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DOWER - POWER OF HUSBAND TO DEFEAT HIS SURVIVING SPOUSE'S STATUTORY SUCCESSION RIGHTS BY AN INTER VIVOS TRANSACTION

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DOWER — POWER OF HUSBAND TO DEFEAT HIS SURVIVING SPOUSE'S STATUTORY SUCCESSION RIGHTS BY AN INTER VIVOS TRANSACTION — Ferdinand Straus died July 1, 1934, leaving a will dated May 5, 1934, which named his wife life beneficiary of a trust composed of one-third of his real and personal property, this being the minimum provision which he could make for her and yet preclude an election on her part to take against the will under the New York Decedent Estate Law. Three days before his death testator executed trust agreements by which he transferred all his real and personal property to trustees, who are defendants herein, and which named plaintiff herein as ultimate beneficiary. In general, all powers granted to the trustees were subject to such control as the settlor saw fit to exercise; he also reserved in himself enjoyment of the entire income for life as well as full revocatory power. Plaintiff appeals from an adverse judgment in an action which she brought to compel the defendants as such trustees to carry out the terms of the trust. *Held*, judgment affirmed. Since the transfer in trust was merely illusory it was ineffective as against the surviving wife of the settlor. *Newman v. Dore*, 275 N. Y. 371, 9 N. E. (2d) 966 (1937).[1]

Dower was a favorite of the common law.[2] In the United States this notion has been perpetuated with the result that the dowress is regarded as having a right entitled to protection by the courts even though it is inchoate and not yet vested.[3] This is shown also by the fact that the general rule is stated to be

[1] For opinion in the Appellate Division, see 250 App. Div. 708, 294 N. Y. S. 499 (1937).

[2] 1 SCRIBNER, DOWER, § 33 (1883).

[3] 1 TIFFANY, REAL PROPERTY, 2d ed., § 230 (1920); Brown v. Brown, 94 S. C. 492, 78 S. E. 447 (1913), wife granted injunction against waste by an alienee

that conveyance made by a husband, without the knowledge of his intended wife and with the intention of depriving her of the interest she would acquire in his property through the marriage relationship, will be set aside at her suit.[4] Such transfers made in contemplation of marriage or "on the eve of marriage" are commonly said to be "in fraud" of the prospective wife's marital rights.[5] Nor may the husband by some artifice dispose of his property in an effort to bar the wife's dower rights.[6] However, even though made without the wife's knowledge and with the intention of preventing her dower from attaching, conveyances by the husband have been sustained if they were made as a fair provision for children of a former marriage or for some other equitable reason.[7] In view of such doctrines, where some statutory system of participation in lieu of dower has been introduced, it is not surprising to find that the courts have protected the widow's rights thereunder when her husband has sought in some manner to defeat them. Thus it has been held that a conveyance in trust to the settlor's use for life, without consideration and made in contemplation of marriage, is a fraud on the prospective wife, and that the intent to defraud may be inferred from the circumstances surrounding such conveyance.[8] A similar rule has been declared elsewhere.[9] Likewise a gift causa mortis is void as to the

of her husband. *Contra*: Rumsey v. Sullivan, 166 App. Div. 246, 150 N. Y. S. 287 (1914), noted in 28 HARV. L. REV. 615 (1915).

[4] 19 C. J. 514, 515 (1920), and cases there cited at notes 5 and 6. In general, see "Gift by Husband as Fraud on Wife," 64 A. L. R. 466 (1929), and "Dower Rights in Property Conveyed Before Marriage," 48 L. R. A. (N. S.) 512 (1914). For other notes and collections of the older cases, see 39 Am. Dec. 218 (1886); 8 L.R.A. 814 (1890); 13 AM. & ENG. ANN. CAS. 104 (1909). For a discussion of the apparently contra English rule and its basis, see Chandler v. Hollingsworth, 3 Del. Ch. 99 (1867), in connection with which see note in 14 HARV. L. REV. 452 (1901).

