PART III
THE CASE LAW
CHAPTER 7

Tests Based On Retention Of Control

PRELIMINARY REMARKS

The evasion cases may be examined from several points of view. The available literature \(^1\) tends to organize the material in terms of underlying rationale: thus the cases are assigned to pigeon-holes labelled "illusory," "colorable," "fraud," "completeness of the transfer," and the like. But the cases may also be organized in terms of (a) the evidentiary factors that seem to influence the courts, (b) the type of dispositive device that is involved, (c) historical development, either country-wide or within a single state, or (d) the apparent trend of authority in each individual state. I will look at the cases from all of these viewpoints, with stress on the first three. Discussion of rationales is imperative; as far as the courts are concerned, these rationales purport to be decisive. An enquiry into the persuasive evidentiary factors will permit us

to determine the extent to which the courts appear to follow the principles of the maintenance and contribution formula. Do they, for example, pay any heed to the relative size of the property transferred? Moreover, any decision on the necessity and the practicability of remedial legislation demands analysis in terms of the various dispositive devices that may be employed by the practicing attorney. These devices differ in social function, in popularity, and in the "reliance interest" normally induced in the donee. Each device poses its own problems.

The evolution of certain rationales will be noted where deemed significant. Likewise, the law of a particular state may merit separate treatment, as, e.g., where the courts of that state have enunciated a distinctive rationale.

The decisions favoring the surviving spouse frequently utilize some variation of the "control" rationale. This rationale stresses the degree of control retained by the decedent over the assets that were transferred. The reasoning is simple: the more control exercised over these assets, the more apparent that the decedent in substance owned the assets at his death — hence the forced share should attach. Consider a revocable inter vivos trust: if the right to the income for life is retained, coupled with such control over administration of the trust as to constitute the trustee a mere "agent," the trust is testamentary; the spouse would win. But if the court be disinclined to strike down the entire trust as an invalid "testamentary" instrument, the spouse may still win if she can persuade the court to declare the trust void or vulnerable because it is "quasi-testamentary," or "illusory," or "not an absolute transfer," or because it involves retention of "dominion," or has some other attribute of the control rationale. Most of these terms have meanings that change with the context. Moreover, the usage may vary with the "tug of new equities." 2

1. Testamentary Transfers

The widow's elective rights affect any assets belonging to the decedent's estate. It follows that the property involved in a testamentary transfer will "feed" the elective share. This suggests a twofold enquiry: (a) what constitutes a testamentary transfer and (b) to what extent should the "testamentary" concept be utilized as a weapon against inter vivos evasions of the forced share? Our discussion will center on the revocable inter vivos trust, for there the evasion problem is acute.

The popularity of the trust stems from its suitability for flexible, controlled inter vivos benevolence. It is also simple in operation. In its most common form the settlor transfers property to a trustee, reserves the income for life and the power to revoke, designates the persons who are to take the principal on the settlor's death, and possibly retains some degree of control over administration of the trust. The settlor achieves most of the advantages of a will without suffering its accompanying disadvantages. With no appreciable loss of control, the settlor can acquire in his lifetime an advisory management service that will be continued after his death; he avoids the expense, delay, and publicity of probate proceedings; he may provide against emergencies during his lifetime, such as practical or legal incapacity to handle his own affairs; and the trust is less vulnerable than a will would be to successful attack by disappointed relatives. Although the tax-collector and the creditor may encroach, the trust is still the most useful device in the estate planner's repertory.\(^3\) It is to be expected that we hear much of the trust in the evasion cases.

Under the orthodox approach, a trust becomes testamentary when the settlor reserves "not only a beneficial life estate and a power to revoke and modify the trust but also such

power to control the trustee as to the details of the administration of the trust that the trustee is the agent of the settlor, . . ." 4 As far as the surviving spouse is concerned, it is immaterial that such a trust happens to be formalized as a will. If the animus testandi was present at the time of execution, she wins qua will. If the animus testandi was lacking, she still wins: it would be an invalid testamentary disposition, and the property concerned would form part of the decedent’s estate.

It will be recalled that under the custom of London the English courts felt that the retention of any interest, even that of possession, would be sufficient to brand the trust or deed a testamentary transfer. This harsh approach may be found in many of the older American evasion cases,5 and its rationale has been used, perhaps inadvertently, in some of the more modern evasion cases. But our conception of a testamentary transfer has changed with the years. An inter vivos trust, for example, is no longer considered testamentary (for purposes unconnected with spouses’ rights) merely because the power to revoke is retained. By the same token, in the evasion cases, we find that it is usually in the older decisions that the surviving spouse prevails on the “testamentary” ra-

4 Restatement, Trusts, §57. Two clues are given. We are told that “The intended trust is not testamentary merely because the settlor reserves power to direct the trustee as to the making of investments or the exercises of other particular powers, or power to appoint a substituted trustee.” And apt draftsmanship is considered helpful: “Thus, if the transfer to the trustee was by a deed formally executed and recorded, the conclusion that the trustee was also the agent of the settlor would be less likely to be drawn than if the transfer were less formally evidenced.”

5 Some early cases proceeded on the reasoning that revocability was a distinguishing characteristic of a testamentary instrument, i.e., one that would thereby be subject to the widow’s share. See, e.g., Lightfoot’s Ex’rs v. Colgin, 19 Va. (5 Munf.) 42 (1813); Gentry v. Bailey, 47 Va. (6 Gratt.) 595, 604 (1850): “Two circumstances must concur to render the gift testamentary in its nature; one is, that it is not to be substantially effective until his death; and the other is, that the husband does not divest himself of the capacity to recall it, . . .” Cf. Smith v. Corey, 125 Minn. 190, 145 N.W. 1067 (1914); Cochran’s Adm’x v. Cochran, 273 Ky. 1, 115 S.W.2d 376 (1938); Cochran’s Adm’x v. Yeiser, 294 Ky. 585, 172 S.W.2d 226 (1943).

the phrase “testamentary” as a synonym for the popular evasion rationales, as, e.g., “illusory,” “colorable,” “fraudulent,” and the like.’ This practice is unfortunate. Taken at face value, it would stop the widow from complaining of any otherwise valid inter vivos transfer. Moreover, if the court in question is motivated more by concern for the widow than for the Statute of Wills, its effect is too drastic. The defeasance would be total; the trust beneficiaries would lose all, not merely the widow’s “share” in the trust corpus. Protection to the surviving spouse would then involve an unwavering trust); Benkart v. Commonwealth Trust Co., 269 Pa. 257, 112 Atl. 62 (1920) (revocable trust); Windolph v. Girard Trust Co., 245 Pa. 349, 91 Atl. 634 (1914) (revocable trust); Lines v. Lines, 142 Pa. 149, 21 Atl. 809 (1891) (revocable trust); Dickerson’s Appeal, 115 Pa. 198, 8 Atl. 64 (1887) (revocable declaration of trust); Smith v. Deshaw, 116 Vt. 441, 78 A.2d 479 (1951) (trust); Patch v. Squires, 105 Vt. 405, 165 Atl. 919 (1933) (joint bank account). Cf. Harber v. Harber, 152 Ga. 98, 108 S.E. 520 (1921) (deed); Burns v. Turnbull, 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), rearg. granted, 267 App. Div. 986, 48 N.Y.S.2d 458 (2d Dep’t 1944), aff’d on rearg. 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) (trust; question left open); Robb v. Washington & Jefferson College, 103 App. Div. 327, 93 N.Y. Supp. 92 (1st Dep’t 1905), modified and aff’d, 185 N.Y. 485, 78 N.E. 359 (1906) (charitable trust).


