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## Is Dower Abolished?

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any negligence case in which the facts are equally known or capable of being known by both parties.<sup>54</sup> Upon the defendant's satisfactory rebuttal, the burden of producing evidence to show how the accident occurred and that it proximately resulted from the defendant's negligence then shifts to the plaintiff and he must prove the defendant's negligence by a preponderance of the evidence<sup>55</sup> as in an ordinary negligence case.

It is thus seen that it is not the burden of *proof* that shifts but the burden of *explaining* how the accident occurred. This is the New York courts' procedural application of the doctrine of *res ipsa loquitur* and it seems to be the most logical method<sup>56</sup> of the three heretofore discussed. The courts of other jurisdictions which give *res ipsa loquitur* a different procedural effect appear to be confused by the mysterious and impressive-sounding Latin words. If such is the case, it is suggested that English words with a clearer meaning be substituted for "*res ipsa loquitur*".

M. RICHARD WYNNE.

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#### IS DOWER ABOLISHED?

The protective attitude of the courts toward dower probably needs no elaboration. Through the years dower has been viewed as a thing apart—something to be religiously protected. In recent times, however, the institution has tended to become a cumbersome affair. Changing times and attitudes demanded some relief from its burden. Finally, by an amendment to Section 190 of the Real Property Law, dower in real property acquired by a husband subsequent to August 31, 1930 was abolished.

However, the Legislature did not stop here. Other rights were created in lieu of dower by enactments in the New York Decedent Estate Law, Sections 18 and 83. Briefly, Section 18 provides that where a husband or wife dies after August, 1930 and leaves a will

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<sup>54</sup> BOHLEN, LAW OF TORTS (1926) 646: "If the defendant's witnesses are believed to have told the truth and his records are accepted as full and accurate, the facts are known and the plaintiff is in no worse position than if such facts had been proved by his own witnesses or books. What advantage he originally labored under has disappeared, and the presumption based on the desire to remove the advantage is satisfied."

<sup>55</sup> Griffen v. Manice, 166 N. Y. 188, 59 N. E. 925 (1901); Goldstein v. Pullman Co., 220 N. Y. 549, 116 N. E. 376 (1917); Plumb v. Richmond Light & Ry. Co., 233 N. Y. 285, 135 N. E. 504 (1922), where the court said, "If a satisfactory explanation is offered by the defendant, the plaintiff may rebut it by evidence of negligence or lose his case. On the *whole case* there must be a preponderance of evidence in favor of the plaintiff's contention." (Italics ours.)

<sup>56</sup> See note 54, *supra*.

thereafter<sup>1</sup> executed, the surviving spouse has a personal right of election to take his or her share of the estate as in intestacy. In Section 18, subdivision 7, we find that such an election is in lieu of dower,<sup>2</sup> and in Section 83, we find that the Legislature has specified just what this intestate share shall be. Generally, the intestate share of a surviving spouse may be said to be one-third of all the decedent's property at his death (personalty as well as realty) if there are children,<sup>3</sup> and one-half or all of the estate if there are no children, depending upon the existence of certain specified relatives.<sup>4</sup> Thus today, a surviving spouse is entitled to at least one-third of the property, outright, which the decedent owned at the time of his death.<sup>5</sup> It should be noted, however, that in exercising the right of election under Section 18, a surviving spouse is never entitled to take more than one-half of the net estate of the decedent.<sup>6</sup>

The courts were soon called upon to construe this new legislation. Thus, where a widow was entitled to dower<sup>7</sup> and her husband died intestate after September 1, 1930, it was held that she must elect between her right of dower and her intestate share, because the latter is specifically given only in lieu of dower.<sup>8</sup> It was also decided that a husband or wife could, during the lifetime of the other, waive the right of election, before or after marriage, by an instrument executed in accordance with Section 18, sub. 9 of the Decedent Estate Law;<sup>9</sup> that the burden of showing a right to elect rests on the surviving spouse asserting the right,<sup>10</sup> although, once the status of surviving spouse is established, the right to elect to take an intestate share against

<sup>1</sup> If the will is executed prior to August 31, 1930, the widow does not come within this section so as to have a right of election. *In re Carnevale's Will*, 158 Misc. 290, 285 N. Y. Supp. 591 (1936).

<sup>2</sup> See also NEW YORK DECEDENT ESTATE LAW § 82.

<sup>3</sup> NEW YORK DECEDENT ESTATE LAW § 83 (1).

<sup>4</sup> *Id.* § 83, (2), provides in general that where there are no children or descendants, but deceased leaves one or both parents, the surviving spouse gets \$5,000 plus half the estate. Subdivision 3 provides in general that where there are no descendants or parents of the deceased, if there is a brother or sister, a nephew or niece, the surviving spouse gets \$10,000 plus half the estate. Subdivision 4 provides in general that if the deceased leaves no descendant, parent, brother or sister, nephew or niece, the surviving spouse will be entitled to the whole estate.

