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Article 18

Husband and Wife--Trusts--Dower--Decedent Estate Law Section 18 Construed (Newman v. Dore, 275 N.Y. 371 (1937))

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as wire-tapping has long been regarded as a reprehensible practice,[17] the principle, in this case, seems to have been justly applied.[18]

A. W.

HUSBAND AND WIFE—TRUSTS—DOWER—DECEDENT ESTATE LAW SECTION 18 CONSTRUED.—Ferdinand Straus, three days prior to his death on July 1, 1934, after making his last will, executed a trust agreement wherein he transferred to trustees *all* his real and personal property, reserving the income for life, right to revoke the trust at will, and full control of the trustees. Upon his death, the property was to pass to one other than his wife.[1] The widow has challenged the validity of the transfer to the trustees. *Held,* the husband's conveyance to the trustees, reserving the income, power of revocation and right to control the trustees was illusory and void as to the rights of the surviving spouse under the Decedent Estate Law Sections 18 and 83.[2] *Newman* v. *Dore,* 275 N. Y. 371, 9 N. E. (2d) 966 (1937).

Prior to September 1, 1930, a wife was endowed of a life estate in one-third of the real property of which her deceased husband was beneficially seized during coverture.[3] While the husband was still alive, dower was an inchoate right, a mere contingent claim and not an estate in land,[4] yet, it was a subsisting interest which was fully

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[17] See N. Y. Times, Edit., Sept. 4, 1931, p. 18, col. 3; *id.* Dec. 3, 1932, p. 36, col. 6; *id.* Edit., Jan. 30, 1933, p. 2, col. 4.

[18] As to effect upon intrastate communications, see Edit., N. Y. L. J., Dec. 29, 1937.

[1] The deceased could not have effectively cut off his wife by a testamentary disposition, nor by dying intestate seized of the property in question. If the agreement effectively divested the settlor of title, then the decedent left no estate and the widow receives nothing.

[2] N. Y. DEC. EST. LAW § 18. "Where a testator dies after August 31, 1930, and leaves a will thereafter executed and leaves surviving a husband or wife, a personal right of election is given to the surviving spouse to take his or her share of the estate as in intestacy, subject to the limitations, conditions and exceptions contained in this section. * * *." See also DECEDENT ESTATE LAW §§ 82, 83.

[3] N. Y. REAL PROP. LAW § 190. "When the parties intermarried prior to the first day of September, 1930, a widow shall be endowed of the third part of all lands whereof her husband was prior to the first day of September, 1930, seized of an estate of inheritance, at any time during the marriage. Except as hereinbefore provided, after the 31st day of August, 1930, no inchoate right of dower shall be possessed by a wife during coverture, and no widow shall be endowed in any lands whereof her husband became seized of an estate of inheritance."

[4] Witthaus v. Schack, 105 N. Y. 332, 11 N. E. 649 (1887); Moore v. City of N. Y., 8 N. Y. 110 (1853).

protected,[5] and any attempt to deprive a married woman of her dower through fraudulent means would fail.[6] In a conveyance of realty by a husband, joinder by his wife in the deed was necessary in order to effect a release of her inchoate right of dower in the property conveyed.[7] The need for such joinder made land transactions wherein the husband was the expectant grantor, burdensome in that an additional party had to be consulted; and perilous in that the covert possibility existed that a widow might claim dower in lands otherwise believed free from any entanglements.[8]

The legislature in 1929, motivated partly by the desire to facilitate the alienation of realty, enacted statutes wherein dower was, to an extent, abolished [9] and in lieu thereof, Section 18 of the Decedent Estate Law and other statutes relating to a decedent's estate were passed, effective on September 1, 1930.[10] Will the courts extend the same measure of protection to this new statutory expectancy as was formerly granted to inchoate dower? In attempting to answer this question we must bear in mind the reasons why dower was abolished and what motivated the legislature in adding these new sections to the Decedent Estate Law. Various factors must be considered if we are to arrive at an intelligent conclusion, as for example, free alienation of property, the abolition of the distinction formerly existing between real and personal property, the equal status attained by a husband and wife today, and the fact that the Decedent Estate Law applies only to property of which a spouse dies seized. While a husband is still alive, the wife has no interest in his property. The difficulty arises when we lose sight of these facts. Has a right similar to dower been granted to a wife under the Decedent Estate Law or is this new expectancy subject to different considerations than those which applied to dower?

