Tests Based On The Reality Of The Transfer

Considerable popularity is being attained by the theory that a transfer is immune from the widow's attack if it has "factual reality," or "reality," as we shall call it. A transfer has "reality," under this theory, if it has inter vivos validity aside from any question of the rights of the widow. The only transfers subject to the widow's attack, on this reasoning, are sham transfers or testamentary transfers. In other words, she cannot impugn any transfer that is operative, inter vivos, between the parties thereto, or, as it is sometimes said, which was "complete," 1 or in which the transferee obtained a "present interest" 2 in the subject matter of the transfer as soon as the transfer was made. The equities of the case—in theory, at any rate—are irrelevant. 3

1 E.g., Matter of Halpern, 303 N.Y. 33, 38, 100 N.E.2d 120, 122 (1951); Haskell v. Art Institute, 304 Ill. App. 393, 404, 26 N.E.2d 736, 741 (1940); see Small v. Small, 56 Kan. 1, 15, 42 Pac. 323, 327 (1895); Lines v. Lines 142 Pa. 149, 21 Atl. 809 (1891). A transfer has also been said to be valid if it is "absolute": e.g., In re Kilgallen's Estate, 204 Misc. 558, 561, 123 N.Y.S.2d 827, 830 (Sur Ct. 1953); cf. Bolles v. Toledo Trust Co., 144 Ohio St., 195, 213; 58 N.E.2d 381, 391 (1944). Likewise a case may be said to turn on whether the transferees took a "vested interest": cf. Rose v. Union Guardian Trust Co., 300 Mich. 73, 71 N.W.2d 458 (1942).


3 Massachusetts liberally provides the surviving spouse with the first $10,000 of the estate, (Mass. Laws Ann. chap. 191, §15) but is apathetic about inter vivos evasions. In Kerwin v. Donaghy, 317 Mass. 559, 571, 59 N.E.2d 299, 306 (1945) the court said that "[i]n this Commonwealth a husband has an absolute right to dispose of . . . all of his personal property in his lifetime, without the knowledge or consent of his wife, with the result that it will not form part of his estate for her to share

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I. The Halpern Case

Of all the "reality" decisions, the cause célèbre is the recent Halpern case in the New York Court of Appeals. This case is significant for two reasons. It condoned the Totten trust as a weapon of disinheritance; and it cast disquieting doubts on the validity of the entire illusory transfer doctrine.

In the Halpern case the husband by his will in 1939 made his wife executrix and sole beneficiary. He separated from her in 1946. During 1946 and 1947 he opened four savings bank accounts in his own name in trust for an infant grandchild. He died in 1948 leaving an estate of about $3,300, exclusive of the Totten trusts. Several deposits had been made in the accounts, but no withdrawals; and the balance at his death approximated $14,000. The husband had in no way disaffirmed or revoked the trusts. There was evidence that he had informed several people that he wanted the grand-

. . . by virtue of a waiver of his will. That is true even though his sole purpose was to disinherit her. . . . The right of a wife as a distributee stands no higher than the similar right of a child."

The ultimate in the "present transfer" reasoning is reached in Redman v. Churchill, 230 Mass. 415, 119 N.E. 953 (1918). Here the husband about a year before his death transferred the greater part of his personality (at least $50,000) to himself as executor of his mother's will. His purpose was to exclude his wife. Presumably he was a substantial beneficiary under his mother's will; his own will left the residue of his estate "or over which I have, under the will of my mother or otherwise, the power of distribution" in trust for his children. The widow received by will one-third of the realty and personalty "standing in my name," which amounted only to $825.69. Held, the widow could get no share of the $50,000, there being no "legal fraud" on her because he had the right to dispose of his property during his lifetime without her consent; and, since the transfer was "real," it "passed the title" to himself as executor.

On powers of appointment see pp. 252-258, infra. The Massachusetts cases are also discussed, in connection with the "intent" rationale, in Chap. 8, note 24.

daughter to "have his bankbooks." Three of the bankbooks were found in his safe-deposit box at his death. The fourth was apparently handed to the grandchild's mother before his death. The widow, as executrix, began discovery proceedings to recover the accounts on the ground that they were illusory transfers.

The Surrogate Court, stating that there was no proof of any act on the part of the testator which made the trusts irrevocable, held the trusts illusory; and, as Burns v. Turnbull had said that an illusory transfer is a nullity, the estate was thus deemed entitled to all of the accounts. The First Department of the Appellate Division affirmed, but pointed out that to declare a Totten trust entirely void merely to give the widow a portion would amount to overruling the Totten trust doctrine. Totten trusts being sui generis, serving a useful purpose, and easily divisible, it was concluded that they should be defeasible only to the extent of the widow's share.

The majority opinion in the Court of Appeals stated, curiously, that both courts below had found the trusts illusory, "not on any proof that they lacked actuality or reality, but solely because they were made for the purpose of keeping the widow from collecting [her] share. . . ." It then proceeded to repudiate the test that actually had been followed by the lower courts, declaring that "There is nothing illusory about

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5 303 N.Y. 33, 37, 100 N.E.2d 120, 121 (1951). But cf. concurring opinion, id. at 41, 100 N.E.2d at 124.
6 197 Misc. 502, 504, 96 N.Y.S.2d 596, 598 (Surr. Ct. 1950). A comment in 37 Cornell L. Q. 258 (1951) speculates that the "trusts" could have been ruled irrevocable, either because of the statement to the child's mother that the bank books were "for" the child or because of the apparent delivery of the fourth bank book.
8 303 N.Y. 33, 37, 100 N.E.2d 120, 122 (1951). The lower courts apparently relied solely on the reasoning that "a Totten trust is an illusory transfer," 277 App. Div. 525, 528, 100 N.Y.S.2d 894, 898 (1st Dep't 1950).
a Totten trust as such.” 9 Professing to apply the so-called *Newman v. Dore* test of “good faith divestment,” the opinion stated that Totten trusts are valid if “real and not merely colorable or pretended.” 10 The *Newman, Krause, and Burns* cases, all cases involving trusts that the Court of Appeals had held illusory, were distinguished on the ground that “in each of those cases the finding of illusoriness was made on a factual showing of unreality, and not solely because the transfers operated to, and were intended to, defeat the widow’s expectancy.” 11 The *Krause* 12 case, which courts 13 and commentators 14 had understood to categorize Totten trusts as illusory *per se*, was specifically distinguished on the ground that there the decedent “had never intended that his Totten trust, made in favor of his daughter who lived in a foreign country and from whom he had not heard in years, would have any real effect, or that the money should ever go to the faraway daughter.” 15

