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THE PRESENT STATUS OF "ILLUSORY" TRUSTS-THE DOCTRINE ON NEWMAN v. DORE BROUGHT DOWN TO DATE

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COMMENTS

THE PRESENT STATUS OF "ILLUSORY" TRUSTS—THE DOCTRINE ON NEWMAN V. DORE BROUGHT DOWN TO DATE[1]—It has long been the policy of the law to provide for a widow by setting aside some portion of her deceased husband's estate for her future support. Such a policy, it has been said, dates back to the laws of Hammurabi and later evidences of it may be found in the Justinian Code of the Roman Law, and in English law from the earliest times; its final manifestation being in the well-known common law dower.[2] It is not with dower, however, that we are here concerned, for that institution is sufficiently well understood to require no discussion in this comment.[3]

While dower still exists in many states in this country, a great majority have by statute provided that the surviving spouse may take a certain distributive share of the deceased's estate in lieu of dower or courtesy,[4] and as a general rule, the wife cannot be deprived of this statutory share by will, since the statutes specifically permit her to take against the will.[5] However, with few exceptions,[6] legislatures have not seen fit to protect this distributive share from inter vivos transfers, due partly, it would seem, to an unwillingness to interfere with the free alienation of property, and partly to the belief that a man's hesitancy to impoverish himself during his lifetime will overcome any desire he might have to impoverish his widow after his death.

The result has been the adoption of various devices by husbands, and sometimes by wives, to convey, at least nominally, the title to their

[1] It is not the purpose of this comment to try to cover the entire field of the law protecting the widow's distributive share from inter vivos gifts and trusts. We shall confine ourselves rather strictly to the recent cases involving the doctrine of "illusory" trusts as set out in Newman v. Dore, 275 N.Y. 371, 9 N.E. (2d) 966 (1937). For a more complete treatment of the general subject see: 64 A.L.R. 466 (1930); 112 A.L.R. 643 (1938); SCOTT, TRUSTS, §§ 58.5, 57.5 (1939).

[2] See Cahn, "Restraints on Disinheritance," 85 UNIV. PA. L. REV. 139 (1936).

[3] "Dower is the estate to which a widow is entitled, at common law, for the period of her life, in one-third of the lands and tenements of which her husband was seized in fee or fee tail, and which her issue, if any, might inherit." TIFFANY, REAL PROPERTY, § 178, p. 417 (1903). For other types of dower that have not survived see footnote on same page.

For a discussion of the restrictions imposed by dower on the alienability of land see: WALSH, THE LAW OF PROPERTY, 2d ed. (1927); 12 ST. JOHNS L. REV. 355 (1938).

[4] 3 VERNIER, AMERICAN FAMILY LAWS, §§188, 189 (1935). Cahn, "Restraints on Disinheritance," 85 UNIV. PA. L. REV. 139 at 141 (1936).

[5] 64 A.L.R. 466 (1930); Pringle v. Pringle, 59 Pa. 281 (1868).

[6] Tenn. Code (Michie, 1938) § 8365; Report of the Commission of Revision of the Laws of North Carolina Relating to Estates 34-37 (1936).

property before any vested or contingent right in said property accrues in the spouse. Dower can be defeated by a bona fide conveyance before marriage, since seizin or title during coverture is one of the essentials of dower,[7] and as just stated, a man may freely dispose of all his personal property by an absolute transfer inter vivos even after marriage.[8]

The courts have been very watchful, however, to see that such transfers are made in good faith. The doctrine of "fraud on the marital right" developed early. The rule is usually stated that if a man conveys his real property on the eve of marriage with the intent of depriving his wife of dower therein, she is entitled to dower as if the deed had not been made.[9] While the rule is usually stated in terms of intent, it is probable that it has its roots in genuine fraud; that is, part of the inducement by which a man acquires a wife is her belief that she will share in the property of which he is ostensibly siezed, at his death; if a conveyance of this property is made on the eve of the marriage she is misled, and to her detriment.[10] The rule was originally applied only to attempts to defeat dower, but the recent cases would indicate that it applies also to transfers of personal property where there has been an express or implied representation prior to marriage that the husband had property, sufficient for the proper support and maintenance of the wife, in which she would be entitled to a share on his death.[11]

It has been further applied where the decedent, in order to effect a reconciliation with his estranged wife, promised to make certain provisions for her support.[12] In all of these situations we have the elements of actual fraud.