An executed transfer of realty is perhaps less vulnerable to attack. See, e.g., Kelly v. Parker, 181 Ill. 49, 54 N.E. 615 (1899) (nonevasive).

A line of Missouri cases, for example, brands a transfer as testamentary if made in expectation of death with intent to defraud the surviving spouse. Merz v. Tower Grove Bank & Trust Co., 344 Mo. 1150, 130 S.W.2d 611 (1939); Rice v. Waddill, 168 Mo. 99, 67 S.W. 605 (1902); Tucker v. Tucker, 29 Mo. 350 (1860), 32 Mo. 464 (1862); contra, Wanstrath v. Kappel, 354 Mo. 565, 190 S.W.2d 241 (1945), 356 Mo. 210, 201 S.W.2d 327 (1947), aff’d, 358 Mo. 1077, 218 S.W.2d 618 (1949) (revocable trust with considerable control retained held defeasible by widow but not testamentary). For the Missouri law see p. 114–116, infra.
ranted interference with the settlor's deliberate benevolence to the inter vivos donees. It should not be necessary to burn the house down to get heat.

The community values implicit in protection of the family against disinheritance do not coincide with the values involved in the Statute of Wills. We have seen that family protection is a desirable community goal. But can we say that the Statute of Wills is a pillar of democracy? Over a decade ago Gulliver and Tilson, in a provocative analysis, suggested that the various Wills Act formalities have three functions — ritualistic, evidentiary, and protective. The ritual-function is required because some type of ceremony is needed to impress the transferor with the significance of his donative actions and statements, and to justify the court in concluding that they were deliberately intended to be operative. The evidence-function is to provide a satisfactory guarantee against subsequent lapse of memory, fraud, and the like. The protection-function — Gulliver and Tilson regard its value and effectiveness as dubious — is to safeguard the testator at the time of the execution of the will against undue influence or other imposition. The not unreasonable conclusion is reached that "an intended transfer should be sustained if the facts show substantial performance of the ritual and evidentiary functions, whatever may be the particular method of securing that performance." Certainly, an inter vivos trust should not be defeated solely because it was not formalized as a will. And if the Statute of Wills is of doubtful relevance in this connection, it is an even cruder weapon when misused to protect the surviving spouse.


9 An eminent critic has stated that Gulliver and Tilson "underestimate . . . the dangers which the elimination of administration proceedings through substitute transactions implies for creditors, the public treasury and forced heirs." Rheinstein, Cases on Decedents' Estates, 778 (2d ed. 1955). Nevertheless, Professor Rheinstein would probably agree that the forced heir would be ill served if her sole chance to reach
2. ILLUSORY TRUSTS

(a) Newman v. Dore. The vicissitudes of the illusory trust doctrine in New York form a melancholy commentary on the ineptitude of the typical American forced share. The New York forced share had an auspicious inception. Enacted in 1930, it was considered a significant advance in succession law. In brief, the 1930 reforms abolished dower and curtesy, made the spouses reciprocal heirs, and provided the surviving spouse with an election to force his or her intestate share against the will. No election could be made if the testator "devised or bequeathed in trust an amount equal to or greater than the intestate share, with income thereof payable to the surviving spouse for life." On paper the scheme appeared to presage a new era of practical protection for the surviving spouse. A contemporary writer declared that "although curtesy and dower are abolished, the act is socially significant because of the increased protection which it gives to the husband and wife in lieu of their prior rights." This statement was technically accurate; but it shortly became apparent that the "increased protection" lay more in appearance than in actuality. The forced share, by completely ignoring the evasion problem, proved itself vulnerable to inter vivos depletion of the decedent's estate. One of the most effective devices, of course, proved to be the revocable inter vivos trust. Although there was some early

an inter vivos transfer lay in having it declared totally void as being testamentary.

10 It was the first major revision in 100 years, and was enacted only after lengthy deliberation; see The Reports of the Commission to Investigate Defects in the Laws of Estates, N.Y. Legislative Document No. 69 (1930).

11 N.Y. Real Prop. Law §§189, 190.


TESTS BASED ON RETENTION OF CONTROL

uncertainty, it was thought that the matter was clarified by the leading case of *Newman v. Dore*. There the husband created a testamentary trust under which his widow was the beneficiary of a life interest in one third of all his property. By the terms of the new law this prevented the widow from electing against the will. Three days before his death, however, and with the intent to defeat the widow’s statutory rights, he created an inter vivos trust of all his property. He retained the power to revoke and the income for life; and the powers granted to the trustees were made “subject to the settlor’s control during his life,” and could be exercised “in such manner only as the settlor shall from time to time direct in writing.” The widow was given no beneficial interest whatever. The Court of Appeals sustained the widow’s attack. The husband’s motive in making the transfer, said the court, is immaterial: “the only sound test . . . is whether it is real or illusory. . . . [We must ask] whether the husband has in good faith divested himself of ownership of his property or has made an illusory transfer.” By “illusory” the court apparently contemplated neither a sham transfer, i.e., lacking the *animus donandi*, nor a testamentary transfer, in the orthodox use of that term: “We assume, without deciding, that except for the provisions of section 18 of the Decedent Estate Law the trust would be valid.” What did concern the court, however, was that the settlor retained the power to control the trustees, as well as the income for life and the power to revoke. Such a conveyance, it said, “from the technical point of view . . . does not quite take all that it gives, but practically it does.” In sum, excessive control is decisive; intent (motive) is immaterial.

17 See cases cited in note 92, infra.
21 Id. at 377, 9 N.E.2d at 968.
22 Id. at 379, 9 N.E.2d at 969.
23 See *supra*, text at note 4.
24 275 N.Y. 371, 380, 9 N.E.2d at 969.
25 Id. at 381, 9 N.E.2d at 969, quoting from a statement of Chief
The illusory trust doctrine, as popularized by *Newman v. Dore*, received a partial setback from the *Halpern* case in 1951. As mentioned earlier, the New York Court of Appeals decided in the *Halpern* case that a Totten trust is not illusory *per se*. The *Halpern* case, which is the cause célèbre of the "reality" rationale, will be discussed in detail in Chapter 9. There we shall consider whether or not the court intended an outright repudiation of the illusory trust doctrine. Before the *Halpern* case had been decided, however, the illusory trust doctrine had spread to other states. It deserves special study, regardless of its ultimate fate in New York.

(b) *The Ohio Cases*. The Ohio case law is of special interest, not only as an extreme example of the illusory trust doctrine but also as an illustration of changing judicial reaction to the trust device.

At the turn of the century the Ohio courts apparently considered the revocable inter vivos trust to be an unwelcome usurper of the functions performed by a will. Thus, in *Worthington v. Redkey*, decided in 1912, the court mentioned the power of revocation as one of a number of objectionable features in a trust that it declared void. In

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26 See *supra*, Chap. 1, text at note 3.