The concurring opinion declared that the rights of the surviving spouse depend upon suit being brought by the surviving spouse individually and in compliance with the terms

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9 303 N.Y. 33, 38, 100 N.E.2d 120, 122 (1951).
10 Id. at 37, 100 N.E.2d at 122.
11 Id. at 38, 100 N.E.2d at 122.
12 285 N.Y. 27, 32 N.E.2d 779 (1941).
14 E.g., Note, 52 Colum. L. Rev. 284, 285 (1952).
15 303 N.Y. 33, 38, 100 N.E.2d 120, 122 (1951). This seems a large assumption, even though four of the judges in the Halpern case were on the court that decided the Krause case: Loughran, C. J., Lewis, Desmond, and Conway, J. J. Aside altogether from the Krause case, the court in the Halpern case seems on questionable ground when it says that “unreality” of this sort existed in *Newman v. Dore* (remainder of trust going to a favorite niece) or in *Burns v. Turnbull* (remainder to a daughter by a previous marriage). The trial court in the Turnbull case, 37 N.Y.S.2d 580, 588 (1942), in speaking of the wife’s inter vivos transfer to a daughter by a previous marriage, stated: “There was logic in what she did. . . . The settlor may have concluded that her husband and son would not need her property, whereas [the donee] having no other means of support, would. There are many hypotheses consistent with the good faith of settlor.”
of the statute. On this reasoning the widow would lose; she had brought the action in her capacity as executor, and without filing a notice of election within the required six months period. Both opinions stated that the order of the Appellate Division would have to be affirmed, since no appeal therefrom had been taken by the infant beneficiary. Both opinions, then, are dicta.

The first thing to notice about the Halpern case is that it is indecisive. Nowhere is there an express repudiation of the illusory trust doctrine of Newman v. Dore. Instead, we have some cryptic references to the Newman case, seemingly linking it with the "reality" doctrine. Moreover, three of the seven members of the court, Judges Lewis, Conway, and Froessel, based their opinion solely on procedural grounds. This means that the "reality" rationale is found in dicta of a bare majority of the court. Technically, this reduces the persuasive force of the decision. Nor can we rule out the possibility of eventual refinement or change in the court's views, because of a change in the personnel of the court.

Nevertheless, the case does much to undermine the "control" rationale of Newman v. Dore. Both opinions may be mere dicta; but their considered, deliberate tone may well persuade later courts — in New York and elsewhere — to adopt the "reality" rationale. For in the Halpern case the phrase "illusory" takes on a new meaning. Whereas in the Newman case it connotes excessive control, in the Halpern...
case it refers to a lack of *animus donandi*. Under *Newman v. Dore* an inter vivos device might be valid, aside from the widow’s rights, and yet still be subject to the widow’s share; under the reasoning of the *Halpern* case, if the device is valid aside from the widow’s claim, the widow has no claim. Says the majority opinion: “There is nothing illusory about a Totten trust as such.” But nothing could be more “illusory,” in the “control” sense of *Newman v. Dore*, than a Totten trust. The retention of almost complete control earmarks it for what it is—a specifically bequeathed bank account. The only rational explanation of the statement quoted above is that the Court of Appeal is using “illusory” in a fresh sense. The bird with a broken pinion never flies as high again; similarly, the doctrine of *Newman v. Dore*, while not specifically rejected, at least as to devices other than Totten trusts, is not as strong as it used to be.

What influence has the *Halpern* case had on subsequent decisions? To attempt an answer to this question we must consider both Totten trusts, and devices other than Totten

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21 303 N.Y. 33, 38, 100 N.E.2d 120, 122. This, of course, is not what courts and commentators had assumed the “illusory trust” doctrine to mean; and, although the matter is not free from doubt, in all probability it is not what the court in the Newman case had in mind. That court stressed the retention of control, stating: “We assume, without deciding, that except for the provisions of section 18... the trust would be valid,” 275 N.Y. 371, 380, 9 N.E.2d 966, 969 (1937); cf. Hayes, “Illinois Dower and the Illusory Trust: The New York Influence,” 2 De Paul L. Rev. 1, 16 (1952).

Under the Halpern case reasoning the husband’s intent to disinherit his wife is relevant, but only insofar as it assists in furnishing proof of the *animus donandi*. Thomas v. Louis, 284 App. Div. 784, 786, 135 N.Y.S.2d 97, 99 (3rd Dep’t 1954); but cf. Hoffman v. Hoffman, 144 N.Y.S.2d 855, 856 (Sup. Ct. 1955) (deed to spouse). Prior to the Halpern case the New York courts formally eschewed the “intent” factor, in practice often used it as ballast: In re Schurer’s Estate, 157 Misc. 573, 284 N.Y.S. 28 (Surr. Ct. 1935), aff’d without opinion, 248 App. Div. 697, 289 N.Y.S. 818 (1st Dep’t 1936) (mere “constructive fraud” contrasted with “an element of fraud which is so blatant that it is impossible to ignore it”); Mottershead v. Lamson, 101 N.Y.S.2d 174 (Sup. Ct. 1950) (presumption of fraud if a major portion of estate without knowledge of wife goes to children by a previous marriage). In one case “intent” was the *ratio decidendi*: Bodner v. Feit, 247 App. Div. 119, 286 N.Y.S. 814 (1st Dep’t 1936). See also Chap. 7, note 92, supra.
trusts. The Totten trust cases are examined in detail in a later chapter, but a brief summary will be useful at this point. Subsequent lower-court decisions in New York have uniformly followed the lead given in the Halpern case. Recent decisions from other states involving bank account trusts appear to be restricted to Maryland and Pennsylvania. In neither jurisdiction has the Halpern case resulted in any change of rationale. Maryland uses what amounts to a "reasonableness" test; and Pennsylvania is now governed by legislation that permits invasion of "revocable" transfers by the surviving spouse.

