his wife is dissolved by decree, failing her predeceasing him, is to construct a pecuniary or proprietary inducement to one or both parties to use any opportunity for the dissolution of the marriage. But the law having adopted a settled policy, once it is seen that a condition subsequent is framed in opposition to that policy, the law does not proceed to examine or weigh the probabilities of the inducement established by the limitation proving effective. It does not do so either in the given case or by considering the presumed responses of the average reasonable man. When, as in the present case, the form of the gift is in opposition to the policy of the law, that, as I understand the matter, is enough to invalidate the condition.

I am therefore of opinion that the condition subsequent and the gift over are bad.

I think that the appeal should be allowed and so much of the order appealed from as answers the first question should be discharged and that in lieu thereof in answer to paragraph (*a*) of the first question, it should be declared that the plaintiff is entitled to an immediate absolute interest in the residuary estate of the testator.

The costs of all parties of the appeal as between solicitor and client should be paid out of the residuary estate.

McTIERNAN J. In this case I have come to the conclusion that the appeal should be dismissed. I do not think that the disposition of the residue is at variance with public policy. The head of public policy invoked is marriage. This, of course, is not a novel head of public policy. The relation of husband and wife is important to society and it is the policy of the law to maintain the relation. The policy of the law is affected by the view adopted by Parliament that marriage is a secular contract dissoluble on certain grounds. The test of whether a disposition of property is at variance with the policy of the law is its tendency to injure the public interests. It is necessary to consider whether the disposition of the residue in the present case has an injurious tendency of this character. It

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would have this character if its tendency is to promote crime, immorality or conduct harmful to the marriage of the testator's son. I cannot agree that the disposition in question has any such tendency. The proper ingredients of an inquiry into the tendency of a disposition of property or a contract are explained by the Lords in *Egerton* v. *Brownlow* (1) and *Fender* v. *St. John-Mildmay* (2). The approach is an abstract and theoretical one. It must be made apart from particular individuals. The character of the testator's son and his wife are not in question. Indeed, there is no evidence about their character. Presumably they are persons of excellent character and neither would take any action to bring about a dissolution of the marriage in order to enlarge the husband's fortune. But that consideration is not decisive on the question whether or not the bequest has a mischievous tendency. If, on the other hand, the testator's son and daughter were not persons of good character neither would that consideration be decisive. If it were, the husband might profit by being a person of evil propensities. But in the application of the test he is not under a disadvantage because he is honorable. I apprehend that the matter of which the Court must be satisfied is that, speaking generally, the practical result of a bequest in the terms of the present one would be to promote conduct inconsistent with the due performance of the obligations of the marriage in the hope that divorce would result. It is to be remembered, as Lord *Atkin* observed in *Fender* v. *St. John-Mildmay* (3), "The obligations are not all included in the legal phrase, rendering conjugal rights." I should think that it would be the rule that a disposition of property like that made by the testator in the present case would not expose a husband to the temptation to contrive by unlawful or wicked means, or otherwise, to end his marriage. If there are exceptions, these would prove the rule. By way of an analogy, it would be contrary to all experience to say that a remainderman is by the will or other disposition, under which he is entitled to property, exposed to a temptation to hasten the death of the life tenant. The generality of persons in a civilized community respect the sanctity of marriage as well as of life, and would not be induced by pecuniary gain to destroy one or the other. It is not reasonable to suppose that the terms of the disposition of residue create any practical conflict between the son's duty as a husband and his interest as a beneficiary. Illegality is not to be presumed. Applying the test of tendency, as elucidated in the

(1) (1853) 4 H.L.C. 1 [10 E.R. 359].
(2) (1938) A.C. 1.
(3) (1938) A.C., at p. 16.

decisions which have been cited, I am not satisfied that this disposition of residue is at variance with public policy. If this result is contrary to the *ratio decidendi* in the case of *In re Caborne*; *Hodge* v. *Smith* (1), with respect, I feel that I cannot alter it in deference to that decision. The apparent object of the testator here was to exclude the possibility of the acquisition by his son's wife of any of his property. Of course, he was bound to observe the restraints imposed by public policy on the freedom of testamentary disposition in desiring to exclude his daughter-in-law; he may have been actuated by dislike for her or he may have ranked the claims on his bounty of his son and the two relatives mentioned in the proviso to the bequest of the residue higher than the claims of his son's wife. He was free to make that preference. There is no ground for holding that the testator exceeded any restraint imposed by law upon the freedom of testamentary disposition.

WILLIAMS J. George Binnie Ramsay died on 23rd April 1946, leaving as his sole next-of-kin his son George Binnie Ramsay, the present appellant. The deceased made his last will and testament on 12th March 1946, whereby he directed his executors and trustees to sell and convert his estate into money and to hold the proceeds, subject to the payment of his just debts, funeral and testamentary expenses and two legacies of £100 each, upon trust to pay the income to the appellant for such period and for so long as he should remain married to his present wife, Irene Ramsay, and on the termination of such period in trust for the appellant absolutely, provided however that should the appellant predecease his said wife during such period his estate should go to his nephew, Robert Ramsay, and his sister, Mary Marshall Baillieu, in equal shares. The value of the residuary estate, which consisted entirely of personalty, was sworn for probate purposes at £15,300. Under the trusts of the will therefore the appellant is only entitled to be paid the income of residue during the existence of his present marriage and will only become entitled to be paid the corpus if he outlives that marriage.