II

The more troublesome problems arise in those cases in which the transfer involved does not satisfy the legal concept of fraud, those cases in which the courts try to protect the widow's distributive share

[7] TIFFANY, REAL PROPERTY, § 189, p. 443 (1903).

[8] 64 A.L.R. 466 (1930); 112 A.L.R. 649 (1938); Lines v. Lines, 142 Pa. 149 (1891).

[9] TIFFANY, REAL PROPERTY, § 189, p. 443 (1903), and cases cited; 2 BIGLOW, FRAUD 147 (1890).

[10] Mitchell v. Mitchell, 177 Misc. 1050, 32 N.Y.S. (2d) 839 (1942), repealed on *facts* in 265 App. Div. 27, 37 N.Y.S. (2d) 612 (1942); LeStrange v. LeStrange, 242 App. Div. 74, 273 N.Y.S. 21 (1933); Rubin v. Myrup Realty Co., Inc., 244 App. Div. 541, 279 N.Y.S. 867 (1934); Bodner v. Feit, 247 App. Div. 119, 286 N.Y.S. 814 (1935).

[11] Martin v. Martin, 282 Ky. 411, 138 S.W. (2d) 509 (1940), and the cases cited in note 10; Clavin v. Clavin, (N.Y. Co. S.Ct. 1943) 41 N.Y.S. (2d) 377.

[12] Weisman v. Metropolitan Life Ins. Co., 170 Misc. 487, 7 N.Y.S. (2d) 565 (1938) affirmed in 256 App. Div. 914, 10 N.Y.S. (2d) 414 (1939).

from devices by which the husband attempts to keep for himself the benefit of his property during his lifetime and at the same time deprive his widow of her interest at his death. In this field, the law is more hazy and the decisions less clear cut. For the purpose of classification and more careful analysis we shall treat these cases as falling into two groups; those which are avoided on the ground stated in *Newman v. Dore*, that they are "illusory"; and those avoided on various grounds involving an improper intent, such as, that they are "colorable," "fraudulent," or "testamentary."[13]

It is not our purpose to deal extensively with "colorable" transfers but it is necessary to attempt a classification of them, even though it may be more or less arbitrary, to differentiate them from "illusory" transfers. The term "colorable," as used herein, indicates a transfer which may be absolute on its face, but which, actually, is not a transfer at all because, through some secret or tacit understanding, the parties intended that ownership is to be retained by the donor.[14] Such a transfer might not even be enforcible between the donor and donee if all the evidence of the transaction were admitted.[15] We might also, for want of a better place to put them, include within this grouping those cases in which the courts seem to find fraud in inter vivos transfers after marriage by analogy to "fraud on the marital right." Resting their decisions on intent to defeat the widow's interest,[16] and in some cases on public policy, they have allowed the widow to reach property given absolutely in the lifetime of the husband.[17] Within this group

[13] "Fraud, says the majority, is to attempt destruction of the widow's share by a colorable (as distinguished from a real) transfer. To pretend to alienate property, while retaining all indicia of ownership and control; to go through the motions and forms of conveyance when no genuine shifting of economic benefit is intended: these are fraud. In other words, although the courts do not say as much, they will not set aside fraudulent transfers; they merely disregard shams and pretenses." Cahn, "Restraints on Disinheritance," 85 UNIV. PA. L. REV. 139 at 151 (1936).

[14] As in Martin v. Martin, 282 Ky. 411, 138 S.W. (2d) 509 (1940) where the husband deposited all his money in the name of his sister and the sister drew checks at his order. Also see Blevins v. Pittman, 189 Ga. 789, 7 S.E. (2d) 662 (1940), where husband conveyed land to aunt. The aunt in return gave him the use of the land for life and devised the land to him by a will in which she prohibited alienation to the wife.

[15] Kerwin v. Donaghy, (Mass. 1945) 59 N.E. (2d) 299.

[16] Harrison v. Harrison, 198 Ark. 64, 127 S.W. (2d) 270 (1939) citing 1 PERRY, TRUSTS AND TRUSTEES, 6th ed., § 213 (1911), and 2 BISHOP, LAW OF MARRIED WOMEN, § 350 (1875). Bodner v. Feit, 24 App. Div. 119, 286 N.Y.S. 814 (1936).