On transfers other than Totten trusts the outlook is still indecisive. It will be recalled that the Halpern case brought a new connotation to the phrase "illusory": under the pre-Halpern decisions it meant real, but voidable because of retained control, but the majority in the Halpern case used it as synonymous with "sham," i.e., lacking reality for any purpose. At least three subsequent decisions contain language that directly or inferentially adopts the Halpern version. But two of these cases are not strictly evasion cases: one deals with fraud on inchoate dower; the other does not involve a surviving spouse. The third case was a trial decision permitting a widow to prevail against a contract to make a will, on the reasoning that the widow's elective rights would reach such an exercise of the "power of testamentation." Conversely, the New York Appellate Division, Third Department, has

23 E.g., Whittington v. Whittington, 205 Md. 1, 106 A.2d 72 (1954). For a list of Maryland cases see Table E, infra.
24 Infra, Chap. 9, text at note 74.
26 Van Devere v. Moore, supra, note 25.
27 In re Ford's Estate, supra, note 25.
not only referred to retention of control as connoting illusoriness, but also has stated that “The doctrine announced in Matter of Halpern’s Estate . . . applies to Totten trusts and not to conveyances of real property.” Finally, a recent lower-court decision dealing with transfer of stock contains language broad enough to cover both the Newman version (“illusory transfers . . . during his lifetime are perfectly legal”) and the Halpern version (“He could either give it away . . . or he could equally well transfer it to dummies, without actually depriving himself of control”).

Policy-wise, the “reality” rationale (as exemplified by the reasoning of the Halpern case) is open to serious criticism. This rationale precludes any judicial assistance to the widow, even when need is established. Her only hope is to show that the transfer was defectively executed, that it was a sham, or that it was testamentary. This means that the widow in New York has been deprived of effective protection against disinheritance, at least as far as Totten trusts are concerned. It is ironic that the new doctrine has specific reference to the Totten trust. The “poor man’s will” may now be used to hurt the poor man’s widow.

For all its shortcomings, the illusory trust doctrine, as popularized by Newman v. Dore, has at least the virtue of

29 Gillette v. Madden, 280 App. Div. 161, 162, 112 N.Y.S.2d 543, 545 (3d Dep’t 1952). But mentioned in the same breath was intent not to have an “actual change of title until death.” The case involved the sufficiency of a complaint. Cf. Thomas v. Louis, 284 App. Div. 784, 135 N.Y.S.2d 97 (3d Dep’t 1954). Here the court held a deed “illusory,” citing Newman v. Dore, Krause v. Krause, and Gillette v. Madden; but from the context the court may have considered the deed a sham, since “the purported transfer was, by agreement of the parties, to be completely ineffectual until after the death of the grantor, and subject to recall or revocation until then.” See MacGregor v. Fox, 280 App. Div. 435, 114 N.Y.S.2d 286 (1st Dep’t 1952), aff’d without opinion, 305 N.Y. 576, 111 N.E.2d 445 (1953), discussed by Dean Niles in 1952 ANNUAL SURVEY OF AMERICAN LAW 572; In re Kilgallen’s Estate, 204 Misc. 558, 123 N.Y.S.2d 827 (Surr. Ct. 1953); Radecki v. Radecki, 279 App. Div. 1137, 112 N.Y.S.2d 764, (4th Dep’t 1952).

30 Gillette v. Madden, supra, note 29, at 163, 112 N.Y.S.2d at 545-46.

sympathy with the stated purpose of the statutory share. To be sure, the illusory trust doctrine is too narrow: under it the widow may recover too much or nothing at all from the transferee, depending on the happenstance of retained "control." But even within those confines there is some slight room for the play of judicial discretion. Grossly extreme transfers, such as the eleventh-hour trust in the Newman case, would not prevail against the judicial philosophy that protection based on testamentary transfers should extend to transfers that are almost, if not exactly, testamentary. Under the doctrine of the Halpern case, however, even retention of excessive control is irrelevant, provided the transfer is not testamentary.

As in the case of harsh decisions in other fields of the law, the reaction to the Halpern case may result in remedial legislation. Bills have already been introduced in New York, without success. The matter is on the agenda of the New York Law Revision Commission, though not presently under active consideration.

2. EXTENT OF DEFEASANCE

A favorite gambit of some courts and commentators is to argue the "logical impossibility" of a trust being illusory as to the wife but valid for all other purposes. A similar judicial ploy is to state that a transfer valid — or "complete"

32 See supra, Chap. 7, text at note 93.
33 To be sure, subsequent New York cases involving devices other than Totten trusts do refer to "control"; but these references may indicate that Newman v. Dore still governs these devices, rather than that "control" or the "equities" may be relevant under the Halpern doctrine.
34 Atkinson, "Succession," 1952 ANNUAL SURVEY OF AMERICAN LAW, 599.
35 The defeasance problem is taken up here because of the strong dictum on the point in the Halpern case. Logically the problem should be discussed in conjunction with either the control rationale or the intent rationale.
or “absolute”\(^{37}\) — for one purpose must be valid for all purposes. On this reasoning a transfer defeasible by the widow is cancelled \textit{in toto}. But the logic of total defeasance, when used in conjunction with the “control” or “intent” theories, is open to question. Examples abound elsewhere of instruments that are valid for formal purposes but defeasible, or “voidable,”\(^{38}\) at the instance of an aggrieved party, i.e., contracts voidable for fraud in the inducement and inter vivos transfers that may be reached by creditors.

The “all black or all white” reasoning, however, received a fresh impetus from the famous dictum in the \textit{Halpern} case: “We see no power in the courts to divide up such a Totten trust and call part of it illusory and the other part good.”\(^{39}\) From one viewpoint, this dictum is quite acceptable. Assuming that the court in the \textit{Halpern} case was adopting the “reality” rationale, there could be no question of partial defeasance; indeed, the question cannot arise when the widow has no cause of action stemming from her elective share. From another viewpoint, however, the dictum is unfortunate. From the context it probably was designed to support the notion that defeasance should be \textit{in toto} even when the widow \textit{does} have a cause of action, as e.g., in a jurisdiction where the “intent” theory is used, or, as in the Appellate Division decision in the \textit{Halpern} case, where the “control” thinking prevails. It must be remembered that until the \textit{Halpern} case was decided the New York courts had been fully committed to the “control” rationale, as seen in their espousal of the illusory trust doctrine; moreover, the Court of Appeals had never before specifically ruled on the defeasance problem.\(^{40}\) The dictum in the \textit{Halpern} case thus shuts the damper

\(^{37}\) Cf., passage “A” of the Kerr “fraud” test, supra, Chap. 7, text at note 1.