<sup>5</sup> That the right of a surviving spouse to decedent's personalty is, however, subject to payments of debts and legacies ordinarily, see *id.* § 83.

<sup>6</sup> *Id.* § 18, (1), a.

<sup>7</sup> Because she had been married prior to September 1, 1930 and her husband had acquired the land prior to that date.

<sup>8</sup> *Matter of Hume*, 139 Misc. 327, 248 N. Y. Supp. 415 (1931); NEW YORK DECEDENT ESTATE LAW § 82.

<sup>9</sup> *Matter of Israel*, 149 Misc. 620, 267 N. Y. Supp. 67 (1933). The waiver by a surviving spouse of all rights which she might otherwise have to a distributive share of the decedent's personal property, "under any statutes now or hereafter in force," relinquishes her rights as in intestacy, under Decedent Estate Law § 83, (1). *Matter of Shapiro*, 154 Misc. 55, 273 N. Y. Supp. 560 (1935).

<sup>10</sup> *Matter of Sitkin*, 151 Misc. 448, 271 N. Y. Supp. 688 (1934).

the provisions of the husband's will, presumptively attaches;<sup>11</sup> that the purpose of Section 18 was to prevent disinheritance, and that this statute, when put in operation, is more in the nature of a modified statute of descent and distribution and must be read in accordance with the statute on descent and distribution.<sup>12</sup>

It soon became incumbent upon the courts to decide one of the main points of difference between dower and the newly acquired right to elect to take against a will, *i.e.*, whether today one spouse obtains a present interest in the property of the other, while both are still alive. On the one hand, it was held that since the new statutes are in derogation of the former unconditional rights of testamentary disposition which the decedent possessed, the steps required to defeat the common-law right thus modified, must be *strictly* observed.<sup>13</sup> On the other hand, it was held that since the statutes were remedial and designed to provide for the proper support of a wife after her husband's death, they should be *liberally* construed in favor of the surviving spouse.<sup>14</sup> Then again, on the one hand, it was held that the new statutes do not increase the rights of a surviving spouse to include any present interest in property transferred other than by will, and that therefore, a present transfer by one, during the lifetime of the other, may be made—free from the right of the spouse to any interest in the property transferred.<sup>15</sup> And on the other hand, it was held that the newly created rights in place of dower and curtesy are intended to enlarge rather than restrict the rights of a wife in her husband's property,<sup>16</sup> and that the wife has such a present interest that

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<sup>11</sup> *In re Green's Estate*, 155 Misc. 641, 280 N. Y. Supp. 692 (1935), *aff'd*, 246 App. Div. 583, 284 N. Y. Supp. 370 (1st Dept. 1935).

<sup>12</sup> *In re Collins' Estate*, 156 Misc. 738, 282 N. Y. Supp. 722 (1935).

<sup>13</sup> *Matter of Coffin*, 152 Misc. 619, 273 N. Y. Supp. 974 (1934).

<sup>14</sup> *Matter of Harris*, 150 Misc. 758, 271 N. Y. Supp. 464 (1934); *In re Collins' Estate*, 156 Misc. 738, 282 N. Y. Supp. 728 (1935).

<sup>15</sup> *Matter of Clark*, 149 Misc. 374, 268 N. Y. Supp. 253 (1933). See also *In re Schurer's Estate*, 157 Misc. 573, 284 N. Y. Supp. 28 (1935), where deceased had, during his lifetime, made an absolute gift of bonds to his sons and had also created a savings bank account in trust for them. It was held that neither the bonds nor the trust account could be considered part of the estate of the deceased for the purpose of calculating the widow's share. See also *Herrmann v. Jorgenson*, 263 N. Y. 348, 189 N. E. 449 (1934); *Matter of McCulloch*, 263 N. Y. 408, 189 N. E. 408 (1934) (to the effect that a husband or wife today has no immediate interest in the property of his or her spouse, during the lifetime of the latter, and is therefore not disqualified as an interested witness under § 347 of the Civil Practice Act).