28 For list of cases, see note 74, *infra*.


30 86 Ohio St. 128, 99 N.E. 211 (1912).

31 The court does not state squarely that the power of revocation is sufficient to defeat the validity of the trust. In fact, the court seems unwilling to hinge its decision on any single factor, preferring instead a pious catalogue of sins: the "ambiguity" of the reference to "my trustee," the reserved power of revocation, the probability that the attorney was acting merely as "agent" for the donor (so that on the death of the principal the agency would terminate, and thus the charities could take nothing), and the feeling, hinted but not expressly stated, that the transaction was an ungentlemanly attempt to evade the formalities of the Wills Act.
Union Trust Co. v. Hawkins, decided in 1929, the administrator sought to recover the corpus of the decedent's revocable inter vivos trust. A degree of discretion had been given to the trustee. In the first hearing, unreported, the Supreme Court of Ohio set the trust aside, as an invalid testamentary disposition. This decision was reversed, on the rehearing, by a majority of the court. Although the reasoning of the Redkey case was approved, the court felt itself bound by an amendment to section 8617, Ohio General Code. Doubts cast by the Hawkins case on the common-law validity of revocable trusts in Ohio were not dispelled until 1938, in Cleveland.

32 121 Ohio St. 159, 167 N.E. 389, 73 A.L.R. 190 (1929).
33 121 Ohio St. 177-78, 163 N.E. at 394.
34 At the time of the execution of the first trust agreement in the Hawkins case this section provided: “All deeds of gifts and conveyance of goods and chattels, made in trust to the use of the person or persons making them, shall be void and of no effect.”

In 1921 (before the execution of the supplementary agreement in the Hawkins case), the section was amended to add the following:

“... but the creator of a trust may reserve to himself any use or power, beneficial or in trust, which he might lawfully grant to another, including the power to alter, amend, or revoke such trust, and such trust shall be valid as to all persons, except that any beneficial interest reserved to such creator shall be subject to be reached by the creditors of such creator, and except that where the creator of such trust reserves to himself for his own benefit a power of revocation a court of equity, at the suit or any creditor or creditors of the creator, may compel the exercise of such power of revocation so reserved, to the same extent and under the same conditions that such creator could have exercised the same.”

On this amendment see Rowley, “Living Testamentary Dispositions and the Hawkins Case,” 3 U. CIN. L. R. 361 (1929), referring to it as “essentially a creditors statute.” See also King, “A Reappraisal of the Revocable Trust,” 19 ROCKY Mt. L. R. 1, 9 (1946). A note in 5 OHIo St. L. J. 269, 271 (1939) states: “At the time of the Redkey decision, the trust companies in Ohio were administering a great many living trusts, the validity of which would be denied if ever tested in the courts on the basis of the Redkey case. To avoid this contingency, the trust companies exerted sufficient pressure on the legislature to secure an amendment to section 8617 of the General Code. ... Since this amendment made only trusts for the exclusive use of the creator void, if the trust provided that the property go to another after the death of the settlor it was not for the exclusive use of the settlor and therefore not void, and an entering wedge was created whereby the court could modify its ruling in the Redkey case.”
 Further doubts, however, arose from dicta in *Woodside Company v. Narten*, in 1941. And the uncertainty was heightened by *Central Trust Co. v. Watt*, decided in the same year. Here the court split three ways on the validity of a trust which reserved the income for life, the power to revoke, and the power to veto and to “direct” the trustee in matters of investment and management.

*Cleveland Trust Co. v. White*, 134 Ohio St. 1, 15 N.E.2d 627 (1938). But this case is not as strong as it is sometimes considered, as the trust concerned could be revoked only with the approval of the trustee. Judge Matthias was the only member of the court left of the members who had decided the Hawkins case. He had voted to renounce the common-law validity of the revocable trust in the Hawkins case, but voted for its validity in the White case.

In *Schofield v. Cleveland Trust Co.*, 135 Ohio St. 328, 21 N.E.2d 119 (1939), a trust was upheld in which the settlor reserved the net income and right to occupy the real estate, the trustee being relieved from payment of taxes and insurance and required to secure the settlor's written approval of all sales and purchases. It was also held, however, that Section 8617 would permit the plaintiff creditors to revoke the trust only in the lifetime of the settlor. Three judges, Weygandt, C.J., Williams and Myers, J.J., dissented, presumably on the ground that the trust was invalid. This construction of Section 8617 is perhaps questionable, but it is in keeping with the confusion surrounding that unhappily worded provision. Thus Alexander, “Certain Problems Confronting Creditors When a Revocable Trust Accomplishes Succession,” 31 Mich. L. Rev. 449, at 467 (written before the decision in the Schofield case): “It is to be noted that the statute (Section 8617) makes no reference to the situation after death of the settlor, yet this is the statute upon which the court expressly based its decision in Union Trust Co. v. Hawkins.”

*Woodside Company of Nevada v. Narten*, 138 Ohio St. 469, 35 N.E.2d 777 (1941). The court was composed of Weygandt, C.J., and Williams, J. (both of whom dissented in the Schofield case), Hart, J. (who concurred in the Schofield case), and Turner, Zimmerman, and Bettman, J.J. (none of whom were in the court which decided the Schofield case). Matthias, J., who had concurred in the Schofield case, did not participate. The settlor had reserved the income for life, the power to revoke in whole or in part, and the power to withdraw principal. In deciding the case on another issue, the court said: “After a study of the facts in the instant case the members of this court find a difference of opinion among themselves as to whether a valid trust was created, and since the ultimate judgment herein will not be affected thereby, this question will not be discussed further.”

*Central Trust Co. v. Watt*, 139 Ohio St. 50, 38 N.E.2d 185 (1941). Hart, J. upheld the trust, explaining that the control was really retained for the welfare of the beneficiaries. Zimmerman and Bettman, J.J., concurred, as also did Williams, J., in a separate opinion. Wey-
During this period of judicial unrest over the revocable trust there occurred the famous evasion case of Bolles v. Toledo Trust Co. In that case the husband executed three inter vivos trusts. The first trust in point of time (No. 328) irrevocably transferred $110,000 in insurance and $1,000 in stock, for the benefit of a daughter, with the settlor taking in the event of the daughter's incapacity. The second trust (No. 331) was revocable and comprised securities worth $4,000. The husband reserved the right to the income for life, and for payments of principal if required. After the settlor's death the trustee was to pay the settlor's wife $500 monthly for life, with the trustee having discretion to give her additional sums if needed. Surplus funds beyond the amount needed to provide the widow's payments were to be transferred to Trust No. 328. All payments to the widow under trust No. 331 were to be cancelled, and the trust "terminated," in the event that she elected not to take under the will.

The third trust (No. 520) was made in 1930, and was also revocable. It covered securities of an approximate value of $80,000. Income (and principal if needed) was payable to the husband for life. Upon the husband's death, the corpus was to be transferred (partly intact and partly liquidated) to Trust No. 331, to be "thereafter treated as a part of that trust." In 1928, on the same day on which Trust No. 331 was executed, the husband made his will. The wife was given certain chattels. The residue of realty and personalty went to the Trust Company as trustee of Trust No. 331. The will stated that the provisions made for the wife in the will and with the Trust Company were to be "in lieu of all her rights, claims and estates given to her by law, by way of dower or otherwise."