By statute,[11] it was intended to give to a surviving spouse an increased share *of the estate the spouse died seized of,*[12] either in case of intestacy or by an election against the terms of a will left by the

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[5] *In re* Cropsey Ave., 268 N. Y. 183, 197 N. E. 189 (1935); Matter of Brooklyn Bridge, 143 N. Y. 640, 39 N. E. 823 (1893).

[6] Byrnes v. Owen, 243 N. Y. 211, 153 N. E. 51 (1926); Clifford v. Kampfe, 147 N. Y. 383, 42 N. E. 1 (1895); Simar v. Canaday, 53 N. Y. 298 (1873); Young v. Carter, 10 Hun 194 (N. Y. 1877).

[7] Whitthaus v. Schack, 105 N. Y. 332, 11 N. E. 649 (1887); Hinchliffe v. Shea, 103 N. Y. 153, 8 N. E. 477 (1886); Elmendorf v. Lockwood, 57 N. Y. 322 (1874).

[8] WALSH, REAL PROPERTY (2d ed. 1934) 185; Clifford v. Kampfe, 147 N. Y. 383, 42 N. E. 1 (1895); McIntyre v. Costello, 47 Hun 289 (N. Y. 1888).

[9] See note 2, *supra.*

[10] N. Y. DEC. EST. LAW §§ 18, 83.

[11] *Ibid.*

[12] N. Y. DEC. EST. LAW § 18; *In re* Blumenstiel's Will, 248 App. Div. 533, 290 N. Y. Supp. 935 (4th Dept. 1936); Bodner v. Feit, 247 App. Div. 119, 286 N. Y. Supp. 814 (1st Dept. 1936); *In re* Collins' Estate, 156 Misc. 783, 282 N. Y. Supp. 728 (1935); *In re* Harris' Estate, 150 Misc. 758, 271 N. Y. Supp. 464 (1934).

deceased spouse, subject to certain conditions, limitations and exceptions found in the statute. Thus, under the statute, the utmost freedom of control of property with the ability to transfer the same at will, has been achieved.[13] While in a few states with similar statutes, the disposition of property with the *intent* to prevent the rights of a surviving spouse from accruing will not be successful,[14] yet, the majority view gives no such weight to the intent, the transfer not depending upon the motive for its validity.[15] However, an illusory conveyance *will not* defeat the expectant interest of the wife under the statute. One may not in form convey while in substance retain control, enjoyment and other powers closely associated with ownership.[16] Though a person may use means lawfully available to keep outside the scope of a statute, a false appearance of legality, however attained, will not avail him.[17] The test to be applied is not the intent but the question of whether the disposition was real or illusory.[18]

Herein the court has properly found that the alleged conveyance

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[13] Herrmann v. Jorgenson, 263 N. Y. 348, 189 N. E. 449 (1934); *In re* Schurer's Estate, 157 Misc. 573, 284 N. Y. Supp. 28 (1935); Pringle v. Pringle, 59 Pa. 281 (1868).

[14] Payne v. Tatem, 236 Ky. 306, 33 S. W. (2d) 2 (1930); Patch v. Squires, 105 Vt. 405, 165 Atl. 919 (1933); Dunnett v. Shields, 97 Vt. 419, 123 Atl. 626 (1934).

[15] 64 A. L. R. 487 (1930) (Gifts inter-vivos, husband and wife); 1 SIMES, FUTURE INTERESTS (1936) 238-239; instant case; Samson v. Samson, 67 Iowa 253, 25 N. W. 233 (1885); Sturgis v. Citizens Nat. Bank, 152 Md. 654, 137 Atl. 378 (1927); Leonard v. Leonard, 181 Mass. 458, 63 N. E. 1068 (1902).

[16] Bodner v. Feit, 247 App. Div. 119, 287 N. Y. Supp. 814 (1st Dept. 1936); Rubin v. Myrub Realty Co., 244 App. Div. 541, 279 N. Y. Supp. 867 (1st Dept. 1935); Brownell v. Briggs, 173 Mass. 529, 54 N. E. 251 (1899).

[17] Jenkins v. Moyse 254 N. Y. 319, 172 N. E. 521 (1930).