[5] Roberts v. Roberts, 131 Ark. 90, 198 S. W. 697 (1917); Deke v. Huenkemeier, 260 Ill. 131, 102 N. E. 1059 (1913), noted in 8 ILL. L. REV. 500 (1914). See note in 28 YALE L. J. 701 (1919). Logically, in view of the established doctrine that where one has a legal right to do an act, the law will not inquire into his motive for doing it, is not the fraud argument out of order? Query whether policy is not the real basis for the decisions, at least in the absence of affirmative false representations or silence when under a duty to speak.

[6] Byrnes v. Owen, 243 N. Y. 211, 153 N. E. 51 (1926), noted in 36 YALE L. J. 149 (1926), 12 CORN. L. Q. 104 (1926).

[7] Hamilton v. Smith, 57 Iowa 15, 10 N. W. 276 (1881); Beechley v. Beechley, 134 Iowa 75, 108 N. W. 762 (1906); Butler v. Butler, 21 Kan. 521, 30 Am. Rep. 441 (1879); Goff v. Goff's Exrs., 175 Ky. 75, 193 S. W. 1009 (1917). Such holdings seem to strengthen the theory advanced at note 5, supra, that perhaps policy underlies most of the decisions.

[8] Rubin v. Myrub Realty Co., 244 App. Div. 541, 279 N. Y. S. 867 (1935); LeStrange v. LeStrange, 242 App. Div. 74, 273 N. Y. S. 21 (1934) (trust set up before actual marriage, but after affirmative representations of property worth had been made to the prospective spouse), commented on in 20 CORN. L. Q. 381 (1935).

[9] Jarvis v. Jarvis, 286 Ill. 478, 122 N. E. 121 (1919); Bookout v. Bookout, 150 Ind. 63, 49 N. E. 824 (1898); Beere v. Beere, 79 Iowa 555, 44 N. W. 809 (1890); Payne v. Tatem, 236 Ky. 306, 33 S. W. (2d) 2 (1930); Collins v. Collins,

wife.[10] So is a gift testamentary in character.[11] Some courts base the invalidity of the transaction on the control or benefit retained by the settlor-husband.[12] On the other hand, in a case where the trust for the husband's benefit was set up after the marriage, even though the settlor reserved full powers of revocation and control, it was held that the wife could not avoid it.[13] It has been suggested as paradoxical that a disposition made in *contemplation* of marriage is held invalid, while a disposition made *after* marriage, through the medium of a trust device, is in the same state held valid.[14] The principal case of course resolves this paradox by holding the trust device insufficient to accomplish the end desired. The question thus is whether that conclusion is justified. It is true that the new Decedent Estate Law in New York, under which the principal case arose, was enacted to give the surviving spouse an increased right in lieu of dower or curtesy under certain conditions,[15] and that its avowed purpose is to provide such spouse with a fair share of the estate as well as to prevent disinheritance of the survivor by the deceased.[16] Moreover, the statute confers on the survivor a right of election "to take his or her share of the estate as in intestacy" in case the will fails to give him outright or in trust an amount equal to that share.[17] Thus it has been forcefully argued that under such statute there is no intimation of any interest given to each spouse in the property of the other until death, and then only in the *estate* of the deceased spouse.[18] Therefore, the argument runs, if there is no estate, no matter what the reason, no interest comes into existence and there is thus no right to be protected. While the Court of Appeals agrees that under the new law "neither spouse has any immediate interest in the property of the other," yet it states that the legislature did confer "an expectant interest dependent upon the con-

98 Md. 473, 57 A. 597 (1904). For historic development of the rule, see Thayer v. Thayer, 14 Vt. 107, 39 Am. Dec. 211 (1842), and 20 CORN. L. Q. 381 (1935).

[10] Crawfordsville Trust Co. v. Ramsey, 55 Ind. App. 40, 100 N. E. 1049, 102 N. E. 282 (1913). See note in 99 AM. ST. REP. 890 at 915 (1904).

[11] McCammon v. Summons, 2 Disney (Ohio Super.) 596 (1859).