* C.J., Turner and Matthias, J.J., dissented, branding the transaction as a "mere agency" (p. 73). The trust instrument in the Watt case was executed prior to the amendment to Section 8617, so that the amendment played no part in the case.

To summarize: the insurance ($110,000) went to the daughter under Trust No. 328. The widow received an annuity of $500 per month (and more, if needed for support) from Trust No. 331 ($4,000), as fed by Trust No. 520 ($80,000) and the residuary estate under the will. But if the widow spurned the will, she would be bereft of her trust interest.

The background information, as brought out in previous litigation, indicated that the equities favored the widow. The parties were married in 1920, she at the time being a widow with two minor children. In 1921 a daughter was born, the beneficiary of the trust mentioned above. It appeared that Mr. and Mrs. Bolles “lived together in a seemingly harmonious relationship until his death.” Mrs. Bolles’ former husband had left her a substantial amount of property. In addition, Mr. Bolles had rented a safe-deposit box from the Toledo Trust Company, in which he had deposited securities, purchased with his own money, worth approximately $216,215. When the box was opened after his death the securities stood in his own name and were contained in a folder inscribed with his name. In subsequent probate-court proceedings, however, Mrs. Bolles introduced evidence which later led the Supreme Court to remark that “there can be little doubt that he intended his wife to have the securities and thought he had effectuated such desire.” Nevertheless, the court held that the securities should form part of the estate assets for administration purposes, stating that Mrs. Bolles had failed to prove a sufficient delivery to constitute a valid gift; and, in a later proceeding, the court failed to respond to the suggestion that Bolles had held the securities in trust for his wife.

Finally the widow brought the present suit, arguing that the two revocable trusts should be declared void as bogus

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40 Bolles v. Toledo Trust Co., 132 Ohio St. 21, 4 N.E.2d 917 (1936).
41 Id. at 23, 4 N.E.2d at 918.
42 Id. at 30, 4 N.E.2d at 921.
43 Id. at 31, 4 N.E.2d at 921. The holding is criticized in note, 4 Ohio St. L. J. 134 (1937).
44 Because of res judicata. 136 Ohio St. 517, 27 N.E.2d 145 (1940).
testamentary dispositions, or at least held defeasible to the extent of the widow's statutory share. The court agreed. Although holding the trusts to be otherwise valid under section 8617, it stated that "such trusts may not be used as a device to deprive the widow of her distributive share of the property possessed by her husband at the time of his death. To the extent that such an arrangement, if allowed to stand, would deprive the widow of her distributive share of property, it is voidable at the instance of the widow." And later this statement is made: "Trusts No. 331 and No. 520, taken in connection with the contemporaneous execution of the will and trust No. 331 and the value of the res prior to testator's death in the respective trusts are illusory as to the widow's rights." Apparently the court felt that Trust No. 331, although not technically a testamentary disposition, gave the settlor such enjoyment of his property during his

45 Note that the assumption of the court in the Halpern case (infra, pp. 122-123) that the trust in Newman v. Dore (supra, pp. 75-76) was not "real" could not be made with reference to the trusts in the Bolles case. There are repeated statements that trusts 331 and 520 were valid aside from the widow's rights (see, e.g., 144 Ohio St. 226). Such a holding would of course be expected because of statutory recognition of revocable trusts in Ohio, in §8617. Under the Halpern test, as applied to Ohio under present §8617, the widow would have lost.

46 144 Ohio St. 195, 213, 58 N.E.2d 381 at 390. See also 144 Ohio St. at 210-11, 58 N.E.2d at 389-90.

47 The court seems impressed with the fact that until Bolles' death "trust No. 331 remained, as apparently it was his intention for it to so remain during his lifetime, wholly inadequate for the purpose for which it was established" (id. at 212, 58 N.E.2d at 390). The point of this reference to the inadequacy of Trust No. 331 is not clear. The court purports elsewhere to minimize "intent" as a criterion (id. at 215, 58 N.E.2d at 391); and, in any event, it is apparent from the evidence that if Bolles had any intent at all it was to make generous provision for his wife. Both the will and trust No. 331 ($4,000) were made in 1928, with the residue of the will to "pour over" into the trust in order to produce the annuity of $500 per month. Trust No. 520 ($80,000) was executed in 1930. The safety deposit box was opened in 1931. Bolles visited the box 48 times before his death on August 8th, 1933. Certainly he intended to give his wife the $216,000 in securities in the box. It also seems to be clear that he was not attempting to defraud his wife; firstly, because of the safety deposit box episode, and, secondly, because of the generous annuity from the two trusts in question.

48 Id. at 229, 58 N.E.2d at 397.
lifetime that it amounted to an unfair deprivation of the widow's right to elect against her husband's "will." This may be seen from the statement that the Newman case "is illustrative of the fact that where a widow is given certain rights by statute she may not be deprived thereof by her husband," 49 and that "irrespective of the husband's intention, if the effect of the device resorted to is such as to cut down or deprive the widow of the right given her under [the forced share] such device is voidable when challenged by the widow." 50

The actual decision is not unreasonable, in view of the peculiar circumstances in the case. The rationale, however, is no more than a variation of the "control" test, in spite of the broad language suggesting that the widow may invade any device, the effect of which is to "cut down or deprive" her of her elective rights. That language must be read in the light of repeated references to the settlor's retention of "dominion" over the trust res. 51 Such "dominion," considered in connection with the settlor's quasi-testamentary arrangements, renders trusts Nos. 331 and 520 illusory with reference to the widow. But "illusory" is a term with new implications. It now seems possible to state that an inter vivos trust in Ohio, in some undefined circumstances, may be illusory merely because of the retention of the power to revoke. 52 The apparent criterion is the quasi-testamentary nature of trusts Nos. 331 and 520. 53 Also relevant, it would seem, is the existence of factual control, whether or not formally reserved. 54 But financial need on the part of the surviving spouse, which one would suppose to be all-important, is not

49 Id. at 214, 58 N.E.2d at 391.
50 Id. at 215, 58 N.E.2d at 391.
52 Very little formal control was retained by the settlor. Id. at 198–99, 58 N.E.2d at 384–85, and see notes 64 and 78, infra.
54 See 144 Ohio St. 195, 224–26, 58 N.E.2d 381, 395–96 (1944). Also see note 78, infra.
mentioned; we know that the widow had been left half the stock in her former husband's company, but we do not know its value, nor do we know the value of Bolles' estate.

