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TORTS - RIGHT OF PROSPECTIVE LEGATEE AGAINST PERSON PREVENTING EXECUTION OF WILL

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TORTS — RIGHT OF PROSPECTIVE LEGATEE AGAINST PERSON PREVENTING EXECUION OF WILL — The plaintiff's sister had prepared a will which she desired to have witnessed, by the terms of which will the plaintiff would have received a share of her sister's estate. The defendant, brother-in-law of the plaintiff, by threats prevented his wife from completing the execution of the will, and he acquired all of her property by intestate succession. The plaintiff sued for damages in the amount of the proposed legacy, but the court *held* that the petition stated no cause of action inasmuch as there was no showing that the defendant had invaded any property right of the plaintiff. *Cunningham v. Edward*, (Ohio App. 1936) 3 N.E. (2d) 58.

This decision is in accord with the decisions of other courts faced by similar fact situations. Thus, the Pennsylvania court permitted no recovery against a defendant who merely persuaded the testator not to change his will so as to increase the gift to the plaintiff.[1] Nor has recovery been allowed in the stronger cases where the defendant by fraud induced the testator not to make the plaintiff a beneficiary under his will,[2] or to make a new valid will cutting off a prior bequest to the plaintiff.[3] On the other hand, recovery has sometimes been permitted in the cases which show prevention of probation of the true will by spoliation [4] or by the forgery of an allegedly subsequent will,[5] but there is little difficulty in finding the required property right in these cases in which the plaintiff claims as legatee under an unprobated will. Whether an otherwise lawful act becomes tortious because of the malicious motive of the actor is questionable,[6] but it is to be remembered that the defendant in the principal case was charged with acts which might well have been regarded as duress. It is possible that some courts would have found a sort of quasi-property right, sufficient as a basis for a tort action, in the plaintiff's right to inherit free from interference by the defendant. It is suggested that such a right would be no more attenuated and evanescent than the right protected in certain cases of unfair

[1] Marshall v. De Haven, 209 Pa. 187, 58 A. 141 (1904), on the ground that the plaintiff had no interest in the estate in the absence of a completed gift.

[2] Hall v. Hall, 91 Conn. 514, 100 A. 441 (1917), on the ground that a probated will was not subject to collateral attack by a party to the probate proceeding; Lewis v. Corbin, 195 Mass. 520, 81 N.E. 248 (1907). In the second case the defendant by fraud prevented the gift from being legally effective and the court indicated by way of dictum that recovery might have been allowed had there been sufficient averment of damage.

[3] Hutchins v. Hutchins, 7 Hill (N. Y. S. Ct.) 104 (1845), on the ground that the plaintiff had no property interest; Murphy v. Mitchell, (D. C. N. Y. 1917) 245 F. 219, dictum indicated that there might be a cause of action.

[4] Dulin v. Bailey, 172 N. C. 608, 90 S. E. 689 (1916), noted in 30 HARV. L. REV. 527 (1917); Creek v. Laski, 248 Mich. 425, 227 N. W. 817 (1929), noted and result approved in 14 MINN. L. REV. 704 (1930).

[5] Petitt v. Morton, 38 Ohio App. 348, 176 N. E. 494 (1930), noted and approved in 30 MICH. L. REV. 478 (1932).

[6] Lancaster v. Hamburger, 70 Ohio St. 156, 71 N. E. 289 (1904); Hardison v. Reel, 154 N. C. 273, 70 S. E. 463 (1911); Allen v. Flood, 14 T. L. R. 125 (H. of L. 1897); Randall v. Hazelton, 94 Mass. 412 (1866). That motive may lend tortious character to an act is contended by Ames, "How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor," 18 HARV. L. REV. 411 (1905).

competition. A damage suit in tort is now recognized in these cases [7] as an appropriate remedy supplementing the equitable remedy of injunction. Certainly the courts are going far to find a property interest when the wrong punished is interference, not with an existing contract to which the plaintiff is a party, but with a contract about to be made by the plaintiff.[8] However, the willingness of the courts in these cases to find and protect a property interest as distinguished from their unwillingness to do so in the cases instituted by disappointed legatees is perhaps explicable and justifiable on the basis of the law's traditionally favorable attitude toward a man's right to be free to earn his living by the unhindered exercise of his trade.[9]

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[7] Louis Kamm, Inc. v. Flink, 113 N. J. L. 582, 175 A. 62 (1934); Grismore, "Are Unfair Methods of Competition Actionable at the Suit of a Competitor?" 33 MICH. L. REV. 321 (1935).

[8] Sparks v. McCreary, 156 Ala. 382, 47 So. 332 (1908); Louis Kamm, Inc. v. Flink, 113 N. J. L. 582, 175 A. 62 (1934); Grismore, "Are Unfair Methods of Competition Actionable at the Suit of a Competitor?" 33 MICH. L. REV. 321 (1935).

[9] It is noteworthy that the court in the principal case did not overlook this distinction for it said, 3 N. E. (2d) 58 at 60: "It must be remembered that the instant case does not involve an interference with a right to work or transact business, nor an interference with a contract relation; . . ."