\(^{39}\) 303 N.Y. 33, 40, 100 N.E.2d 120, 123 (1951).

\(^{40}\) In Newman v. Dore the point was ignored, possibly because the disposition under the will and under the inter vivos trust apparently was practically identical; see Note, 2 \textit{Syracuse L. Rev.} 378, note 3
on flickering attempts in the lower New York courts to adopt the partial defeasance doctrine.\(^41\) It would be a pity if this dictum were to be followed by other jurisdictions already committed to the “control” or “intent” thinking.

The total defeasance notion misconceives the nature of the widow’s claim.\(^42\) She complains that the transfer prevents her from obtaining her statutory share. Although willing to concede that the transfer has “reality,” she wants her fractional cut. More she cannot use; she is bound by the election statute.\(^43\) To decree total defeasance results in unnecessary

(1951). In Krause v. Krause, the lower court had awarded partial partial defeasance. On appeal the question was deferred, since distribution had to await the probate of the will. 171 Misc. 355, 13 N.Y.S.2d 812 (Sup. Ct. 1939), rev’d, 259 App. Div. 1057, 21 N.Y.S.2d 341 (4th Dep’t 1940), modified, 285 N.Y. 27, 33, 32 N.E.2d 779, 781 (1941). In Burns v. Turnbull the court affirmed, without opinion, an Appellate Division holding which had cancelled an illusory inter vivos trust in its entirety. 37 N.Y.S.2d 380 (Sup. Ct. 1942), rev’d mem., 266 App. Div. 779, 41 N.Y.S.2d 448 (2d Dep’t 1943), reargument granted, 267 App. Div. 986, 48 N.Y.S.2d 458 (2d Dep’t 1944), aff’d on reargument mem. 268 App. Div. 822, 49 N.Y.S.2d 538 (2d Dep’t 1944), motion to dismiss appeal denied, 294 N.Y. 809, 62 N.E.2d 240 (1945), aff’d without opinion, 294 N.Y. 889, 62 N.E.2d 785 (1945). Defeasance in toto had the effect of thwarting settlor’s intent to prefer a child of her first marriage over a child of her marriage with the plaintiff husband.


\(^42\) Defeasance of any sort, partial or total, involves difficulties. Partition may not be feasible, as in, e.g., a closely held family business, when the widow is inexperienced. And liquidation may not always be economically advisable, as with, e.g., potentially valuable paintings. These problems point up the wisdom of careful estate planning; if the widow is adequately provided for in the will she probably will not litigate.

\(^43\) In some jurisdictions her statutory share is a specified fraction, e.g., in Florida, one third. In other states she may be entitled to her in-
loss to the beneficiaries of the inter vivos transfer and a possible gain for the "laughing heirs." The effect of total defeasance on the Totten trust is such as to destroy much of its everyday utility as a "poor man's will." To be sure, in most instances the beneficiaries of the inter vivos transfer are children of the decedent spouse, who would probably take their intestate share in the excess over and above the widow's statutory share. But the "total defeasance" cases show no disposition to restrict the operation of the doctrine to transfers of this sort.

A substantial body of cases decree partial defeasance. As is testate share. If in these other states she is the sole heir, total defeasance would result in any event—a factor that may or may not be a subconscious influence on the court concerned with the evasion litigation.

The devastating effect of total defeasance may in practice militate against the widow's chances of recovery in close cases when the beneficiaries of the inter vivos transfer are not also heirs of the decedent.

See infra, Chap. 10:2(d).

But the children probably would not participate if the decedent left a will which gave the residue to an outsider. See supra, Chap. 2:4(f).

Smith v. Smith, 22 Colo. 480, 46 Pac. 128 (1896); Fleming v. Fleming, 194 Iowa 71, 184 N.W. 296 (1921), writ of error dismissed, 264 U.S. 29 (1924); Ibe v. Ibe, 98 N.H. 434, 43 A.2d 157 (1945), exceptions overruled, 94 N.H. 425, 55 A.2d 872 (1947); Baker v. Smith, 66 N.H. 422, 23 Atl. 82 (1890); Harris v. Harris, 79 Ohio App. 443, 74 N.E.2d 407 (1945), aff'd, 147 Ohio St. 437, 72 N.E.2d 378 (1947); Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381 (1944); Estate of Black, 64 York 166, 73 D.&C. 66 (Pa. 1950) (under Pa. Stat. Ann. tit. 20, §301.11 (1950) (donees also heirs); cf. Hatcher v. Buford, 60 Ark. 169, 29 S.W. 641 (1895) (semble; gift causa mortis); Rabbitt v. Gaither, 67 Md. 94, 8 Atl. 744 (1887) (dower assigned); Hays v. Henry, 1 Md. Ch. 337 (1848). For the Kentucky cases see p. 112, supra. For the Missouri cases see p. 114, supra; also see note 48, infra.

Many cases use the ambiguous phrase "invalid as to the widow" or some similar expression. Seemingly this phrase implies that the transfer is vulnerable to attack only by the surviving spouse; but the consequences of a successful attack are not always discernible from the case as reported. In some instances we may assume total defeasance. Thus in Sanborn v. Lang, 41 Md. 107 (1874) a deed was "declared null and void so far as wife is concerned, and she may be relieved against the same." In the Sanborn case, however, the transfer was probably a sham, since a power of attorney was given donor, by donee, to dispose of the property. Cf., Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E.2d 75 (1944); Walker v. Walker, 66 N.H. 390, 31 Atl. 14 (1891). Under Tenn. Code Ann. §31-612 (1955) it would seem that assignment of dower results merely in partial defeasance, even though the cases
to be expected, however, these decisions are pretty well restricted to jurisdictions following the "intent" or "control" rationale. Indeed, it is only with reference to "intent" jurisdictions, e.g., Missouri \(48\) and Kentucky,\(^49\) that we can say with assurance that partial defeasance is the weight of authority. The sensible approach of these jurisdictions in this respect is in keeping with their willingness to seek a working compromise \(^50\) between the respective interests of the widow and the transferee, as, e.g., by weighing the "equities" of the case.