[12] Wilson v. Wilson, 23 Ky. L. Rep. 1229, 64 S. W. 981 (1901); Hayes v. Lindquist, 22 Ohio App. 58, 153 N. E. 269 (1926).

[13] Beirne v. Continental-Equitable Title & Trust Co., 307 Pa. 570, 161 A. 721 (1932). Cf. Jones v. Sommerville, 78 Miss. 269, 28 So. 940 (1900), deed by husband to child reserving to the grantor the possession, income, and profit for life; Gentry v. Bailey, 6 Gratt. (47 Va.) 594 (1850), followed in Hall v. Hall, 109 Va. 117, 63 S. E. 420 (1909). *Contra*: Bodner v. Feit, 247 App. Div. 119, 286 N. Y. S. 814 (1936), noted in 50 HARV. L. REV. 529 (1937). For a criticism of the Pennsylvania view, see comment in 8 TEMPLE L. Q. 531 (1934).

[14] Referring to the rule in Pennsylvania; see 8 TEMPLE L. Q. 531 at 542 (1934).

[15] 13 N. Y. Consol. Laws (McKinney, 1937 Supp.), § 18, note at p. 38.

[16] Cummins, "Recent Reforms in the Inheritance Laws of New York," 16 A. B. A. J. 785 (1930).

[17] 13 N. Y. Consol. Laws (McKinney, 1937 Supp.), § 18.

[18] Dissenting opinion of Untermeyer, J., in Bodner v. Feit, 247 App. Div. 119 at 122, 286 N. Y. S. 814 (1936). It is interesting to note that the same judge with his brother Glennon voiced a strong dissent in the principal case when it was before the Appellate Division; see Newman v. Dore, 250 App. Div. 708, 294 N. Y. S. 499 (1937).

tingency that the property to which the interest attaches becomes part of a decedent's estate." [19] It further states that "the contingency does not occur, and the expectant property right does not ripen into a propery right in possession, if the owner sells or gives away the property." The court then resolves the problem into a question of how far the statute protects the right while it remains merely contingent. Admitting the rule that where a right exists the motive involved in the exercise of that right is immaterial, the court constructs a new framework on which protection of the right may be based. The new argument, recognizing that one may use lawful means to keep outside the scope of a statute, postulates that a false appearance of legality, however accomplished, will not avail. The device resorted to by the settlor in the principal case clearly enabled him to enjoy substantially the same benefits and control that he had previously; in fact the transaction masked an effective retention of property which had in legal form been conveyed.[20] It is submitted that from the standpoint of strict logic the argument of the dissent in the Appellate Division is difficult to resist.[21] On the other hand, aside from the question of freedom of alienability, the result reached in the Court of Appeals may be justified on the ground of policy. On principle, however, the only adequate basis on which to support the principal case is that since the Decedent Estate Act allows a widow to dissent from a will unless it makes certain minimum provisions for her, she will be allowed also to dissent from such a transaction as is involved in the principal case on one of two theories: either (1) that it is enough like a testamentary disposition to warrant the application of the statutory rules covering testamentary transactions, or (2) that otherwise the central purpose of the statute will be vitiated.[22] In that event the test of whether the transfer was real or illusory is certainly to be preferred to the intangible "intent" and "motive" tests which have been used so widely in the past in cases of this sort.

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[19] 275 N. Y. at 376 (1937).

[20] The court denominates the transfer in the instant case "illusory," thus implying that there was no substantial change of legal relations with respect to the widow, as distinguished from a mere colorable or simulated transfer which may be ineffective even as between the parties. Normally gifts causa mortis and conveyances reserving life estates are recognized as devices other than testamentary. However, the court here looks to the substance of the transaction, rather than to its form, and reaches the conclusion that it sufficiently approximates the testamentary transaction expressly avoided by the statute so as to warrant its being treated in a similar manner.

[21] See note 18, supra.

[22] Compare the question propounded by the court at the outset of its opinion, viz., "Does the statute [Decedent Estate Law] intend that such a transfer shall be available as a means of defeating the contingent expectant estate of a spouse?" 275 N. Y. at 378. The decision reached clearly indicates that the court answers the question negatively.