The indecisive nature of the Bolles case left the legal profession in a quandary: did the case stand for the proposition that all revocable inter vivos trusts were *per se* illusory — or should the decision be authoritative only with respect to the particular facts? These doctrinal uncertainties contributed to the furor that attended the later case of *Harris v. Harris*. In this case the husband in 1939 transferred in trust 100 shares of a corporation in which there were but five stockholders, each owning 100 shares. At the time of execution the *res* was worth $40,000; at the date of settlor's death, in 1942, it was worth $75,000. The wife was not mentioned. The settlor reserved the income for life, the power to revoke, and the power to deliver additional securities. The trustee was given no authority to sell, invest, or reinvest; and his authority to vote the stock was "virtually nullified by a further provision authorizing the trustee to enter into a trust agreement with the remaining four stockholders whereby all of the stock of the corporation was to be surrendered and one certificate issued in the joint names of the trustee and the four other stockholders, all five to be designated as trustees thereof. This was done. "As a result," says the court, "... there no longer was any stock standing in the name of the original trustee alone, and, of course, he alone could vote no

55 Nor was predictability aided by the appearance in the Bolles case of some of the usual overworked "evasion" clichés: "not an absolute transfer;" "merely colorable," "made with a fraudulent intent." Bolles v. Toledo Tr. Co., 144 Ohio St. 195, 213, 215, 58 N.E.2d 881, 890, 391 (1944).

56 Harris v. Harris, 79 Ohio App. 443, 74 N.E.2d 407 (1945), aff'd, 147 Ohio St. 437, 72 N.E.2d 378 (1948). The Ohio Fiduciaries Research Association filed a lengthy brief as *amicus curiae* in the Harris case, and also participated in that capacity in the oral argument in court. The Bolles case had in the meantime received adverse comment: King, "Reappraisal of the Revocable Trust," 19 Rocky Mt. L. Rev. 1 (1946).

57 The inventory value of the assets in the estate (excluding the *res* of the inter vivos trust) was $75,186.46.
stock in that capacity. In spite of the new trust agreement the plaintiff's husband continued to serve as the president at a salary of $20,000 per year and as director of the corporation; and until his death he made the same use of his property as he had done previous to the execution of the trust agreements, while the trustee attended no meeting of the stockholders, attended no meeting of the board of directors, and at no time did he examine the books of the corporation. As well stated by the Court of Appeals . . . 'the record shows that Harris, the settlor, engaged in the business of operating the company, along with the other stockholders, and that the activities of his trustee were of a minor character.'”

The husband's will was executed in 1940, and contained no provision for the wife other than a sum not to exceed $5,000 annually. This sum, however, was to be derived from a testamentary trust which “obviously could produce income amounting to but a mere fraction of the $5,000.”

The widow, having elected to take against the will, brought action to have the inter vivos trust declared either void or vulnerable. The Courts of Appeals reversed the trial court's dismissal of the plaintiff's petition. The Supreme Court, by a four to three vote, agreed that "the plaintiff's husband retained such dominion and control over the corpus of the trust estate as to make the trust ineffective to deprive the plaintiff of her interest in the assets thereof as the surviving spouse.” Weygandt, C.J., in delivering the majority opinion, led off with a sweeping endorsement of the "rule of law" of the Bolles case, as exemplified in the first three paragraphs of the syllabus in that case. Referring to the argument of counsel

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58 Entered into on May 15, 1939, three days after the execution of the first agreement. Seemingly Harris' wife, the plaintiff, had no knowledge of either trust agreement until after her husband's death; whereas the wives of each of the remaining four stockholders were informed at the time of the execution of the new trust agreement.

59 147 Ohio St. 437, 441, 72 N.E.2d 378, 380 (1948).

60 Id. at 437, 72 N.E.2d at 378.

61 Id. at 442, 72 N.E.2d at 380.

62 These paragraphs from the syllabus in the Bolles case are as follows:

"1. A husband may dispose of his personal property during his lifetime without the consent of his wife, but a husband may
for the defendants that these paragraphs were obiter dicta and incorrect, Weygandt, C.J., stated summarily that “it is unnecessary to restate the rationale of the court.” He concluded that the combination of the right to income, the power to revoke, and the other circumstances mentioned above was so similar in effect to the facts in the Bolles case as to demand that a similar decision be reached. Turner, Bell, and Sohngen, J.J., concurred.

The dissent of Matthias, J., (concurred in by Hart, J.) turns on the proposition that the widow could win only by establishing that the inter vivos trust was void as “creating an agency.” He stated that the Hawkins case and the White case “are still the law in this state and particularly so in view of not bar his widow of her right to a distributive share of any property which he owns and of which he retains the right of disposition and control up to the time of his death.

“2. Section 8617, General Code, which provides that a revocable and amendable living trust ‘shall be valid as to all persons’ except creditors, does not deprive the settlor of all dominion over the trust res so that a widow electing to take under the statute of descent and distribution is barred from claiming a distributive share of the property in such trust.

“3. The transfer of property to a trustee under an agreement whereby the settlor reserved to himself the income during his life with the right to amend or revoke, is valid by virtue of Section 8617, General Code, but under such a trust agreement settlor does not part absolutely with the dominion of such property and his widow electing to take under the statute of descent and distribution may assert her right to a distributive share of the property in such trust at settlor’s death.”

63 147 Ohio St. 437, 440, 72 N.E.2d 378, 380 (1948).

64 In the Bolles case little control over administration was formally reserved, but the decision stressed failure to relinquish absolute “dominion.” The majority opinion in the Harris case, naturally, commented on the fact that the settlor in that case did “... a number of additional things that are important in determining the question of dominion over the trust res.” These “additional things” are analyzed in the application for rehearing, beginning at p. 10.

65 Presumably he is referring to the statement in the Hawkins case to the effect that §8617, as amended, validated revocable inter vivos trusts; surely he cannot be referring to the unfortunate remarks in that case regarding the common law invalidity of inter vivos trusts. It will be recalled that Matthias, J., voted with the majority that held the trust void at common law in the Hawkins case but voted to hold the trust
the provisions of Section 8617. . . .” 66 He concluded that Section 8617 sustained the Harris trust, whereas in the Bolles case “the entire plan . . . was testamentary in character.” 67 In other words, for Matthias, J., reasoning of this sort assumes that an inter vivos trust must be totally black or entirely white. And we encounter the same black-white gambit in the more closely reasoned dissent by Zimmerman, J. 68 Inter vivos trusts, he says, are valid because of the Hawkins, White, and Watt cases, as well as because of Section 8617; 69 he rejects the Bolles view that a trust can be valid and yet voidable by the widow. 70

In summation, the questions raised by the decision in the Bolles case were left unanswered by the Harris case. The majority opinion in the Harris case does little more than affirm the Bolles case, but the dissenting opinions reveal a fundamental difference of opinion 71 in the Ohio judiciary as to whether or not a surviving spouse may set aside the decedent’s inter vivos transfers. This difference of opinion is valid in Cleveland Trust Co. v. White, 134 Ohio St. 1, 15 N.E.2d 627 (1938). See note 35, supra.

66 147 Ohio St. 437, 442, 72 N.E.2d 378, 380-81 (1948).
67 Id. at 444, 72 N.E.2d at 381.
68 It was also used by the New York Court of Appeals in the Halpern case; see infra, Chap. 9, text at note 39.
69 §8617, of course, does not preclude the widow from attacking an inter vivos trust. Strange that the dissenting judges in the Harris case did not urge the “expressio unius” rule, viz., that in singling out creditors rights §8617 inferentially excludes the widow. It will be recalled that the court in the Bolles case stated that the widow occupies a higher position than a creditor, thus distinguishing the Schofield case, supra note 35.

