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Gifts Causa Mortis--Testamentary Disposition as Affecting Widows' Statutory Rights (Railey v. Railey, 30 F. Supp. 121 (D.D.C. 1939))

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confronted with the evidence, was not deemed a sufficient satisfaction of the authorization clause of the section.

Meaning has been given to what Congress has written so as to accomplish the policy that Congress formulated.[14] It appears that enforcement of the criminal law and the protection of rights of privacy granted by the Constitution have been harmoniously fused.

A. B.

GIFTS CAUSA MORTIS—TESTAMENTARY DISPOSITION AS AFFECTING WIDOWS' STATUTORY RIGHTS.—Administrator of deceased seeks to have a trust declared with respect to a sum given by decedent to the defendant, his brother, shortly before the decedent's death, contending said transaction to be a gift *causa mortis* [1] and as such is testamentary in character and must be subject to rights which the law grants to widows.[2] The evidence established that deceased having become so ill that "death could be expected at any time" gave said gift, the sum of two thousand dollars, to defendant "so that he could have it in case anything happened". Defendant maintains that said

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[14] "Congress may have thought it less important that some offenders go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty." Nardone v. United States, 302 U. S. 379, 383, 58 Sup. Ct. 275, 277 (1937).

[1] *Donatio mortis causa* is defined as: "A gift made by a person in sickness, who apprehending his dissolution near, delivers, or causes to be delivered, to another the possession of any personal goods, to keep as his own in case of donor's decease. 2 BL. COMM. 514. The civil law defines it to be a gift under apprehension of death; as when anything is given upon condition that, if the donor dies, the donee shall possess it absolutely, or return it if the donee should survive or should repent having made the gift, or if the donee should die before the donor." BLACK'S LAW DICTIONARY (3d ed. 1933) 612. In Gymes v. Hone, 49 N. Y. 17, 20 (1892), the court in defining gifts *causa mortis* said: "Three things are necessary. 1. It must be made with a view to donor's death. 2. The donor must die of that ailment or peril. 3. There must be a delivery." Where donor feared death from an operation but died from a heart attack the court held that a valid gift causa mortis was created despite the fact that donor died from a different ailment or peril. Redden v. Thrall, 125 N. Y. 572, 26 N. E. 627 (1890).

A gift *causa mortis* where donor took his own life was held invalid as against public policy. Bainbridge v. Hoes, 163 App. Div. 870, 149 N. Y. Supp. 20 (2d Dept. 1914).

[2] It is fundamental that the law always seeks to provide for a widow from the estate of her deceased husband. Today this tendency is strongly evidenced by the New York statutes in relation thereto. See N. Y. DECEDENT ESTATE LAW §§ 18, 83. N. Y. DECEDENT ESTATE LAW § 18 amounts in effect to a statutory limitation on the power of an owner to direct the mode of distribution of his net estate subsequent to his death, and renders invalid as to a surviving spouse, at his or her election, a will, which is executed after the effective date of this section, and which fails to make the specified minimum provision for his or her benefit. *In re* Lavine's Will, 167 Misc. 879, 4 N. Y. S. (2d) 923 (1938).

transaction was an executed gift *inter vivos* [3] unaffected by the statutory rights of the widow. *Held,* complaint dismissed. Though a widow's claim is valid as against a gift *causa mortis,*[4] (which is in certain respects substantially similar to a testamentary gift), this is so, only, where estate is insufficient to meet widow's claim; where there is sufficient funds to uphold gift and satisfy wife's claim no cause of action is stated. *Railey* v. *Railey,* 30 F. Supp. 121 (D. C. D. of C. 1939).

In New York, an owner of property can alienate his property as he pleases unless it amounts to a fraud upon creditors.[5] Where the question of a transfer in fraud of a widow's statutory rights are involved "the test is essentially whether the husband has in good faith divested himself of ownership" [6] and "the good faith required of the donor in making a valid disposition of his property during his life does not refer to the purpose to affect his wife but to the intent to divest himself of ownership of the property." [7] Hence in dealing with a trust created in an alleged attempt to evade a wife's statutory privileges, the court in *Newman* v. *Dore* [8] concluded that the trust agreement executed by a husband, three days before his death, reserving the right to income during his life, the right to revoke at will and the retention of entire control over the trustees was sufficient to show a transfer in bad faith on the theory that the husband never divested himself of ownership and the transfer was merely illusory.