[18] Instant case; Holmes v. Holmes, 3 Paige 363 (N. Y. 1832); Leonard v. Leonard, 181 Mass. 458, 63 N. E. 1068 (1902). It must be noted that all the cases to date, on this issue, have been those in which some measure of control of the property has been retained by the grantor. A case wherein an actual disposition has been effected, no benefits retained, with the intent to leave no property upon death, so that the widow would not have the benefit of the Decedent Estate Law, has not as yet been submitted to judicial interpretation. Fortunately, the court in the instant case has laid down the test by which the validity of a conveyance by a married person may be established. It has done much to weaken, if not to vitiate, the effect of the dicta in the case of Bodner v. Feit, wherein the court placed the grantor's hidden motive in making the conveyance, upon a high and governing plane. Undoubtedly, if the test laid down in the instant case is applied to future cases in point, the intent of the person conveying will be held to be immaterial, where an actual disposition of the property, with no strings attached, has been made. Thus, free alienation of property, real and personal, will have been attained, as was intended by the legislature. As so ably stated by Judge Henderson in the Matter of Schurer, "A presumption might arise that a man does not intend to leave his wife a public charge. Such a presumption, though beneficial to a surviving spouse, would be so prejudicial to the doctrine of free alienation of property that the courts might hesitate to correct legislative mistakes by judicial interpretation. The solution of the problem lies with the legislature."

to the trustees was illusory and thus ineffective to prevent the rights from accruing under the recently enacted statute.[10]

L. I.

INJUNCTION—LABOR UNION—PICKETING—SECTION 876-a OF THE CIVIL PRACTICE ACT.—W. and I. Blumenthal employed non-union labor in manufacturing meat products which they sold to retailers under the name "Ukor". In an effort to induce the manufacturers to hire union workmen, the defendant Butcher Union Local 174 picketed the shops of those retailers, among them the plaintiff, who dealt in this non-union product. The pickets bore placards making public the nature of the dispute and requesting customers to buy union-made delicatessen only. The plaintiff was denied an injunction at Special Term on the ground that a situation governed by Section 876-a of the Civil Practice Act, which prohibits issuance of preliminary injunctions in labor disputes, was involved. The Appellate Division reversed both on the law and the facts. On appeal to the Court of Appeals, *held,* injunction denied.[1] Picketing may be carried on in a proper and peaceful manner, not only against the manufacturer but against a non-union product sold by one in unity of interest with the manufacturer who is in the same business for profit. *Goldfinger* v. *Feintuch,* 276 N. Y. 281, 11 N. E. (2d) 910 (1937).

Picketing is not violative of either the Federal[2] or the New York State[3] Constitutions. Although it is illegal to use violence and intimidation incidentally to picketing,[4] any injury resulting from peaceful picketing in conjunction with a labor dispute is *damnum absque injuria.*[5] The use of temporary injunctions against picketing had become such a formidable employers' weapon to combat unions that Section 876-a of the Civil Practice Act was enacted to eliminate

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[10] N. Y. DEC. EST. LAW § 18.

[1] The Court of Appeals and Special Term were in disagreement concerning the reliability of evidence offered by the plaintiff in proof of illegal coercive conduct by the defendant for which an injunction might be issued lawfully.

[2] No one "has a constitutional right to a remedy against the lawful acts of another." Senn v. Tile Layers' Protective Union, 301 U. S. 468, 57 Sup. Ct. 857 (1936); Levering and Garrigues Co. v. Morrin, 71 F. (2d) 284 (1934).

[3] J. H. & S. Thea., Inc. v. Fay, 260 N. Y. 315, 183 N. E. 509 (1932); Aberdeen Restaurant Corp. v. Gottfried, 158 Misc. 785, 285 N. Y. Supp. 832 (1935); (1937) 35 MICH. L. REV. 1320.

[4] Truax v. Corrigan, 257 U. S. 312, 42 Sup. Ct. 124 (1921); Stuhmer and Co. v. Korman, 265 N. Y. 481, 192 N. E. 281 (1934); Nann v. Raimist, 255 N. Y. 307, 174 N. E. 690 (1931); Auburn Draying Co. v. Wardell, 227 N Y. 1, 124 N. E. 87 (1919); Remington Rand, 248 App. Div. 356, 289 N. Y. Supp 1025 (4th Dept. 1932).

[5] Exchange Bakery and Restaurant, Inc. v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927).