<sup>16</sup> The notes of the commission which drafted these enactments contained language to the effect that the right of election given by Decedent Estate Law § 18 increased the rights of the surviving wife or husband in lieu of the existing rights of dower and curtesy. The courts had held that these notes of the commission, which were appended and which were before the legislature at the time of the enactment, should be considered in interpreting legislative intent in employment of language used. *In re McGarry's Estate*, 270 N. Y. 514, 200 N. E. 296 (1936). *Rubin v. Myrub Realty Co.*, 244 App. Div. 541, 279 N. Y. Supp. 867 (1st Dept. 1935) and *Bodner v. Feit*, 247 App. Div. 119, 286 N. Y. Supp. 814 (1st Dept. 1936) definitely take the stand that the rights created in

even a prospective husband may not, in his lifetime, in order to defeat the inchoate rights of his wife under the Decedent Estate Law, make such a transfer as will enable him to derive the benefits from the property during his lifetime, the entire interest passing to his children at his death.<sup>17</sup>

In *Bodner v. Feit*,<sup>18</sup> we find this situation arising. The parties were married subsequent to August, 1930. Thereafter the husband, solely for the purpose of defeating his wife's rights under the Decedent Estate Law, transferred his property to his children without consideration, in such manner as to enable him to retain control of the property during his lifetime. All this was done without the wife's knowledge or consent. It was held that the wife could maintain an action to set aside such transfer. The exact question presented had been without precedent in New York, for in former cases where the courts had sustained the right of a wife to set aside similar transfers, there had always been present either an antenuptial agreement or a representation of ownership upon which the intended wife was expected to rely, and it was a simple matter to spell out fraud.<sup>19</sup> In the instant case there was present neither antenuptial agreement nor representation, and other jurisdictions, under similar circumstances, have held that a husband may make such transfer as was attempted in *Bodner v. Feit*, although its purpose be to deprive a wife of her statutory rights in his estate.<sup>20</sup> We feel that the decision in *Bodner v. Feit* thus makes the validity of the transfer depend upon the motive which induced the disposition to be made, for there is little doubt but that

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place of dower and curtesy were intended to enlarge rather than restrict the rights of a wife in her husband's property.

<sup>17</sup> Such a transfer, in contemplation of, and just preceding marriage is considered fraudulent as to the wife. *Rubin v. Myrub Realty Co.*, 244 App. Div. 541, 279 N. Y. Supp. 867 (1st Dept. 1935).

<sup>18</sup> 247 App. Div. 119, 286 N. Y. Supp. 814 (1st Dept. 1936).

<sup>19</sup> *Le Strange v. Le Strange*, 242 App. Div. 74, 273 N. Y. Supp. 21 (2d Dept. 1934); *Rubin v. Myrub Realty Co.*, 244 App. Div. 541, 279 N. Y. Supp. 867 (1st Dept. 1935).

<sup>20</sup> *Leonard v. Leonard*, 181 Mass. 458, 63 N. E. 1068 (1902); *Hall v. Hall*, 109 Va. 117, 63 S. E. 420 (1909) (where it was recognized that the decision might have been otherwise, had it been a transfer in contemplation of marriage); *Jones v. Somerville*, 78 Miss. 269, 28 So. 940 (1900); *Samson, Adm'x.*, v. *Samson et al.*, 67 Iowa 253, 25 N. W. 233 (1885) (deciding that such a transfer by a husband during his life is not against public policy). In *Lines v. Lines*, 142 Pa. 149, 21 Atl. 809 (1891), a wife sought to have deeds of trust executed by her deceased husband, declared to be void as in fraud of her rights as his widow, upon the ground that they were executed in order that she might be deprived of her interest in his estate under a statute very similar to ours. The court said: "It is the settled law of this state that a man may do what he pleases with his personal estate during his life. He may even beggar himself and his family, if he chooses to commit such an act of folly. *When he dies, and then only, do the rights of his wife attach to his personal estate. She then becomes entitled to her distributive share, and of this she cannot be deprived by will or any testamentary paper.*" (Italics supplied.) *Contra: Payne v. Tatem*, 236 Ky. 306, 33 S. W. (2d) 2 (1930).

a father may create a trust for his children ordinarily.<sup>21</sup> And whether such trust gives them a present or future interest (as, for example, if it were to take effect at his death, which was apparently the case here), or contains a power of revocation, should make no difference so far as its validity is concerned. This is because immediately upon the creation of the trust, the beneficiary's interest would vest (though it be contingent)—the right to possession only being postponed.<sup>22</sup> For this reason, we would have attached little significance to the fact that the husband had a life interest in the trust, although the court seems to feel that the husband's control and use of the income and proceeds of the property were fatal to the transfer sought to be made.<sup>23</sup> We feel that if he could have made a gift in trust to take effect in the present, then he should have been able to make a gift in trust to take effect in the future, even though such future date happened to be determined by his death. It is submitted that as a result of this decision, every disposition by a husband during the lifetime of his wife, may subsequently be open to attack on the ground that the transfer was made for the purpose of defeating his wife's statutory rights. We were not aware that Section 18 of the Decedent Estate Law had placed a restriction on a husband's right to dispose of his property during his life. On the contrary, our impression was otherwise. Ours was the belief that either party to a marriage could now dispose of his or her property freely, unless the disposition was sought to be made by will.<sup>24</sup>

One of the principal purposes of abolishing dower was to avoid complications in the transfer of real estate. "The decision here will not only restore certain of these complications, but will extend the evil to personal property as well. And what will be the issue which

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<sup>21</sup> See *In re Schurer's Estate*, 157 Misc. 573, 284 N. Y. Supp. 28 (1935), cited *supra*, note 15.