3. "Colorable Transfers"

(a) In General. The term "colorable," as employed in the evasion cases, means all things to all men. It has been used to connote shams; it may signify "real" transfers that are made without the knowledge \(^51\) of the surviving spouse; it may be a synonym for "illusory," as used with reference to "real" transfers in which the decedent retained undue con-

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\(^{48}\) See cases discussed, supra, p. 114. In Merz v. Tower Grove Bank & Trust Co., 344 Mo. 1150, 130 S.W.2d 611 (1939), the trial court decreed partial defeasance, but on appeal the Supreme Court of Missouri ordered defeasance in toto. The judgment does not purport to change the Missouri "partial defeasance" rule, but intimates that the equities may dictate total defeasance. In the Merz case the conduct of the trust company was considered reprehensible.

\(^{49}\) See cases discussed, supra, p. 112.

\(^{50}\) A parallel compromise is exemplified in actions to set aside transfers by the decedent in fraud of creditors. The creditors prevail only if the estate assets are insufficient, and then only to the extent of the claim. As was pointed out by the Appellate Division in the Halpern case, defeasance in this instance is partial, not total. Cf. the example of partial defeasance under the civil law, infra, p. 284.

\(^{51}\) See the early Colorado cases, infra, pp. 135–136.
trol, or merely the power to revoke; and oftentimes it is tossed in for makeweight effect, with no ascertainable meaning—a bit of harmless garbage from the law digests. For most men, on most occasions, however, a "colorable" transfer signifies a sham: either no transfer at all, or one accompanied by some secret agreement between the parties that negates any animus donandi on the part of the donor.


54 E.g., Crawfordsville Trust Co. v. Ramsey, 55 Ind. App. 40, 71, 100 N.E. 1049 (1913), rehearing denied, 55 Ind. App. 40, 102 N.E. 282 (1913) (gift causa mortis held "colorably absolute," therefore testamentary); McGee v. McGee, 26 N.C. 77 (1843) (continued enjoyment of land after conveyance; held, colorable, and "express fraud" under the then prevailing statute). A note in 16 BROOKLYN L. REV. 229, 246 (1950), discusses the term "colorable" in connection with antenuptial transfers.

55 Mendez v. Quinones, 78 F. Supp. 744 (D.C.P.R. 1948) modified sub. nom. Mendez v. Mendez, 176 F.2d 849 (1st Cir. 1949) (transfer of assets to purported business); Blevins v. Pittman, 189 Ga. 789, 7 S.E.2d 662 (1940) (deed to aunt, reconveyance to husband on condition that if the land should go to the wife or children, by agreement or "by any legal proceedings or order of court," it would revert to the aunt's estate); Martin v. Martin, 282 Ky. 411, 138 S.W.2d 509 (1940) (antenuptial transfer of bank deposits, donee acting as a "mere depositary" of
Thus, colorable transfers are transfers that have no "reality," and can best be discussed in conjunction with the reality doctrine.

A typically colorable ("sham") arrangement would be a secret deed, handed over by the husband to the obliging friend or relative whose name appears as "grantee." The parties have previously agreed that the husband may demand the return of the deed at his pleasure, in particular if his wife should predecease him. If also it is agreed that the deed in

the money and issuing checks on request); Brown v. Crafts, 98 Me. 40, 56 Atl. 213 (1903) (gift, with donee redelivering the property to the husband and signing power of attorney giving the husband power to manage, sell, and use it "as though it were his own property"). Cf. Cochran's Adm'x v. Cochran, 273 Ky. 1, 115 S.W.2d 376 (1938); Murray v. Murray, 90 Ky. 1, 13 S.W. 244 (1890); Lockhart v. Dickey, 161 La. 282, 108 So. 483 (1926); Wellington v. St. Paul, Minneapolis & Manitoba Ry., 123 Minn. 483, 144 N.W. 222 (1913); Jiggitts v. Jiggitts, 40 Miss. 718 (1866); Lusse v. Lusse, 140 Mo. App. 497, 120 S.W. 114 (1909); Bodner v. Feit, 247 App. Div. 119, 123, 286 N.Y. Supp. 814, 818 (1st Dep't 1936) (dissenting opinion).

A line of Kansas cases states that the only restriction on the husband is that the transfer be not "merely colorable." From the context the courts in these Kansas cases probably have "shams" in mind; literally, they say that any reservation of an interest in the property concerned renders the transfer colorable: e.g., Poole v. Poole, 96 Kan. 84, 90-91, 150 Pac. 592, 595 (1915); also see Williams v. Williams, 40 Fed. 521 (C.C.D. Kan. 1889); Small v. Small, 56 Kan. 1, 42 Pac. 323 (1895); Osborn v. Osborn, 102 Kan. 890, 172 Pac. 23 (1918). The Osborn case stresses retention of the power to dispose of the property. Quaere: what about the power to revoke?


"Colorable" was assured longevity if not lucidity by its appearance in passage "A" of the Kerr test, supra, p. 98. Probably it was there intended to denote a sham. At any rate, this seems to be the usage of modern courts that regurgitate the Kerr phraseology: Cheatham v. Sheppard, 198 Ga. 254, 31 S.E.2d 457 (1944); Haskell v. Art Institute 304 Ill. App. 393, 26 N.E.2d 736 (1940); Blankenship v. Hall, 233 Ill. 116, 84 N.E. 192 (1908). Cf. Holzbeierlein v. Holzbeierlein, 91 F.2d 250 (D.C. Cir. 1937) (antenuptial); Flowers v. Flowers, 89 Ga. 632, 15 S.E. 884 (1892); Blodgett v. Blodgett, 266 Ill. App. 517 (1932), transferred, 343 Ill. 569, 175 N.E. 777 (1931) (confession of judgment); Wright v. Holmes, 100 Me. 508, 62 Atl. 507 (1905).
no circumstances is to be legally effective, the transfer is clearly "colorable." If the deed is to become effective only at the husband's death, it probably is still a nullity, unless it can be sustained as a will, in which event the wife, if she survives, may claim her elective share.

*Hayes v. Lindquist* illustrates a colorable transfer of personalty. In that case the husband caused shares in the family corporation to be transferred to his sister. She redeemed the securities to her brother, who kept them until his death in a safe-deposit box to which they both had access. Holding for the widow, the court labelled the transfer to the sister "colorable and illusory." It pointed out that "The manifest plan of her brother and herself was to have this property so held that it could be claimed by either as circumstances required, and the gift to her was not complete."

