Volume 55
Issue 1 *Dickinson Law Review - Volume 55, 1950-1951*

10-1-1950

A Situation in Which the Pennsylvania Courts Have Been Reluctant to Enforce the Wife's Statutory Dower Right

John A. MacPhail

A SITUATION IN WHICH THE PENNSYLVANIA COURTS HAVE BEEN RELUCTANT TO ENFORCE THE WIFE'S STATUTORY DOWER RIGHT

There is no dispute that a voluntary transfer of realty by a husband is subject to the dower or statutory interests of the wife therein.[1] This is a vested right in the wife at coverture and death has no effect on it except to convert an equitable into a legal title. As to personalty, the antithetical rule is that the husband has an absolute right to dispose of it as he desires, with or without his wife's consent. However, at the husband's death, the "expectant" right of the wife in the personalty is converted into a vested right for she then shares in the remaining personalty in shares according as the law provides.[2]

Pennsylvania courts have often been presented with the perplexing question as to whether item X is personalty or realty. In most cases, a clear-cut answer can be given, but in some cases item X may be either personalty or realty and in a few cases it may be both.

The question the writer is concerned with here is a specific instance of the "conversion" of realty into personalty by the act of the donor. A subsequent question which is posed is the wife's rights when this situation occurs.

Preliminarily, it must be pointed out that the Pennsylvania legislature[3] has time and again given expression to the strong public policy that a wife ought not to be left destitute when her husband dies, if her husband in fact had anything of pecuniary value in which she could share. Thus, where a husband by will disposes of all this property, real, personal, and mixed, and does not include his "beloved" wife as a beneficiary, the law provides she may elect to take against the will.[4] Other elementary rules of testamentary disposition and death intestate illustrate the same policy.

To tie together all the elements of the problem involved, a hypothetical question composed of fact situations from various cases, seems to be most practical and will, therefore, be presented.

The Problem

H and W marry. Two children are born of the marriage. Sometime during the marriage there are difficulties—a separation, unsuccessful divorce action, etc. The husband becomes incensed and determines to "cut off" W from as much as he possibly can. Upon consulting counsel, he learns that his wife has a vested interest in his realty, but no interest in personalty while he is living. H disposes of all his personalty but is seised of a home worth $5,000. H makes out his will leaving to W "just what she is entitled to under the law and no more."

---

1 64 A. L. R. 480.
2 J. P. Lines v. W. E. Lines, et. al., 142 Pa. 149, 21 A. 809 (1891).
3 Intestate Act. of 1947; Wills Act of 1947.
4 Wills Act of 1947.

Then H makes out an ordinary judgment note in favor of his two sons in the sum of $5,000, "not to be exercised until after my death." H delivers the note in escrow to attorney X. H dies.

The Will

A careful study of the *Potter Title and Trust Co.*[5] case leaves no doubt that the wording of the bequest to W in H's will is entirely legal. It is neither fraud in itself nor is it evidence of fraud. The court does not even consider the question worth a discussion. Although this identical language is seldom used, it appears to be a graceful way to deny to the wife anything unless her forefathers enacted legislation for her protection.

Of course, under the provisions of the Intestate Act, W may choose to take against H's will.[6] Her share then is one-third. No personalty having remained, W must secure her share out of the $5,000 home. When she takes legal action to sell the home, however, the children present H's note and levy execution on the home. Whose claim is superior?

The Note

To attack the validity of the note, one may use several avenues of approach.

At first thought, it may be argued that the note is testamentary in character and thus of no legal effect unless executed in accordance with the provisions of the Wills Act.[7] There is some authority to support this argument[8] but H has been very careful. He has executed what amounts to a *present* obligation, only the payment or discharge of which is postponed until his death. This he has every right to do.[9] The mere fact that payment is to be made after the maker's death does not necessarily make the note testamentary in character.[10]

Where is the consideration? True, neither of the children gave anything of value in exchange for the note (and it may be added that the children need not even know of the note's existence) and in most states this would amount to a mere promise to pay, unenforceable for lack of consideration.[11] However, in Pennsylvania[12] the "magic of the seal" arises to surmount this obstacle and again H has been very careful to see that his note was under seal.

There has been a delivery of the note so as to make it irrevocable[13] and the escrow delivery, of course, carries with it the legal fiction of "the doctrine of relating back."[14] This reenforces the proposition that the note is a binding obligation.

---

5 294 Pa. 482, 144 A. 401 (1928).
6 Intestate Act of 1947, Sec. 2.
7 64 A. L. R. 480.
8 Geisinger's Will, 5 D. & C. 493 (Pa. 1924).
9 68 C. J. 619.
10 Eisenlohr's Estate (No. 2), 258 Pa. 438, 102 A. 117 (1917); Unif. N. I. L. Ann. 66 (a).
11 BROWN ON PERSONAL PROPERTY, pp. 167.
12 Mack & Person's Appeal, 68 Pa. 231 (1871).
13 In re Bell's Will, 161 Pa. Super. 3, 54 A.2d 79 (1947).
14 9 PITTSBURGH L. REV. (1947).

