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Husband and Wife--Decedent's Estate Law § 18--Totten Trusts (Krause v. Krause, 285 N.Y. 27 (1941))

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stroying the purpose for which the covenant was created,[13] courts of equity will not enforce such covenants.[14]

S. L.

HUSBAND AND WIFE—DECEDENT'S ESTATE LAW § 18—TOTTEN TRUSTS.—Gustav Krause and Mary Krause, plaintiff, were married in 1932. At that time the former had three children from an earlier marriage. In 1935 he opened in the Buffalo Savings Bank an account in his name "as trustee for Anna Severin", one of these three children. No withdrawal was ever made from this account, and on his death there was $3,552.77 therein. On July 19, 1938, he executed two warranty deeds to his two sons, which conveyed to each grantee a parcel of real property subject to a life tenancy in the grantor. There was no consideration paid for these deeds, and they were recorded on the same day. Gustav Krause having died on October 17, 1938, the wife brings this action under Section 18 of the Decedent's Estate Law for her share in his property. Plaintiff claims that these transactions are illusory and fraudulent and executed for the sole purpose of depriving her of her inheritance. Therefore, she asks the court to declare that this property was a part of the estate of Gustav Krause at the time of his death. The trial court has held for the plaintiff, that both transactions were illusory. The Appellate Division held the real property transfers were valid and reversed a finding of the trial court that the bank account transfer was illusory. On appeal, *held,* Appellate Division decision modified. The real property transfers were valid, but the transfer of the bank account illusory. The real property transfers were real in that the grantor divested himself of a major legal estate in real property evidenced by recorded warranty deeds which contained no power of revocation. The fact that no consideration was shown is immaterial. As to the savings bank account transfer, since the sole evidence of the intent of the testator was the form of the deposit, the inference must be drawn that he intended to reserve power during his lifetime to deal with the deposit in any way he should choose, and there is no foundation for a finding that testator had made a gift *inter vivos* to his daughter of the sums deposited in his name as trustee. *Krause* v. *Krause,* 285 N. Y. 27, 32 N. E. (2d) 779 (1941).

The instant case once again brings up the question concerning

College v. Thacher, 87 N. Y. 311 (1882); Amerman v. Deane, 132 N. Y. 355, 30 N. E. 741 (1892).

[13] Jackson v. Stevenson, 156 Mass. 496, 31 N. E. 691 (1892); Columbia College v. Thacher, 87 N. Y. 311 (1882); Roth v. Jung, 79 App. Div. 1, 79 N. Y. Supp. 822 (2d Dep't 1903).

[14] Knowlton Bros. v. N. Y. Air Brake Co., 169 App. Div. 324, 154 N. Y. Supp. 675 (4th Dep't 1915).

the interest of a wife in the property of her husband upon his death. Wives married before September 1, 1930 had, in New York, a right of dower.[1] In 1930 dower was abolished.[2] Since September 1, 1930, in lieu of dower a wife has a right of election to take the equivalent of her intestate share against or in the absence of adequate testamentary provision.[3] The intestate share is determined by the amount of property the husband possessed on his death. Some husbands, therefore, wishing to cut off their wives' inheritance, would transfer their property before their death and at the same time reserve to themselves the full enjoyment and control during life. Some cases set aside these transfers on the ground of intent to defraud the wife,[4] or intent to deprive the wife of property which under the law would otherwise pass to her.[5] But, the case of *Newman* v. *Dore* [6] set up a new test for the validity of these transfers, *i.e.*, whether the transfers were real or merely illusory.[7] Did the husband divest himself of ownership of his property, or has he made an illusory transfer? In the instant case, applying the test laid down in *Newman* v. *Dore*, the real property transfers were not illusory since the husband put this property entirely out of his control. The fact that no consideration was paid for the deeds is of no moment. No consideration is necessary for a valid transfer by delivery of a deed.[8] Nor has the wife any standing to attack the deeds as having been given in fraud upon her.[9]

As to the savings bank account, that was a "Totten Trust".[10]

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[1] The right of dower gave to a wife upon her husband's death a life estate in one-third of the real property of which he was seized during the marriage.

[2] N. Y. REAL PROP. LAW 190 (L. 1929, c. 229, § 12).

[3] N. Y. DECEDENT'S ESTATE LAW § 18. *In re* Blumensteil's Will, 248 App. Div. 533, 290 N. Y. Supp. 935 (4th Dep't 1939); *In re* Bomer's Estate, 156 Misc. 511, 288 N. Y. Supp. 419 (1939).

[4] Rubin v. Myrub Realty Co., 244 App. Div. 541, 290 N. Y. Supp. 935 (1st Dep't 1935); Bodner v. Feit, 247 App. Div. 119, 286 N. Y. Supp. 814 (1st Dep't 1936).

[5] Payne v. Tatem, 236 Ky. 306, 33 S. W. (2d) 2 (1930); Dyer v. Smith, 62 Mo. App. 606; Evans v. Evans, 78 N. H. 352, 100 Atl. 671 (1917); Thayer v. Thayer, 14 Vt. 107 (1842).

[6] 275 N. Y. 371, 9 N. E. (2d) 966 (1937); (1937) 37 COL. L. REV. 1219; (1938) 23 CORNELL L. Q. 457; (1937) 15 N. Y. U. L. Q. REV. 108.

[7] An illusory transfer would be one in which the testator had conveyed away his property in form, but, in substance, had effectively retained control of his property. Newman v. Dore, 275 N. Y. 371, 9 N. E. (2d) 966 (1937).

[8] WALSH, REAL PROPERTY (2d ed. 1927) 738.