(b) *The Colorado Cases.* As Holmes has said, "a word is the skin of a living thought." Its meaning will change with the generations. This is exemplified by the Colorado cases on "colorable" transfers.

The Colorado cases start in 1896 with *Smith v. Smith.* In that case the husband transferred all his realty by deeds made about four years before death. The husband and the grantees contrived to keep the wife in ignorance of the deeds, and they were not recorded until the day before death. The aged widow was left penniless. The court castigated the husband for his "heartlessness and inhumanity." The transfers, it said, were "merely colorable"; and it quoted with approval passage "A" of the "Kerr" test. We noted in an earlier chapter that this passage purports to exclude "intent." In the *Smith* case, however, the stress on the collusive nature of the transfer indicates partiality to the intent rationale. It is significant

57 22 Ohio App. 58, 153 N.E. 269 (1926).
58 Id. at 64, 153 N.E. at 271.
59 22 Colo. 480, 46 Pac. 128 (1896), reconsidered, 24 Colo. 527, 52 Pac. 790 (1898).
60 *Supra*, Chap. 8, text at note 1.
61 Because of the husband's flint-hearted conduct it is of course pos-
also that there was no agreement between the parties that would deny "reality" to the transfer; "colorable," for this court, merely connotes secrecy. That this secrecy must involve collusion, that there must be "participation in fraudulent conduct by the grantee," is reiterated in Phillips v. Phillips. 62 In that case a father prepared deeds giving property to his daughters, but he retained the deeds for several years. He delivered them about seven or eight months before his death, and the deeds were recorded at the time of delivery. Counsel for the widow claimed that the conduct of the daughters in permitting their father to retain possession was indicative of a "fraudulent or collusive compact." The court agreed, but said that the "suspicious circumstances" could be explained in this case as a natural transaction between father and children. In Grover v. Clover 63 the court endorsed and followed the "colorable" test of the Smith case. No mention was made of the collusion aspect of the Smith case rationale, but the "intent" factor apparently still remained an essential ingredient. 64

The change in emphasis comes with Ellis v. Jones, in 1923. 65 Although formally retaining the "colorable" test, the court made it clear that intent to defraud is irrelevant. "How can one fraudulently deprive another of that of which he may lawfully deprive him?" asks the court. Thus "colorable" has now nothing to do with collusion, with participation by the donee, with motive; it concerns shams, mere pretenses—"counterfeit, feigned, having the appearance of truth (Webster) — not really intended as a deed." 66 The death blow to secrecy as a factor comes with Wilson v. Lowrie, 67 where,

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62 30 Colo. 516, 71 Pac. 363 (1903).
63 69 Colo. 72, 169 Pac. 578 (1917); see comment, 26 Rocky Mt. L. Rev. 180, 183 (1954).
64 69 Colo. 72, 75, 169 Pac. 578, 579 (1917).
65 73 Colo. 516, 216 Pac. 257 (1923).
66 Id. at 517, 216 Pac. at 258; see also Hammond v. Hammond, 91 Colo. 327 (1932); Taylor v. Taylor, 79 Colo. 487, 247 Pac. 174 (1926).
67 77 Colo. 427, 236 Pac. 1004 (1925).
in line with the Ellis case’s repudiation of intent, the court said it was irrelevant that the widow neither knew about nor consented to the transfers. 68

To summarize, the Colorado cases reflect a gradual change in the meaning of the term “colorable.” Originally denoting a secret transfer with intent to disinherit, it now signifies a sham, a transfer that is not “real,” no transfer at all. A “real,” i.e., non-colorable, transfer is valid against the surviving spouse regardless of secrecy or retention of a life estate. 69

To all this we add a caveat: when the equities strongly favor the surviving spouse, perhaps she may be permitted to defeat a “real” transfer. 70 A reluctance to divorce the equities from the evasion cases may be sensed from the recent case of Thuet v. Thuet. 71 In that case, although the inter vivos transfer was sustained, 72 the court not only reiterated passage “A” of the “Kerr” test—which, as we have seen, may mean anything, but at least it mentions “circumstances indicative of fraud upon the rights of the wife”—but also made specific inquiry as to whether the declared intent of the decedent “was her true intent, or whether it was merely a scheme by which to make disposition of the property after her death contrary to the provisions of our statute concerning wills. . . .” The court concluded that “Such intent, as would appear from the circumstances, was equitable. . . .” 73


70 Cf. 26 Rocky Mt. L. Rev. 180 (1954). The writer of this comment frequently uses “colorable” and “illusory” (in the “excessive control” sense of Newman v. Dore) as synonyms.

71 128 Colo. 54, 260 P.2d 604 (1953).

72 The equities in the Thuet case favored the transferee.

Pennsylvania has an important new statute dealing with our problem. It states, in part:

"(a) In general. A conveyance of assets by a person who retains a power of appointment by will, or a power of revocation or consumption over the principal thereof, shall at the election of his surviving spouse, be treated as a testamentary disposition so far as the surviving spouse is concerned to

§301.1 defines a conveyance as “an act by which it is intended to create an interest in real or personal property whether the act is intended to have inter vivos or testamentary operation.”

The widow prevailed against such a device, In re Trust of Diede, 32 D.&C. 685 (Pa. 1938).

A statutory note to Pa. Stat. Ann. tit. 20, §301.11 (1950) explains that the phrase “power of appointment” was used, instead of “general power of appointment,” to prevent the section being evaded "by creating special powers giving the right to appoint to a class including everyone but the spouse or some other designated individuals.” A companion statute, Pa. Stat. Ann. tit. 20, §180.8 (c) (Wills Act of 1947) states: “The surviving spouse upon an election take against the will, shall not be entitled to any share in property passing under a power of appointment given by someone other than the testator whether or not such power has been exercised in favor of the surviving spouse and whether or not the appointed and the individual estates have blended.” On powers of appointment generally, see pp. 252-258, infra.
the extent to which the power has been reserved, but the right of the surviving spouse shall be subject to the rights of any income beneficiary whose interest in income becomes vested in enjoyment prior to the death of the conveyor. The provisions of this subsection shall not apply to any contract of life insurance purchased by a decedent, whether payable in trust or otherwise."