<sup>22</sup> *Van Cott v. Prentice*, 104 N. Y. 45, 10 N. E. 257 (1887).

<sup>23</sup> In the instant case, we feel that the majority of the court put the issue too broadly in stating: "This complaint raises the question whether an owner of property, in order to defeat the inchoate rights of the wife under the Decedent's Estate Law, may, in his life-time, make such a transfer as will enable him to keep control of the property and yet prevent the rights of the wife from maturing at his death." Note that the question as presented totally ignores the fact that the purpose of the transfer was to deprive the wife of her statutory rights. Can it be that even when a husband makes a transfer with the best of intentions, that his reservation of a life interest, coupled with a power of revocation, would be sufficient grounds to have the transfer set aside?

<sup>24</sup> In *Herrmann v. Jorgenson*, 263 N. Y. 348, 189 N. E. 449 (1934) the court says: "The husband has no immediate interest in his wife's property. She may, as heretofore, convey it *without his consent* or signature to the deed. The *only* interest given him by the change of section 18 and section 83 of the Decedent Estate Law is that *if she make a will* he may take the interest which he would have on intestacy." (Italics supplied.) In this case it was sought to be determined whether a husband is disqualified from testifying in favor of his wife as a party in interest. In deciding this question in the negative the court pointed out that what it said here was equally applicable to wife as well as husband.

will be decisive of the validity of the transfer? It will be the secret motive of the transferor."<sup>25</sup> Thus, until there are further decisions on the point, a transferee may only be safe today, if he makes sure that his transferor's wife joins in the transfer or conveyance—for in this substitute for dower, the courts seem to have found a new favorite.

LOUIS H. RUBINSTEIN.

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IS THE PROBLEM OF DISREGARDING THE CORPORATE ENTITY MORE A QUESTION OF FACT THAN OF LAW?

All authorities agree that, in certain instances, a corporation is to be regarded as an entity, while in other cases, the real parties in interest must be found. The problem of disregarding the corporate entity has become increasingly complex as the mechanism of the corporation has grown to dominant proportions through the use of subsidiary corporations. Under the cover of holding companies, "the legitimate use of subsidiaries has become obscured by a too frequent manipulation of accounting and credit; so that lawyers, bankers, and courts are now faced with complicated structures in which the actual interests can not readily be discerned."<sup>1</sup> The difficult problem for student and lawyer alike is to learn when to apply the theory of the existence of the corporation as a separate entity, and when fearlessly to disregard it.<sup>2</sup> The difficulty of form is negligible; and courts of equity should unravel all forms of evasion of obligation, even though the formation is accomplished by a certificate of incorporation and stock certificates.<sup>3</sup> It is not to be denied that equity should, on proper facts, restrain the unconscionable use of any legal right.<sup>4</sup>

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<sup>25</sup> Dissenting opinion by Untermyer, J., in instant case, *Bodner v. Feit*, at p. 820, cited *supra*, note 18.

<sup>1</sup> (1928) 41 HARV. L. REV. 874 (A. A. Berle, Jr., gives an excellent discussion of "two causes for concern arising out of the development of the device of subsidiary corporations. The first evil is that the financial structure of the subsidiary corporation lends itself to the use of that subsidiary's financial resources in other enterprises controlled by the dominant corporation. Secondly, the subsidiary proves a convenient medium by which a parent may acquire property apparently freed from restrictive covenants or agreements which bind the parent").

<sup>2</sup> (1912) 12 COL. L. REV. 496.

<sup>3</sup> Transfers of property to a subsidiary corporation for the purpose of evading an obligation of the parent were discussed in the case of *Higgins v. California Petroleum & Asphalt Co.*, 147 Cal. 363, 81 Pac. 1070 (1905) (There was no actual fraud, but the court held all three companies jointly liable on the ground that the necessary effect of the conveyance was to hinder collection of royalties by the lessor and that the identity of control of the corporations made them all liable). The case is commented on in *WORMSER, DISREGARD OF THE CORPORATE FICTION* (1927) 59-61, and in (1928) 41 HARV. L. REV. 874.

<sup>4</sup> *People v. North River Sugar Ref. Co.*, 121 N. Y. 582, 24 N. E. 834 (1890); *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279 (1892);