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## DESCENT AND DISTRIBUTION - WIDOW'S STATUTORY SHARE - WIDOW ALLOWED TO ELECT AGAINST HUSBAND'S INTER VIVOS TRUST OF PROMISE UNDER SEAL

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DESCENT AND DISTRIBUTION — WIDOW'S STATUTORY SHARE — WIDOW ALLOWED TO ELECT AGAINST HUSBAND'S INTER VIVOS TRUST OF PROMISE UNDER SEAL—Eleven years before his death, *H* executed his bond under seal for \$20,000 payable one year after his death. He delivered the bond to a trustee to hold upon an irrevocable trust to collect and pay the proceeds to named beneficiaries. Upon *H*'s death with a personal estate approximately equal to the amount of the bond, his widow elected to claim her statutory share<sup>1</sup> in the estate, alleging that the bond was invalid. The trustee filed a bill alleging that the trust was sufficient to bar the widow, and the widow demurred. The demurrer was overruled by the trial court and the bond was held a valid claim. On appeal, *held*, reversed. The bond should be set aside as a fraud on the rights of the widow. *Norris v. Barbour*, (Va. 1949) 51 S.E. (2d) 334.

Unlike inchoate dower, the statutory share extends only to property owned by the deceased at his death.<sup>2</sup> Such a restriction allows the decedent to decrease the surviving spouse's share by inter vivos transfers. The skillful use of property concepts in various transfers has compelled the courts to choose, as in the tax field,<sup>3</sup> between following the language and effectuating the policy of the statute. A gift with mere retention of a life estate will bar the statutory claim, and the addition of a right to revoke has been permitted in many cases.<sup>4</sup> The addition of

<sup>1</sup> Va. Code, (1942) §5276. The surviving spouse may elect to take one-half of the surplus personal estate after payment of debts.

<sup>2</sup> 3 VERNIER, AMERICAN FAMILY LAWS, §189 (1931).

<sup>3</sup> Cf. *Helvering v. Hallock*, 309 U.S. 106, 60 S.Ct. 444 (1940). The tax cases must be read in light of an entirely different legislative background, however. See note 12, *infra*.

<sup>4</sup> *Wahl v. Wahl*, (Mo. 1947) 206 S.W. (2d) 334; *Krause v. Krause*, 285 N.Y. 27, 32 N.E. (2d) 779 (1941) (retention of life estate); *Beirne v. Continental-Equitable Title & T. Co.*, 307 Pa. 570, 161 A. 721 (1932); *Kerwin v. Donaghy*, 317 Mass. 559, 59 N.E. (2d) 299 (1945) (retention of life estate and right to revoke); 1 TRUSTS RESTATEMENT, §57(1), comment c (1935). For collection of cases, see 64 A.L.R. 466 (1939); 112 A.L.R. 649 (1938); 157 A.L.R. 1184 (1945).

broad powers of control over the property, however, has generally been said to make the transfer "illusory" and the property subject to the statutory claim.<sup>5</sup> Mere intent to deprive the widow of property the husband possessed in his lifetime is not fraud because the widow has no right in this property. But where the transfer is intended to convey no present interest, or where it has no substantial effect on the husband's rights, the property is subject to the statutory claim as if there had been no inter vivos transfer.<sup>6</sup> Purporting to follow this analysis, the court in the principal case decides that although the claim of the trustee was based on a contract under seal, valid between the parties in the absence of fraud, equity may look behind the seal in case of fraud on the widow's rights and find the claim invalid for want of consideration. However, the sealed promise is irrevocable and binding on the settlor. That it is payable after death does not make the contract testamentary, and it is clear that a binding promise may be held in trust by a third person for named beneficiaries.<sup>7</sup> Invalidity of the contract claim is proved by assuming fraud, the ultimate issue in the case.<sup>8</sup> Since an inter vivos gift is valid, it would seem that fraud should be determined, not by the lack of consideration, but rather by the degree to which the transfer affected the substantial rights of the settlor. Here, it would appear that he irrevocably diminished by \$20,000 the amount of his estate he could bequeath to others. It cannot be said of the settlor in the principal case that he has reserved "substantially the same rights to enjoy and control the disposition of the property as he had previously possessed."<sup>9</sup> Of course, a secret understanding that the trustee would not enforce the trust against the will of the settlor, together with a failure to disclose the trust to the beneficiaries, would have been a sham and unenforceable against the widow's right, but such facts are not suggested here. This transfer seems even more substantial than the revocable trusts and the joint savings ac-

<sup>5</sup> *Newman v. Dore*, 275 N.Y. 371, 9 N.E. (2d) 966 (1937); *Bolles v. Toledo Trust Co.*, 144 Ohio St. 195, 58 N.E. (2d) 381 (1944). But cf. *Inda v. Inda*, 288 N.Y. 315, 43 N.E. (2d) 59 (1942) (joint bank account); *Rose v. Rose*, 300 Mich. 73, 1 N.W. (2d) 458 (1942) (antenuptial trust reserving income, right to revoke, and broad control). See 44 MICH. L. REV. 151 (1945).