Finally, the hypothetical question was drawn in part from *In re Rynier's Estate*[15] and a close study of that case indicates that H's method has been both thorough and effective. One will note, however, that in the Rynier case the *wife* died and by various judgment notes prevented her husband from sharing in her estate. If one could ignore prior and later cases, this point might bear considerable weight. However, other cases which involve a similar question show that it was the husband who died and the conclusion must be that the sex of the decedent is immaterial.

Preliminary Conclusions

Thus far, we have established that H has created a will and a note, both complete, and both blessed by the Pennsylvania courts. Yet there is something about the whole maneuver that is obnoxious and contrary to the existing public policy that a husband ought not to be permitted to leave his wife penniless when in fact others will share what he has. After the Rynier case, two scathing law review articles[16] appeared attacking the situation but all the writers could use to support their argument was their own opinion since the cases ruled otherwise.

These articles did point up, however, that whether the cases agree or not, this *is* fraud. It might be well to consider then this element of fraud.

Fraud

Pennsylvania courts (and all others, for that matter) abhor fraud.[17] The court reports have many cases where a wife has successfully challenged her husband's conveyance of realty or gift of personalty made during coverture because it was fradulent. The courts are careful, however, to point out that it is "actual fraud" which must be shown.

What is "actual" fraud? Definitions will fall aglore if one uses the law dictionaries. But these definitions are of no help unless they are adopted by the courts. Pennsylvania courts seem to be somewhat in a dither as to what they will regard as actual fraud, as witness the following contradictory statements:

"The law will lay its hands upon a fraudulent scheme to deprive the wife of her dower."[18]

"It is not fraudulent as to the wife or children even though the intent and effect are to defeat their succession to the property."[19]

The latter is the majority view of the law[20] and the one most often adopted by Pennsylvania. But does this answer the original question, "What is actual

---

15 347 Pa. 471, 32 A.2d 736 (1943).
16 18 T. L. Q. 185.
17 Commonwealth v. Adams, 97 Pa. Super. 510 (1929).
18 Waterhouse v. Waterhouse, 206 Pa. 433, 55 A. 1067 (1903).
19 Fritz' Estates, 135 Pa. Super. 463, 5 A.2d 601 (1939).
20 64 A. L. R. 487.

fraud?" All that has been decided is what actual fraud is *not*. In the only affirmative approaches to the question the courts have taken, a colorable or sham transfer has been involved.[21] This is the situation where the husband does not divest himself of title absolutely. It is submitted that this is not a *fraudulent* transfer but no transfer at all!

The only logical answer that can be given to the question of actual fraud then, is that the courts are insisting upon something they have not yet defined. As unjust as this may appear, the fact remains that for the purposes of this article, fraud appears not to be available as an attack on the hypothetical situation.

The Dissent

One lone Pennsylvania case,[22] never directly overruled, but no longer the law by implication, stands for what the writer believes to be a more satisfactory statement of the law. In that case the husband executed several promissory notes to his children, payable after his death. While the court admitted that the husband "may give away or squander his property and thus reduce himself and his wife to poverty," it went on to add, "but no case has gone so far as to sustain a voluntary obligation given and received with intent to defraud the wife's rights." The case has lost most of its value, however, because the principal holding was that the fraud will not stand where the donee is a party to it.

In unusual language, Justice Sterrett terms the widow's position as that of a purchaser, giving her a "higher equity" which gives her a right to compensation out of the estate. In other words, the court feels that while the husband has an absolute right to give away his personal property, a superior right exists in the wife when such rights of the husband are abused.

A small minority of other states in the U. S. have also held that an intention to deprive the wife of her share in an estate is a fraudulent intent.[23] New Hampshire[24] and Ohio[25] have so held. Kentucky[26] takes perhaps the most reasonable view by declaring that the intent to deprive the wife of her rights *may* be fraudulent if from the condition of the parties to the transaction and all the surrounding circumstances it appears to the court that a fraudulent intent was in fact present.

Recent Cases

The device is apparently still in use and an examination of recent cases is therefore important. In *Patton* v. *Patton*[27] only the disposal of personal property is involved but the case is important for its discussion of fraudulent intent. Again the court insists upon a showing of actual fraud. It is surprising, however, to

---

21 See Note 2.
22 Hummel's Estate, Hummel's Appeal, 161 Pa. 217 (1894).
23 64 A. L. R. 492.
24 Walker v. Walker, 66 N. Hamp. 390, 31 A. 14 (1890).
25 Doyle v. Doyle, 50 Ohio St. 330, 30 N. E. 166 (1893).
26 Murray v. Murray, 90 Ky. 1, 13 S. W. 244 (1890).
27 Patton v. Patton, 351 Pa. 6, 39 A.2d 921 (1944).

note that the *Hummel*[28] case is cited to support this proposition. As has been shown, the Hummel case seems to be singular in assuming just the contrary position. By dicta the court adds that "mere conjecture or suspicion is insufficient" —which again explains what actual fraud is *not!*

A most surprising case appeared in the late reports and because of its recent character and its interesting decision, it will be discussed in detail. The case in point is *Cancilla* v. *Bondy*.[29]

Tony Cancilla married the plaintiff, she being his second wife. He owned property valued at $7500. Four months after the marriage, Cancilla gave a $10,000 mortgage bond to his grandson and then executed a mortgage in his favor also. Later, Cancilla gave the same grandson a $3,000 mortgage on the same property. No consideration passed between the grandson and Cancilla. When Cancilla died, his sole survivors were the grandson and the plaintiff. By his will, he left the property to his grandson and the residue of his estate to his wife, but at the time of his death he owned nothing except the mortgaged premises!