As far as the designated types of transfer are concerned, the statute represents a distinct change in policy. Before the statute was enacted the widow had little, if any, protection against such transfers. Now she may invade transfers in which the specified degree of "control" has been retained. And the Pennsylvania courts have conceded the influence of the statute in determining the validity of a particular transfer (of a type covered by the statute) made prior to the effective date of the act. Thus, in Black's Estate a lower court had to consider the validity of Totten trusts created by a husband before the act came into effect. Noting that there had been no previous evasion case in Pennsylvania clearly ruling on Totten trusts, and that the Restatement of Trusts had recently taken a stand in favor of spouses' rights, the court implemented "the policy evidenced by the new . . . act" by holding for the widow. "By such circuity of legal ratiocination it was possible to confer upon the widow the full benefits of the new statute while at the same time holding that the statute did not apply." A dictum in a recent

78 A statutory note explains that the proviso favoring income beneficiaries was "included for two reasons: (1) It might prove harsh to withdraw income from persons who have been receiving it. (2) It seemed proper to permit the surviving spouse to share in property of which the decedent had the beneficial enjoyment at his death, but not to permit a sharing in property over which the decedent retained control but which he did not enjoy beneficially."

79 Infra, text at note 83.

80 73 D.&C. 86 (Pa., 1950).

81 Note, by Judge E. L. Van Roden, "Rights of Surviving Spouse to Share in Assets Transferred by Decedent in His Lifetime," 58 Dick. L. Rev. 70, 77 (1953). Judge Van Roden wrote the decision in Black's Estate. See also In re Graham's Estate, 3 D.&C. 2d 218, 42 Del. Co. 9, 4 Fiduc. 467 (1954); Del Conte v. Luca, 2 D.&C. 2d 130 (1954).
Supreme Court case substantiates the not unreasonable assumption that Totten trusts are covered by the statute.\textsuperscript{82}

As far as the devices not affected by the statute are concerned, the Pennsylvania case law strongly favors the "reality" test. As one writer has said, "It is only the stupid husband, who, against his wishes, would be forced to allow his wife to share in his personalty." \textsuperscript{83} The motive for the transfer is, it would seem, quite irrelevant; all that is required is a "good faith" divestment. Frequently cited in that connection is the following: "The good faith required of the donor or settlor in making a valid disposition of his property during life does not refer to the purpose to affect his wife but to the intent to divest himself of the ownership of his property." \textsuperscript{84}

But even in the Pennsylvania cases we find vague caveats about "intent," "fraud," and "actual fraud." It is unclear whether or not these refer to (a) sham transfers,\textsuperscript{85} (b) transfers in evasion of the widow's inchoate dower rights, or (c) some primordial power of equity to punish excessive guile or vindictiveness, or to prevent the widow from being left destitute. The classic early example of this phraseology is in \textit{Hummel's Estate}, where the court declared that "no case has gone so far as to sustain a voluntary obligation given and received with intent to defraud the wife's rights." \textsuperscript{86} At one time it

\textsuperscript{82} In re Iafolla's Estate, 380 Pa. 391, 396, 110 A.2d 380, 382 (1955). It was also intimated that the statute might catch pre-1947 Totten trusts when the settlor dies \textit{after} the effective date of the statute. In a Totten trust, said the court, the beneficiary obtains no "vested" interest, merely an expectancy; consequently the transfer was not "effective" until after the date of the statute.

\textsuperscript{83} 5 U. Prtt. L. Rev. 78, 87 (1939).

\textsuperscript{84} Benkart v. Commonwealth Trust Co., 269 Pa. 257, 112 Atl. 62 (1920).

\textsuperscript{85} \textit{Supra}, Chap. 9:3(a).

\textsuperscript{86} 161 Pa. 215, 217, 28 Atl. 1113, 1115 (1894). See Windolph v. Girard, 245 Pa. 349, 366, 91 Atl. 634, 639, (1914) (motive of wife was "not to defraud"); In re Sutch's Estate, 201 Pa. 305, 50 Atl. 943 (1902) (no fraud if the transaction reasonable); Potter v. Braum, 294 Pa. 482, 144 Atl. 401 (1928) (stressing collusion); In re Davies' Estate, 102 Pa. Super. 326, 330, 156 Atl. 555, 556 (1931) (gift several years before death held valid "provided collusion to defraud the wife was not established"); \textit{cf.} Waterhouse v. Waterhouse, 206 Pa. 433, 55 Atl. 1067 (1903) (collu-
was thought that doubts as to the relevance (or otherwise) of the decedent's motive or of participation by the donee had been dispelled by *Beirne v. Continental-Equitable Trust Co.*, \(^{87}\) which was decided in 1932; but those doubts have been somewhat revived by a series of recent cases involving obligations payable at death.

In *Rynier Estate* \(^{88}\) the wife executed sealed judgment notes, payable to her brother, and delivered them to a third party. The notes were "not to be exercised until after my death." The seal in Pennsylvania imports consideration; but lack of consideration would apparently be irrelevant. \(^{89}\) What counts is that in Pennsylvania this type of transfer is not deemed testamentary. \(^{90}\) The lack of consideration, combined

\(^{87}\) 307 Pa. 570, 161 Atl. 721 (1932). A revocable inter vivos trust with income reserved for life was sustained against the widow, although it was made with the "declared purpose" of excluding the wife. The trustee had "exclusive control" of the assets. The majority of the court said that the fraudulent intent stressed in *Young's Estate* is not shown merely by proving a purpose to exclude the widow (citing the *Windolph* case); nor is the matter affected by retention of the income for life or the power to revoke. Kephart, J., in a strong dissent, *id.* at 580, 161 Atl. at 724, stated that to remove the wife's protection is "against the best interests of society." Distinguishing earlier cases either on the ground that irrevocable gifts or transfers with no intent to defraud were involved, he lamented: "Indeed, unless such facts as those outlined in this case are sufficient to show fraudulent intent, then that intent cannot be shown, and such expressions as 'It is true a fraudulent intent will defeat a gift,' and 'Good faith is essential,' are mere words and mean nothing." *Id.* at 588, 161 Atl. at 727. The view of the majority in the *Beirne* case was approved in *DeNoble v. DeNoble*, 331 Pa. 273, 277, 200 Atl. 77, 79 (1938), with the caveat that "fraud" might exist if "the transfer were a colorable one, the husband retaining a concealed interest in the property."