[9] "There can be no fraud when no right of any person is invaded * * * The good faith required of a 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 the property. It is, therefore, apparent that the fraudulent interest which will defeat the gift *inter vivos* cannot be predicated of the husband's intent to deprive the wife of her distributive share." Newman v. Dore, 275 N. Y. 371, 9 N. E. (2d) 966 (1937).

[10] "A deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the settlor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary. In

The depositor intended to create a trust, but intended to reserve power during his lifetime to deal with the deposit in any way he might choose.[11] Thus the husband could have withdrawn this account or revoked it.[12] This "Totten Trust" is substantially the same as the trust in *Newman* v. *Dore*.[13] Hence, the surviving widow should be able to consider the amount of the bank account as part of her husband's estate when she elects under Section 18 of the Decedent's Estate Law. The court so held in deciding this tentative trust was illusory. However, it would seem, from *Murray* v. *Brooklyn Savings Bank*,[14] that a husband may still disinherit his wife by creating "Totten Trusts" and failing to make a will, because the statute [15] expressly provides for a right of election when the testator dies and "leaves a will". That problem was not presented in the instant case because the deceased husband had left a will.

However, in *Schnakenberg* v. *Schnakenberg*,[16] the Appellate Division of the Second Department said:

> We are constrained to disagree with the holding in Murray v. Brooklyn Savings Bank (258 App. Div. 132) to the effect that, in order to invoke the Decedent Estate Law (sec. 18), a surviving widow must show that husband left a will against which she could elect to take under the statute. A widow may have no right to elect pursuant to the Decedent Estate Law (sec. 18) and yet may rely upon it in support of her action to set aside a revocable trust as illusory where the very purpose of the decedent in so conveying was to avoid its application.

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case the depositor dies before the beneficiary without revocation or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor." Matter of Totten, 179 N. Y. 112, 71 N. E. 748 (1904).

[11] SCOTT, THE LAW OF TRUSTS (1st ed. 1939) 358; Matter of Totten, 179 N. Y. 112, 71 N. E. 748 (1904).

[12] RESTATEMENT, TRUSTS (1935) § 58, comment *b*.

[13] See note 6, *supra*. The trust agreements in *Newman* v. *Dore* provided: (1) That the settlor reserved the enjoyment of the entire income as long as he should live; (2) that he reserved the right to revoke the trust at his will; (3) that the general powers of the trustees were "subject to the settlor's control during his life" and could be exercised "in such a manner only as the settlor shall from time to time direct in writing". In a "Totten Trust" the beneficiary named in the bank account occupies the same position as the beneficiary of the express trust agreement. Under a "Totten Trust" (1) the depositor retains full enjoyment of the entire income so long as he lives; (2) he may revoke the deposit either by notifying the depository or by withdrawing all the funds, and (3) he can control his own actions as trustee in exercising his rights as depositor. Murray v. Brooklyn Savings Bank, 169 Misc. 1014, 1021, 9 N. Y. S. (2d) 227 (1939). In a "Totten Trust" the settlor is the depositor and the depositor is also the trustee. Schluter v. Bowery Savings Bank, 117 N. Y. 125, 128, 129, 22 N. E. 572 (1889); Davlin v. Title Guarantee & Trust Co., 229 App. Div. 269, 270, 241 N. Y. Supp. 712 (1st Dep't 1930), *aff'd*, 255 N. Y. 559, 175 N. E. 312 (1930).

[14] 258 App. Div. 132, 15 N. Y. S. (2d) 915 (1st Dep't 1939).

[15] N. Y. DECEDENT'S ESTATE LAW § 18.

[16] 262 App. Div. 234, 28 N. Y. S. (2d) 841 (2d Dep't 1941).

When this question finally arises before the Court of Appeals, it is submitted that the court should follow the ruling and theory of the *Schnakenberg* case.

J. E. M.

LABOR DISPUTE—CIVIL PRACTICE ACT § 876A—INJUNCTION.—The plaintiff, a travelling opera company, uses recorded music to accompany its artists and is seeking to enjoin the defendants from interfering with the business. The defendant union, known as the Musicians' Union, in an attempt to have the recorded music replaced by musicians, has induced the Stagehands' Union to call a strike of its members who are employed by the plaintiff. Since the strike was called the plaintiff's business has not been functioning. The plaintiff contends that the agreement between the two unions is an unlawful interference and that if it is forced to employ musicians it will be compelled to close. There is no other grievance existing between the parties. The defendant contends that the strike arose out of a "labor dispute" and that the immunity granted under § 876-a of the Civil Practice Act[1] prevents the court from issuing the injunction. The trial court issued the injunction on the ground that there was no "labor dispute" as defined by the section in question. This was reversed by the Appellate Division. *Held,* Appellate Division reversed and trial court affirmed. The strike did not have a lawful labor objective and the parties in the case are not involved in a "labor dispute"[2] so as to restrict the court from issuing the injunction. *Opera on Tour* v. *Joseph N. Weber, et al.,* 285 N. Y. 348, 34 N. E. (2d) 349 (1941).

The courts do not deny that employees and their representatives have the right to strike,[3] but like every concerted action this right is subject to control and must be to effect some lawful purpose by lawful means * * *.[4] The mere use of a legal method such as a

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[1] N. Y. CIV. PRAC. ACT § 876-a(2). "No court nor any judge or judges thereof shall have jurisdiction to issue any restraining order or a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined," except in accordance with the eleven categories listed in the Act.

[2] N. Y. CIV. PRAC. ACT § 876-a(10-a). "When used in this section, and for purposes of this section: (a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation or who are employees of one employer; or who are members of the same or affiliated organization of employees or employers; whether such dispute is between one or more employers or associations of employers and one or more employees or associations of employees; * * *."

[3] May's Furs and Ready to Wear v. Bauer, 282 N. Y. 331, 26 N. E. (2d) 280 (1940).

[4] Exchange Bakery v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927).