The principal question with which the case deals is the wife's rights against a purchasor from the mortgagee. To determine these rights, however, the court must preliminarily determine whether the husband has made a bona fide gift to the grandson.

The court notes that the *Hummel*[30] case decided that,

> "Even in the case of his personal property, he (the husband) cannot make a fraudulent gift of it in contemplation of death or to take effect upon death and thereby defraud his wife's statutory rights as his widow."

Then follows what could be an important change in existing law—

> "The execution of the mortgages by Cancilla to Lenia (the grandson) was a *patently crude attempt to destroy the plaintiff's dower rights in the property and was a poor subterfuge for a will which could not have been effectual for the purpose. The mortgages were therefore voidable as to her* (italics added)."

Would the *Cancilla* case then, answer the hypothetical problem? A comparison discloses the following points:

1. The personalty in the *Cancilla* case was a mortgage. The personalty in the hypothetical problem (and *Rynier* case) was a note.
2. There are no words of limitation on what the wife shall receive in the *Cancilla* will, but in the hypothetical problem the language clearly illustrates the wife is to get as little as possible.

---

28 See note 22.
29 353 Pa. 249, 44 A.2d 587 (1945).
30 See note 22.

3. In the *Cancilla* case there was no actual consideration, nor was there any in the hypothetical question.

4. In neither case was a colorable or sham transfer involved.

It is quite probable that there is no material distinction to be drawn simply because the personalty differs in kind.[81] If anything, Cancilla was much more considerate of his wife in his will than was hypothetical H, so that the second distinction is eliminated.

It may be profitable to discuss again the element of consideration. It may be assumed that the mortgage bond in the *Cancilla* case was under seal which under Pennsylvania law takes the place of consideration.[82] But to that rule there is one exception, probably two, and possibly three. The one express exception is in the court of equity.[83] The probable exception exists where fraud is shown but it is to be noted that these cases are few and are roundly criticized.[84] The possible exception is that the Pennsylvania Supreme Court in one case has considered it expedient to dispense with the magic of the seal altogether in a law court.[85] The reception this case was given, however, was not altogether heart-warming.[86] The *Cancilla* case was brought in equity and whether from that fact the court found no consideration, or from the plaintiff's failure to plead it, is not definitely declared.

The *Cancilla* case is important for it is a case where the court found "actual" fraud where there was no colorable or sham transfer involved.

The question may be raised, however, as to what basis the court had for its decision. Was it the "patently crude attempt" to defraud, as shown by *all* the evidence, or was it the lack of consideration? If it was the latter, then one is redirected to the question of *why* the court found there was no consideration.

Later cases seem to stress that the idea of consideration was paramount. Thus Justice Stearne in *Overbeck* v. *McHale*[87] says of the *Cancilla* case,

> "There the husband voluntarily mortgaged his property. The only purpose was to defraud his wife."

Again in *Moser* v. *Granquist*[88] the Court said,

> "There was no allegation or testimony that the purchaser was a purchaser for value from the husband or was acting in collusion with the husband to defraud the defendant of her marital rights."

---

81 Although this may seem to be a superfluous statement, the writer is convinced that for purposes of the seal as consideration in a bill in equity, some distinction may be drawn.
82 Zimmerman v. Zimmerman, 262 Pa. 540, 106 A. 198 (1919).
83 McCLINTOCK ON EQUITY, 2nd Ed. pp. 130.
84 Golder v. Bogash, 325 Pa. 449, 188 A. 837 (1937).
85 Commonwealth Trust Company General Mortgage Investment Fund Case, 357 Pa. 349, 54 A.2d. 649 (1947).
86 52 DICK. L. REV. 175; 23 T. L. Q. 147; 96 UNIV. OF PA. L. REV. 433.
87 354 Pa. 177, 47 A.2d 142 (1946).
88 362 Pa. 302, 66 A.2d 267 (1949).

Conclusions

It is apparent that W's most likely chance for recovery in the hypothetical question will lie in a bill in equity to protect her statutory dower rights on the assumption that the court will find no consideration.

It is hoped that the reader is aware that actually this should be an elementary question. Clearly a man who makes a gift to personalty which in fact is not a gift of personalty but the transfer of an interest in realty is interfering thereby with the statutory dower interests of his wife. This he is prohibited by law from doing. This note endeavors to point out that what seems to be such an elementary question has been clouded by judicial insistence on "actual fraud," by inadequate discussions of what that term means, and by such legal magic as is performed by the seal, that now the answer is not at all obvious.

John A. MacPhail