70 Zimmerman, J., stated that he did not “join with the majority [in the Bolles case] a principal reason being that he considered the second and third paragraphs of the syllabus incompatible with the expressions of this court in previous cases.” Cf. discussion on “extent of defeasance,” infra p. 128.

The uncompromising severity of either viewpoint makes the other all the more intransigent. The majority opinion in the *Harris* case would permit the widow to invade *any* revocable inter vivos trust, regardless of her financial need, and (apparently, but we cannot be sure) regardless of her equities. This unrealistic approach, although it may not result in a "flight of revocable trust capital from Ohio," constitutes an unreasonable fetter on inter vivos trusts. On the other hand, the dissenting opinions would necessitate rejection of the widow's claim in *any* instance, also regardless of her financial need or other circumstances.

3. Conclusion

The illusory transfer test, based on excessive control, is not without merit. The widow's concern is with testamentary transfers, since the election statutes restrict her to the property comprising the decedent's estate. Testamentary transfers are tested in terms of control. On this criterion, if the widow is to be permitted to reach other than testamentary transfers, it would have to be transfers which are quasi-testamentary, i.e., in which an unreasonable (albeit not such as to require the "testamentary" label) degree of control was retained. The reason is simple: if a husband in substance en-

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72 This was predicted at pp. 54, 55 of the brief filed by the Ohio Fiduciaries Research Association as *amicus curiae* in the *Harris* case.

73 Another popular "weasel word" in the evasion cases is "dominion." Webster's New International Dictionary (2d ed. 1954) defines it as "the power of governing and controlling; independent right of possession, use, and control. . . ." "Dominion" appears in the second "Kerr" passage, *infra*, p. 99. The older cases tended to identify retention of possession with "dominion": *e.g.*, Smith v. Hines, 10 Fla. 258 (1863-4) (retention of possession of slaves); Flowers v. Flowers, 89 Ga. 632, 15 S.E. 834 (1892); Gentry v. Bailey, 47 Va. (6 Gratt.) 595, 604 (1850) (dictum) (retention of possession in a revocable trust would make the trust testamentary because the "dominion" over the res continues unlimited). Later cases use the phrase, in describing illusory transfers, as being synonymous with "control"; see, *e.g.*, Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381 (1944); 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); *cf.* In re Kellas Estate, 40 N.Y.S.2d 655 (Surr. Ct., 1943), aff'd, 267 App. Div. 924, 46 N.Y.S.2d 884 (3rd Dep't 1944), *aff'd on other grounds*
joys and "owns" his property until he dies, he is under a moral if not a legal obligation to let the widow share. Put in other words, if the widow can participate in that property which the husband owned "in the eyes of the law," so should she be entitled to that which he owned in substance. Or the eyes of the law should be opened wider. If testamentary transactions are tested by "control," it is only natural that the test for quasi-testamentary ("illusory") transfers should speak the same language. 


Cases using the illusory transfer doctrine include the following:


In the following cases the transfer was held not to be illusory: Allender v. Allender, 199 Md. 541, 87 A.2d 608 (1952) (joint tenancy); Van Devere v. Moore, 243 Minn. 346, 67 N.W.2d 664 (1954) (sale at low price); Schmidt v. Rebhann, 108 N.Y.S.2d 441 (Sup. Ct. 1951), complaint dismissed on merits, 117 N.Y.S.2d 840 (Sup. Ct. 1952) (transfer of apartment building); Hart v. Hart, 194 Misc. 162, 81 N.Y.S.2d 764 (Sup. Ct. 1948), aff'd without opinion, 274 App. Div. 1086, 85 N.Y.S.2d 917 (1st Dep't 1949) (U. S. savings bonds and joint bank account). Cf.
Nor can it be said that the illusory transfer test is open to the charge of being too unpredictable. Of course, there are various degrees of control over administration of a trust — but not too many.\textsuperscript{75} To initiate or veto investments, sales, and the like; to act as co-trustee; to vote stock; to “use, occupy, manage, control, improve and lease the land in any manner and for any purposes he might desire”; \textsuperscript{76} to state that the trustees' powers are to be exercised “in such manner only as the settlor shall from time to time direct in writing.” \textsuperscript{77}

These and other phrases constitute reasonably plain guide­marks on the road to complete ownership. The courts should have little difficulty in defining what is permissible. To be sure, a settlor may have factual control without its legal counterpart; \textsuperscript{78} subtleties of conveyancing may disguise actual


On the illusory trust doctrine in New York since the Halpern Case, see pp. 124–127, \textit{infra}.\textsuperscript{75}

\textit{Restatement, Trusts} \S 185 (1935) makes a distinction between powers of control retained by the settlor that are of a fiduciary nature—and therefore subject to enforcement by the court—and those other broader powers which are said to be for the benefit of the settlor alone, and over which the court has consequently no jurisdiction. In a leading case in which the settlor was given almost complete powers of control, Cardozo, J., remarked that “his discretion, however broad, did not relieve him from obedience to the great principles of equity which are the life of every trust.” Carrier v. Carrier, 226 N.Y. 114, 712, 123 N.E. 135, 858 (1919). Significantly, no power to revoke had been reserved in that case. The distinction under discussion has apparently never been considered in connection with the problem of deciding when a trust becomes testamentary.

\textsuperscript{76} Kelly v. Parker, 181 Ill. 49, 54 N.E. 615 (1899).


\textsuperscript{78} A distinction should be made between control as retained and control as exercised. We are concerned only with the former. Formal re-
ownership. For instance, an irrevocable trust may by prearrangement be revocable. But that is the job of equity: to distinguish the essence from the externals.

There is, however, a disturbing lack of logic in the control rationale, which affects both the Restatement "testamentary" test and the illusory trust test. These tests effect an unrealistic deemphasis of the power to revoke. Standing alone, or in combination with retention of the income for life, this power is not deemed to constitute excessive "control." It is only when the power to revoke and the retention of income for life are combined with extreme control over administration that the transfer will be deemed testamentary or illusory. And yet of the three factors mentioned, it is the power to revoke that gives the settlor the greatest substantial control.

The decisive influence of the power to revoke is brought out in the following evasion cases: United Building & Loan Ass'n v. Garrett, 64 F. Supp. 460 (W.D. Ark. 1946) (trust); Robertson v. Robertson, 147 Ala. 311, 40 So. 104 (1905) (trust); Bee Branch Cattle Co. v. Koon, 44 So. 684 (Fla. 1949) (trust); Williams v. Collier, 120 Fla. 248, 162 So. 868 (1935) (trust); Smith v. Hines, 10 Fla. 258 (1863-4) (bill of sale); Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E.2d 75 (1944) (trust); Smith v. Corey, 125 Minn. 190, 145 N.W. 1067 (1914) (trust deed);
Having the power to recapture the assets, to administer the *coup de grâce*, it would seem that the settlor has all the control he needs over both the trust assets and the trustee. Is it fair to say, with reference to the trustee, that the possibility of loss of business acts as a sword of Damocles suspended in the area of the corporate ledgers? Possibly not. Possibly its power to coerce can be exaggerated. The trustee's duty is to act for the best interests of the beneficiaries, regardless of the consequences. In most jurisdictions, upon revocation of the trust, the trustee would lose only the future commissions on income; he would receive his commission on principal upon


A line of Virginia cases stresses irrevocability. In Lightfoot's *Ex'r's v. Colgin*, 19 Va. (5 Munf.) 42 (1813) the settlor transferred a large part of his personality in trust, reserving a power of sale. The court assumed that the trust was irrevocable and sustained the transfer. Also see Gentry v. Bailey, 47 Va. (6 Gratt.) 594 (1850) (power to sell with accountability for proceeds unless substitute asset purchased); Hall v. Hall, 109 Va. 117, 63 S.E. 420 (1909). *But see* Bickers v. Shenandoah Valley Nat'l Bank, 197 Va. 145, 88 S.E.2d 889 (1955), rehearing denied, 197 Va. 732, 733, 90 S.E.2d 865, 866 (1956).