The question that arises for decision is whether any of the trusts of residue is void on the ground of public policy. *Lowe* J. was of opinion that the whole of these trusts were valid and therefore declared that the appellant is not at present entitled to the corpus of residue but only to an interest in the income thereof so long as he lives and remains married to his present wife.

Were it not for the light thrown on the matter by the decision of *Simonds* J. (as Lord *Simonds* then was) in *In re Caborne*; *Hodge* v.

(1) (1943) 1 Ch. 224.

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Smith (1), I might well have reached the same conclusion. In *In re Caborne* (1) there was an initial gift of an absolute interest in the corpus of residue to the son of the testatrix provided that if his present wife should still be alive and married to him the absolute gift should be modified in such manner that he should have an interest for his life only or for such part thereof as his present wife . . . should remain his wife in the articles set out in the schedule thereto but so that if at any time during his life his said wife should die or his said marriage be otherwise terminated the absolute gift should take effect as and from such event, but if he should die leaving his said wife alive the testatrix bequeathed each article to the respective legatee whose name appeared opposite and as to the remainder of residue gave devised and bequeathed the same on the death of her son if he should predecease his said wife being then still married to her unto her trustees upon trust for a number of charities.

In the present will the initial trust is a gift of income to the appellant and the gift of the corpus though vested only becomes a vested interest in possession on the termination of that interest. Further the gift of corpus though vested is not indefeasibly vested but will be divested by the executory gift over contained in the proviso if the appellant should die during his present marriage. Were it not for the gift over, the trusts of the income and corpus of residue in favour of the appellant would merge by operation of law, and he would be entitled to an immediate absolute interest in possession in the corpus of the residuary estate. Accordingly under the trusts of the present will as under the trusts of the will in *In re Caborne* (1) the attainment by the appellant of such an interest depends upon the termination of his existing marriage in his lifetime, and exactly the same considerations of public policy arise as arose in *In re Caborne* (1). This Court is not, of course, bound by the decision in that case, but it is the decision of a most distinguished Judge who is now a member of the House of Lords and the Judicial Committee of the Privy Council, and one which must carry great weight with this Court. In *In re Caborne* (2) his Lordship said that he was clearly of opinion that the condition was void.

The effect of the condition in the present case is to keep the corpus of residue out of the reach of the appellant so long as he remains married to his present wife. It is evident that the testator disliked the present wife, and his sole motive may well have been simply to prevent her participating in his capital even indirectly as a beneficiary under the will of the appellant if he predeceased

(1) (1943) 1 Ch. 224.

(2) (1943) 1 Ch., at p. 229.

her. But it is now established that a gift is void on the ground of public policy, whatever may be the motive of the donor and whatever might be its effect in a particular case, if, to adapt the words of Lord *Atkin* in *Fender* v. *St. John-Mildmay* (1) donees under a gift of such a nature would generally, in a majority of cases, or at any rate in a considerable number of cases, be exposed to a real temptation by reason of the gift to do something harmful, i.e., contrary to public policy; and it is likely that they would yield to it. Agreements for future separation between husband and wife have always been held to be against the policy of the law. Agreements or gifts which have a general tendency to lead to a future separation or to a divorce must equally be against its policy. The position is succinctly stated by *Simonds* J. in *In re Caborne* (2): "Whether the matter be looked at from its religious or civil aspect, the positive duty of reconciliation and the danger of a provision which tends to encourage a departure from that difficult path are equally obvious. How often must any judge in this Division, exercising the familiar jurisdiction over infants, have felt a profound conviction that the welfare of his wards and the interest of society as a whole could best be served by a reconciliation of the parents, and, perhaps, deplored the readiness with which the one or other, or too often both of them, embraced the opportunity of statutory relief. An inducement to that step by the promise of material advantage must, in my judgment, be utterly invalid." A gift which is made to depend upon the dissolution of an existing marriage by divorce would have a general tendency to wrong. The fruition of the gift of corpus to the appellant is not made to depend solely upon a divorce. He may reach the corpus by his present marriage coming to an end either by divorce or the prior death of his wife. But it appears to me that the gift has a similar harmful tendency whether the attainment of the corpus is conditional on the marriage coming to an end by a divorce alone or by the alternative events of a divorce or the prior death of the wife. The provision which has the harmful tendency is the proviso. It is the fact that the corpus is given over if the appellant dies during the existing marriage which provides the tendency to end this marriage by a speedy divorce so that this blot on his title may be removed. Such a provision has a tendency to induce the spouse who benefits to give the other spouse grounds for a divorce in the hope that the latter will take advantage of them. It might prevent the former condoning some ground for a divorce afforded by the other spouse. It might lead to a collusive divorce with a view to a subsequent

(1) (1938) A.C. 1, at p. 13.

(2) (1943) 1 Ch., at p. 229.

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remarriage. It might interrupt the true consortium of married life by making the spouse who did not benefit suspicious of the motive for some conduct of the spouse who did. As *Simonds* J. said in *In re Caborne* (1) the proviso tends to encourage an invasion of the integrity and sanctity, and I might add happiness and maintenance, of married life and it is, in my opinion, void on the ground of public policy.

I would therefore allow the appeal and set aside the order below except in relation to costs. The first question asked in the originating summons is whether the plaintiff is entitled to an immediate absolute interest in the residuary estate of the testator. I would answer this question in the affirmative. The costs of all parties of the appeal as between solicitor and client should be paid out of the residuary estate.

Appeal dismissed with costs.

Solicitor for the appellant: *H. K. McCleery.*

Solicitors for the respondents: *A. Godfrey*; *Malleson, Stewart & Co.*

E. F. H.

(1) (1943) 1 Ch., at p. 228.