<sup>6</sup> See Cahn, "Restraints on Disinheritance," 85 UNIV. PA. L. REV. 139 at 151, (1936); *Newman v. Dore*, 275 N.Y. 371 at 376-381, 9 N.E. (2d) 966 (1937); 44 MICH. L. REV. 151 (1945). To the effect that an intent to diminish the widow's share makes the gift bad, see *Ibey v. Ibey*, 94 N.H. 425, 55 A. (2d) 872 (1947); *Payne v. Tatem*, 236 Ky. 306, 33 S.W. (2d) 2 (1930).

<sup>7</sup> *Fletcher v. Fletcher*, 4 Hare 67, 67 Eng. Rep. 564 (1844); *Krell v. Codman*, 154 Mass. 454, 28 N.E. 578 (1891); 1 SCOTT, TRUSTS, §17.3 (1939); 1 TRUSTS RESTATEMENT, §§17(e), 26 (1935). Only one similar case has been found in which the widow's right has been involved, and the holding appears in conflict with the principal case. In *re Davies Estate*, 102 Pa. Super. Ct. 326, 156 A. 555 (1931). The court said, at 330: "The father could make a gift of the note [under seal] to the daughter, and if he gave it to her and delivered possession, title vested in her . . ." The decision is clear only when read in the light of *Potter T. & T. Co. v. Braum*, 294 Pa. 482 at 487, 144 A. 401 (1928).

<sup>8</sup> Compare Cardozo, J., in *Newman v. Dore*, 275 N.Y. 371 at 377, 9 N.E. (2d) 966 (1937): ". . . to say that an act, lawful under common law rules and not prohibited by any express or implied statutory provision, is in itself a 'fraud' on the law or an 'evasion' of the law, involves a contradiction in terms." For actual fraud on the marital right see *Lestrangle v. Lestrangle*, 242 App. Div. 74, 273 N.Y.S. 21 (1934).

<sup>9</sup> *Newman v. Dore*, 275 N.Y. 371 at 378, 9 N.E. (2d) 966 (1937).

count agreements that have been held sufficient against the widow's claim.<sup>10</sup> Nevertheless, the attitude of the court is understandable. The fact that the bond in the principal case equalled the decedent's entire personal estate, distinguishes it from most of the cases where inter vivos transfers have been upheld against attack by the widow. The device of a sealed promise in trust, if approved, would be an especially convenient method of diminishing the widow's share. The problem of delivery of the property would be obviated, unexpected appreciation of assets would not go to the trust, and secret agreements not to enforce the trust would be difficult to prove. However, the legislature has not seen fit to give the wife a right in personalty during her husband's life, and criticism of this decision would depend largely on one's opinion of the propriety of judicial legislation in this field.<sup>11</sup>

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<sup>10</sup> *Inda v. Inda*, 288 N.Y. 315, 43 N.E. (2d) 59 (1942); 52 *YALE L. J.* 656 (1943); *Malone v. Walsh*, 315 Mass. 484, 53 N.E. (2d) 126 (1944).

<sup>11</sup> Legislatures have been unwilling to change the judicial interpretations in this field, although several recommendations have been made. See *SIMES & BASYE, PROBLEMS IN PROBATE LAW: MODEL PROBATE CODE*, §33 (1946). Comm. Rep. on Revision of N.C. Laws Relating to Estates 34-37 (1936); 7 N.C. State Bar Proc. 9 at 11 (1940). Cahn, "Restraints on Disinheritance," 85 *UNIV. PA. L. REV.* 139 at 153 (1936). Cf. *Tenn. Code* (Michie, 1938) §8365, which provides that gifts fraudulently made "with an intent to defeat the widow" shall be voidable; and Fla. Laws (1933) c. 16103, §35, amended by Fla. Laws (1935) c. 17171; *Williams v. Collier*, 120 Fla. 248, 158 S. 815 (1935).