*In re* Ford's Estate, 279 App. Div. 152, 108 N.Y.S.2d 122, (1st Dep't 1951), *aff'd without opinion*, 304 N.Y. 598, 107 N.E.2d 87 (1952), in which a revocable trust was held not to be testamentary although the settlor was a co-trustee. Van Voorhis, J., dissented, stating that a settlor who was co-trustee could be "assured of having his own way," because if thwarted he could revoke the trust. He reiterated the following excerpt from the respondent's brief: "... It is almost a uniform practice for a corporate co-trustee, not only to conform to the necessity of consulting its individual settlor-co-trustee as to investments, etc., but on any difference of opinion between them to abide by the settlor's judgment, providing it is within the realm of prudence." *Id.* at 159, 108 N.Y.S.2d at 129.
termination of the trust. And from the settlor’s viewpoint, in addition to the extra commissions, the cost of revocation will be increased by state taxes on the transfer of securities, and in isolated instances by a revocation fee. Nevertheless, the settlor may by prearrangement with the trustee have the commission reduced in order to minimize the cost of revocation; or he may include a provision that the trustee is to account only to the settlor. Despite the high cost of revocation, the fact remains that “a settlor who has reserved a power of revocation . . . has an interest which is, in effect, equivalent to ownership.” Complete ownership is at all times attainable by a stroke of his own pen.

82 Under a pay-as-you-go scheme, of course, the trustee would lose all further commissions on both principal and income.


85 It is probable that most settlors consider themselves to be in actuality the owner of the property in a revocable trust. “A simple explanation of most of this testimony is that Kerwin knew that he had reserved the power to alter, amend or revoke the trust agreements, and concluded that that reserved power left him substantially the master of the trust property.” Kerwin v. Donaghy, 317 Mass. 559, 570, 59 N.E.2d 299, 306 (1945).

There are other areas of the law in which the power to revoke a trust may be deemed to equate ownership. The most obvious example, which we need not labor, lies in the tax field. Creditors, by statute in some jurisdictions, may reach the trust corpus if the power to revoke was retained. See Scott, supra note 84, for a list of the statutes. For a discussion of the Ohio statute, see Alexander, “Certain Problems Confronting Creditors When a Revocable Trust Accomplishes Succession,” 81 Mich. L. Rev. 449 (1933); and see Schofield v. Cleveland Trust Co., 135 Ohio St. 328, 21 N.E.2d 119 (1939), decided after Alexander’s article was written, discussed supra notes 35, 69. In the absence of a statute it is doubtful if a creditor could take advantage of the power to revoke, unless, of course, the trust was a fraudulent conveyance, or the settlor was also the beneficiary. Further, when the settlor of a revocable trust consents to a breach of trust, the fact that the settlor has the power to revoke prevents the beneficiaries from surcharging the trustee. Scott, supra note 84; see City Bank Farmers Trust Co. v. Cannon, 291 N.Y. 125, 51 N.E.2d 674 (1943), reargument denied, 293 N.Y. 858, 59 N.E.2d 445 (1944), aff’d, 264 App. Div. 429, 35 N.Y.S.2d 870, 265 App. Div. 863, 38 N.Y.S.2d 245 (1942). Presumably the reasoning is that the
TESTS BASED ON RETENTION OF CONTROL

And there is another unfortunate aspect of the illusory transfer doctrine. Most courts, even in jurisdictions that purport to follow the doctrine, do not practice what they preach. An analysis of the evasion cases reveals a significantly high correlation between the result actually reached and the result dictated by the apparent "equities" in the case. In other words, the courts, consciously or otherwise, are influenced by factors other than mere retention of control. But the courts already committed to the "control" rationale naturally tend to announce the decision in terms of the control factor. In many cases violence has been done to the doctrine in order to square the result with the doctrine. The power to revoke puts the settlor in the driver's seat, hence his wishes should prevail; otherwise he would be put to the needless expense of revocation, and creation of another trust.

86 See Chap. 11, infra.


88 Substantial control existed, and was referred to, in the following cases in which the transfer was sustained: William v. Williams, 40 Fed. 521 (C.C.D. Kan. 1889) (transfer of all of husband's property to unlawful "wife"); Bullen v. Safe Deposit & Trust Co., 177 Md. 271, 9 A.2d
ensuing confusion in the case-law certainly does nothing to further the basic legislative policy. If anything, it constitutes a hazard for the husband who attempts to make an equitable inter vivos distribution to his children, particularly if the children are of a prior marriage. In other words, the estate planner cannot rely on the courts to say what they mean, or to mean what they say.

That courts following the "control" rationale do pay heed to other factors is exemplified by the Newman case itself. Despite its earlier strong protestations to the contrary,\textsuperscript{89} the court seems interested in indications of fraudulent intent on the part of the husband.\textsuperscript{90} The ultimate decision to label the husband's inter vivos trust "illusory" does not come until near the end of the judgment. The final paragraph justifies the decision by speaking of the husband's patently fraudulent intent. The trust, says the court, was "intended only as a mask for the effective retention by the settlor of the property which in form he had conveyed."\textsuperscript{91} And the concluding sentences

\textsuperscript{89} 275 N.Y. 371, 379, 9 N.E.2d 966, 968 (1937).

\textsuperscript{90} See id. p. 378, 9 N.E.2d at 968, to the effect that the reserved rights "had no other purpose and substantially had no other effect" and also the last two sentences in the opinion, id. p. 381, 9 N.E.2d at 970: "In this case it is clear that the settlor never intended to divest himself of his property. He was unwilling to do so even when death was near."