In problems concerning gifts *causa mortis* is the question of good faith to be considered or are they *per se* to be treated as testamentary dispositions? In *Baker* v. *Smith,*[9] the New Hampshire court, in accepting the majority view, after stating that a married woman could not deprive her husband of his statutory rights by will, said, "and what she cannot do in this respect by will she cannot do by another form of testamentary disposition through *donatie causa mortis,* which is of the nature of a legacy, and becomes a valid gift only upon the

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[3] A gift *inter vivos* is defined as: "Between the living, from one living person to another. Where property passes by conveyance the transaction is said to be inter vivos, to distinguish it from a case of succession or devise. So an ordinary gift from one person to another is called a 'gift inter vivos', to distinguish it from a donation made in contemplation of death (mortis causa)." BLACK'S LAW DICTIONARY (3d ed. 1933) 994.

[4] Facts establishing that decedent lived frugally and that his gifts up until his last illness to his brother were very modest ones, it is clear that the gift complained of was intended by decedent that it should be irrevocable only in case of his death. Instant case at 123.

[5] *In re* Clark's Estate, 149 Misc. 374, 268 N. Y. Supp. 253 (1933). In Redden v. Thrall, 125 N. Y. 572, 579, 26 N. E. 627, 629 (1891), the court said: "Gifts 'causa mortis' as well as gifts *inter vivos* are based upon the fundamental right everyone has of disposing of his property as he wills."

[6] Newman v. Dore, 275 N. Y. 371, 379, 9 N. E. (2d) 966, 969 (1937).

[7] *Ibid.*

[8] 275 N. Y. 371, 9 N. E. (2d) 966 (1937).

[9] 66 N. H. 422, 23 Atl. 82 (1891).

decease of the donor." [10] Thus the weight of authority [11] seems to follow the instant case in treating a gift *causa mortis* as a testamentary disposition and, consequently, subject to the statutory rights of a widow. New York, by way of a surrogate's decision,[12] has fallen out of line with said view when the court said, "The courts in the past have confirmed the right of a spouse to transfer property, free from the claim of a husband or wife, in many ways, among others by gift *inter vivos,* or gift *causa mortis* * * * and the rights of a surviving spouse are not increased * * * to include a right to an interest in property transfered other than by will, it follows that any such transfer, either effective in life, or at the instant of death, other than by will can still be made, free from any right of a surviving spouse to any interest transferred." [13]

The power of revocation only, being reserved in a gift *causa mortis,* it is believed that the test of good faith as laid down by the court in *Newman* v. *Dore* [14] is not violated and that such gifts should be considered as a mode of alienation *inter vivos* and not as a testamentary disposition. The legislature has been quick to regulate the formalities requisite to any form of testamentary disposition and the fact that a gift *causa mortis* can be created without the slightest formality is strong evidence that the legislature never intended that they be treated as such.

B. L.

INCOME TAX—DEDUCTIBILITY OF LOSS TO SOLE STOCKHOLDER ON TRANSFER TO CONTROLLED CORPORATION.—On December 29, 1932, the plaintiff, sole shareholder, who dominated and controlled the Innisfail Corporation through his subordinates, the directors and officers, sold certain securities at market value to the corporation causing himself to suffer a loss with the intent of deducting this loss in the computation of his taxable net income for that year. The plaintiff, thereafter, carried out his plan. On March 11, 1935, the

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[10] *Ibid.*

[11] See Note (1929) 64 A. L. R. 485.

[12] *In re* Clark's Estate, 149 Misc. 374, 268 N. Y. Supp. 253 (1933). See *In re* Schurer's Estate, 157 Misc. 573, 284 N. Y. Supp. 28 (1935), *aff'd,* 248 App. Div. 697, 289 N. Y. Supp. 818 (1st Dept. 1936).

[13] *In re* Clark's Estate, 149 Misc. 374, 376, 268 N. Y. Supp. 253, 255 (1933).

[14] 275 N. Y. 371, 9 N. E. (2d) 966 (1937); Krause v. Krause, 171 Misc. 355, 358, 13 N. Y. S. (2d) 812, 813 (1939) ("Since § 18 of the Decedent Estate Law went into effect (1930) and since the decision in Newman v. Dore (1937) I believe it to be now the general rule in New York State that a husband in his lifetime may lawfully dispose of his property, real or personal, by sale, transfer, trust agreement or gift—with or without an intent to deprive his wife of property rights after his death—if the husband's interest in the property which is transferred be transferred, *inter vivos, eo instanti* and fully").