\(^{89}\) Proof of consideration would strengthen the case for the transferee; proof of lack of consideration merely indicates a gift which under the "reality" theory would prevail against the widow.

\(^{90}\) The decedent of course can thwart the ultimate collection of the note by becoming insolvent, or by giving away his property before his death. *Quaere:* would this make the note "revocable" under the 1947
with postponement of collection until death, makes the motive blatantly in evidence; but the court in the Rynier case brushed aside any question of "fraud" or motive, apparently, but not specifically, relegating these concepts to transfers that are not intended to be operative, i.e., sham. 91

In Cancilla v. Bondy 92 the husband executed a bond for $10,000, payable at death and secured by a mortgage on realty valued at $7,500. He later executed another 93 bond and mortgage for $3,000 on the same property. Both transactions were in favor of a grandson, who gave no consideration. After the husband's death the mortgages were assigned. The assignees then foreclosed, having given the widow appropriate notice. It was not until over a year later that the widow elected against her husband's will and brought a bill in equity to enforce her dower rights. The court refused her claim, on the ground that she should have raised her defence in the foreclosure proceedings; but it stated that otherwise she would have prevailed, since the execution of the mortgages was "a patently crude attempt to destroy plaintiff's dower rights in the property and was a poor subterfuge for a will. . . ." 94

The Cancilla case is of course quite consistent with the legislation? As to the validity of the transfer of the husband's own note, payable at death, see infra, Chap. 16:1.

91 347 Pa. 471, 474, 32 A.2d 736, 738 (1943) (citing the Windolph, Beirne, and DeNoble cases). Cf. Mornes Estate, 79 D.&C. 356 (Pa. 1951). In an earlier hearing in the Mornes litigation the court sustained, apparently with reluctance, an inter vivos revocable trust expressly designed to disinherit the wife. The trust, having been enacted prior to the 1947 legislation, was not affected thereby. Mornes v. Lawrence Sav. & Trust Co., 8 LAWRENCE L. J. 163 (1949).

92 353 Pa. 249, 44 A.2d 586 (1945).

93 The second bond and mortgage stated that "should the mortgagor at any time during his lifetime make sale of the mortgaged premises so that he may use the proceeds thereof for his own maintenance and support, that [the bond and mortgage] . . . shall be absolutely void." If the transaction had been entered into subsequent to the 1947 legislation, would not the widow have had an alternative ground of attack, i.e., that this was a revocable transfer?

TESTS BASED ON THE REALITY OF THE TRANSFER

_Rynier_ case, because of the wife's inchoate interest in realty. Of significance, however, is the court's statement, after having rejected "motive" as a factor in gifts of personality, that "in the case of his personal property, he cannot make a fraudulent gift of it in contemplation of death, and thereby defraud his wife's statutory rights as his widow" (citing _Hummel's Estate_ and _Young's Estate_). In brief, it is not yet entirely clear that Pennsylvania is fully committed to the "reality" test, with reference to inter vivos devices not affected by the 1947 legislation.

Before closing this review of the Pennsylvania law, tribute must be paid to the framers of the 1947 statute. This statute is a great step in the right direction, and undoubtedly affords a real measure of protection to the widow.

I doubt, however, that this type of statute is the best solution to the evasion problem. It diverges too sharply from

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95 In Pennsylvania the widow's inchoate dower may be defeated by judicial sale of the husband's bona fide creditors. Bridgeford v. Groh, 306 Pa. 566, 574, 160 Atl. 451, 453 (1932). One would expect this encroachment on the dower interest to come not from the courts but from the legislatures, but the Pennsylvania approach has also been followed in Florida. In re Hester's Estate, 28 So.2d 164 (1947), 21 FLA. L. J. 152 (1947).

For a case in which the wife was permitted to intervene during the husband's lifetime, see Waterhouse v. Waterhouse, 206 Pa. 433, 55 Atl. 1067 (1905); cf. Howard v. Flanigan, 320 Pa. 569, 184 Atl. 34 (1936).

96 Id. at 253, 353 Pa. 249, 252, 44 A.2d 586, 588 (1945).


98 Brégy offers some cold comfort to the widow: perhaps Hummel's Estate is still the law in determining (as against the next of kin) the spouse's share in what is left after the notes have been paid. Brégy, _INTESTATE, WILLS AND ESTATES ACTS OF 1947_, 5858 (1949). See Note, 55 Dick. L. R. 69, 72 (1950) (referring to Hummel's Estate as "a more satisfactory statement of the law"); comment, "Gifts of Personal Property as Limited by the Rights of the Wife," 5 U. PITT. L. Rev. 78, 89 (1939).

Feeser Estate (No. 2) 88 D.&C. 241 (Pa. 1954) followed the Cancilla case without dealing specifically with our problem.

99 On suggestions for legislative reform, see Part IV, _infra_.
the maintenance and contribution formula outlined in Chapter 4. Flexibility is lacking. In one respect, the statute provides inadequate protection; in another respect, it provides too much protection. On the first count, the statute assumes that the natural reluctance of husbands to surrender control of their assets will preclude most non-revocable "evasions." But is a stony-hearted husband apt to eschew these devices, particularly in the later years of life? Such a man has a fairly wide selection of permissible transfers.\textsuperscript{100} He may continue to enjoy his property by retaining the income for life; and it has been suggested that "even principal can be kept available by giving a disinterested trustee power to use it for the settlor's benefit."\textsuperscript{101} Moreover, there undoubtedly will be occasions when the claim of the particular surviving family will be more persuasive than that of an income beneficiary whose interest is protected under the present Pennsylvania statute.\textsuperscript{102} The family need should supersede the normal "reliance interest" of a stranger. On the second count, the present combination of Pennsylvania statutes may give a particular widow unwarranted protection. She may be financially independent because of her own wealth or because of the inter vivos or testamentary benevolence of the decedent; nevertheless she is permitted to invade the designated types of transfer. These transfers are subject to an unnecessary fetter.


\textsuperscript{101} Brégy, \textit{op. cit. supra}, note 98, at 5882.

\textsuperscript{102} See note 78 \textit{supra}.