\textsuperscript{91} Id. at 381, 9 N.E.2d at 969.
refer to (a) the proximity of the transfer to the date of death and \textit{seem like} (b) the fact that the husband transferred all his property: “In this case it is clear that the settlor never intended to divest himself of his property. He was unwilling to do so even when death was near.” \textsuperscript{92}

\textsuperscript{92} Ibid. In 1936 the First Department had used language that placed strong emphasis on intent to frustrate the statutory share: Bodner v. Feit, 247 App. Div. 119, 286 N.Y. Supp. 814 (1st Dep't 1936). The husband, a few months before death, had transferred substantially all his property, either by way of absolute transfer or by Totten trust, and with retention of a life interest. The court stated that husbands and wives may not “strip themselves of their property for the sole purpose of depriving those that the statute intended to protect of their right to inherit” \textit{id. at} 122, 286, N.Y. Supp. at 817. Untermyer, J., dissented vehemently on the ground that the term “fraud” is meaningless “when applied to a disposition by the absolute owner of property which is intended to prevent it from benefitting a party who has acquired no interest therein.” \textit{Id. at} 125, 286 N.Y. Supp. at 821. The case apparently was settled before it reached the court of appeals; see \textit{46 Yale L. J.} 884, 885, note 3 (1937); cf. Hellstern v. Gillett, 1 P.H. Unreported Trust Cases, Para. 25, 233 (N.Y. 1937) (decided before the court of appeals decision in Newman v. Dore, \textit{supra} note 89); In re Kells’ Estate, 40 N.Y.S.2d 655, 663, \textit{aff’d}, 267 App. Div. 924, 1006, 46 N.Y.S.2d 884, \textit{aff’d on other grounds}, 293 N.Y. 908, 60 N.E.2d 34 (1944).

Similar emphasis may be found in Schnakenberg v. Schnakenberg, 176 Misc. 312, 27 N.Y.S.2d 270 (Sup.Ct.), \textit{aff’d}, 262 App. Div. 234, 28 N.Y.S.2d 841 (2d Dep’t 1941). The resulting confusion in the lower courts is indicated by Burns v. Turnbull, 37 N.Y.S.2d 380 (Sup.Ct. 1942), \textit{rev’d mem.}, 266 App. Div. 779, 41 N.Y.S.2d 448 (2d Dep’t 1943), \textit{reargument granted}, 267 App. Div. 986, 48 N.Y.S.2d 458 (2d Dep’t 1944), \textit{aff’d on reargument mem.}, 268 App. Div. 822, 49 N.Y.S.2d 538 (2d Dep’t 1944), \textit{motion to dismiss appeal denied}, 294 N.Y. 809, 62 N.E.2d 240 (1945), \textit{aff’d without opinion}, 294 N.Y. 889, 62 N.E.2d 785 (1945). Here the wife executed a trust eleven weeks before death. She designated herself as one of the two trustees, retained the power to appoint trustees and remove them, retained the power to revoke, and retained “exclusive control over the management of the trust funds.” The trial court, in upholding the trust, went to some pains to emphasize that motive should be irrelevant, citing Newman v. Dore, but concluded by stating that since there was “no proof to show the settlor’s state of mind at or before the trust’s execution. . . . [C]onsequently it cannot be decided that her act in setting up the trust was not in good faith.” The Second Department reversed, holding the trust void as being illusory, with no mention of the intent factor, or of the trial court’s trenchant remarks on the necessity of preserving freedom of alienation. The Court of Appeals affirmed without opinion. In re Galewitz Estate, 206 Misc. 218, 223, 132 N.Y.S.2d 297, 302 (Sur.Ct. 1954), speaks also of “intent” and “fraud,” citing, \textit{inter alia}, both the Newman and the Halpern cases. But the decision of the Third Department in Thomas
But the main defect of the illusory transfer doctrine is a more serious one than a lack either of logic or consistency. The test is too narrow. To say that the sole criterion of evasion is excessive control is to suggest that we must ignore all the other circumstances in the case. But if we ignore the other circumstances — the other “equities” — we may end up by deciding that a certain transfer is “illusory,” and thus an evasion, even though common sense tells us it was not an evasion. Assume that H, a husband, is worth $40,000. Is not H’s widow more seriously injured by an irrevocable inter vivos trust of $30,000 (non-illusory) than by a revocable inter vivos trust, with retention of control, of $3,000 (illusory)? Should

v. Louis, 284 App. Div. 784, 135 N.Y.S.2d 97 (3rd Dep’t 1954), raises doubts, not only on the relevance of the “intent” factor to the Newman v. Dore doctrine but also on the validity of the doctrine itself. See Chap. 9, note 21, infra.

Authority may even be found for the proposition that any retention of control would be fatal to the validity of the transfer, e.g., Rabbitt v. Gaither, 67 Md. 94, 8 Atl. 744 (1887). The Rabbitt case is probably not authoritative today in Maryland; see Maryland cases listed in Table E, infra, p. 406. Conversely, some cases hold for the widow even though the transfer was irrevocable, e.g., Bodner v. Feit, 247 App. Div. 119, 286 N.Y. Supp. 814 (1st Dep’t 1936); Lonsdale’s Estate, 29 Pa. 407 (1857). For an outline of the elements of “control” in a transfer of land, cf. Courts v. Aldridge, 190 Okla. 29, 120 P.2d 862 (1941) (antenuptial transfer).

Merz v. Tower Grove Bank & Trust Co., 344 Mo. 1150, 130 S.W.2d 611 (1939) illustrates the “joint control” that is obtained when the settlor appoints himself as a co-trustee. Here the trustees had the power to manage, invest and reinvest, and the settlor had the income and the power to revoke. The widow was permitted to defeat this trust, but the court used the traditional Missouri test of intent to defraud, in anticipation of pending death. The court stated that for practical purposes the arrangement was testamentary: “We think it is apparent from the evidence that deceased realized he would not be able to exercise the power of revocation, use the joint control, nor live to enjoy this income.” Id. at 1161, 130 S.W.2d at 617. This statement raises a question: if a transfer of substantially all a man’s assets is made shortly before his death, at the expense of his deserving widow, of what relevance is the existence or otherwise of either or all of the income, power to revoke, control? Would not the trust in Newman v. Dore have been equally flagrant, equally a violation of the spirit of the forced share, if it had contained none of these factors?

Under section 8 of the suggested model statute, in Chap. 22, the claimant would not be permitted to attack an irrevocable trust if it was made more than three years before death.
we not consider the size of the transfer, as well as retention of control? And why not consider the motive, among other factors? In rejecting intent ("motive") the court in the Newman case quoted Mr. Justice Holmes: "when an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law." What Holmes had in mind, of course, was that a transaction that does not infringe the letter of a statute may nevertheless be invalidated because it is repugnant to the basic legislative policy. Implicit in this notion is the not unreasonable assumption that in deciding whether a particular transaction is offensive to the spirit (as opposed to the letter) of a statute, all relevant circumstances must be considered. The court in the Newman case quite properly acknowledged that it should interpret legislation so as to effectuate the purpose of the legislation (in this case to "increase protection of the surviving spouse"). This does not amount to "judicial legislation." But it was unfortunate that the court stressed retention of "control" and ignored other important factors such as the relative amount transferred, the relationship between the decedent and the donee, the financial circumstances of the widow, and the like.

Moreover, fraud should be fought with the net, not with the sword. A broad, flexible coverage is preferable to emphasis on a single point; for fraud, as the old tag goes, wears many faces. To become too specific in defining fraud (or "evasion") serves only to sharpen the wits of the transferor's counsel.

95 Bullen v. Wisconsin, 240 U.S. 625, 630-31 (1915). In this case the Supreme Court upheld the imposition of the Wisconsin inheritance tax on an inter vivos transfer of securities to an Illinois trustee. Holmes stated that the court below "was fully justified in treating Bullen's general power of disposition as equivalent to a fee for the purposes of the taxing statute. . . ."

96 Involving in the Newman case a liberal interpretation of the word "estate."