[17] In Merz v. Tower Grove Bank & Trust Co., 344 Mo. 1150 at 1162, 130 S.W. (2d) 611 (1939), after stating that the public policy of the state had long been to protect the widow's share in the property of her deceased husband, said: "We are unwilling to repeal by implication the statutes of this State and to say that a hus-

also are cases in which an attempt to set up an inter vivos trust has been held to be testamentary.[18]

III

The foregoing discussion is in no respect complete, and is included merely as a background for a study of the doctrine of "illusory" transfers as set out in *Newman v. Dore*.[19] In that case the settlor, a few days before his death, had conveyed substantially all his property to a trustee, but he had retained not only the income for life and the power to revoke, but also the right to control the trustee in the management of the trust. The court specifically rejected all theories of intent and fraud,[20] and held that the only sound test was whether the husband had in good faith divested himself of ownership of his property or had made an illusory transfer.[21] While the court did not decide that the transaction was not testamentary, it carefully avoided placing its decision on that ground.

In view of the rather substantial body of authority in New York and elsewhere in which *Newman v. Dore* is cited, and apparently followed, it is worthwhile to inquire what is meant by an illusory transfer; and in what situations the rule of *Newman v. Dore* has been applied; and how widely the rule has been accepted, modified or rejected by the courts in subsequent cases.

Evidently the court did not mean "colorable" when it used the term "illusory." Nor did it mean to include any element of bad motive or intent to defraud the wife; though it would seem that it was un-

band may by means of a fraudulent conveyance evade the express terms of the statute and that a court of equity is powerless in the premises." See also Martin v. Martin, 282 Ky. 411, 138 S.W. (2d) 509 (1940).

[18] President and Directors of Manhattan Co. v. Janowitz, 260 App. Div. 174, 21 N.Y.S. (2d) 232 (1940); Merz v. Tower Grove Bank & Trust Co., 344 Mo. 1150, 130 S.W. (2d) 611 (1939); Cochran's Admx. v. Cochran, 273 Ky. 1, 115 S.W. (2d) 376 (1937); Central Trust Co. v. Watt, 139 Ohio 50, 38 N.E. (2d) 185 (1942), 41 MICH. L. REV. 191 (1942); cf. TRUSTS RESTATEMENT, § 57 (2) (1935).

[19] 275 N.Y. 371, 9 N.E. (2d) 966 (1937).

[20] The court said, id. at 379, "Intent may, at times, be relevant in determining whether an act *is* fraudulent, but there can be no fraud where no *right* of any person is invaded. . . . the law gives the wife only an expectant interest in the property of her husband which becomes part of his estate. . . . " The court cited Leonard v. Leonard, 181 Mass. 458, 63 N.E. 1068 (1902).

[21] The court quoted with approval from Benkart v. Commonwealth Trust Co., 269 Pa. St. 257 at 259, 112 A. 62 (1920) as follows: "The 'good faith' required of the 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 intent which will defeat a gift inter vivos cannot be predicated on the husband's intent to deprive the wife of her distributive share of his estate as widow."

fortunate to include the phrase "in good faith" in its explanation of the term. The test which the court was laying down, at least if we are to interpret it in the light of subsequent New York decisions, was this: Did the decedent, by the conveyance in his lifetime, retain such a large interest in the property that, at least as to the wife, his inter vivos transfer was illusory? Or to use the phrase of Mr. Justice Holmes, quoted by the court from *Leonard v. Leonard*,[22] can we say that "from the technical point of view such a conveyance does not take back all that it gives, but practically it does"?

The first question that naturally presents itself is just how much control retained in the settlor is necessary to make the transfer illusory? *Newman v. Dore* clearly implies that a conveyance absolute on its face is effectual to defeat the widow's interest, and it has been so held in subsequent cases.[23] It seems evident that courts will not declare a transfer illusory where the donor retains only the income, or the beneficial use.[24] In *Newman v. Dore* the court specifically refused to decide whether the retention of income plus the power to revoke would make the trust illusory, and the authority of one recent case would indicate that such retention would not be fatal.[25] It is interesting to note, however, that there has been a recommendation made in one state for legislation which would make such a trust void;[26] and such a trust

[22] 181 Mass. 458 at 461, 63 N.E. 1068 (1902).

[23] In re Wrone's Estate, 177 Misc. 541, 31 N.Y.S. (2d) 191 (1941) cites the rule but holds that where the decedent, in normal health, by a gift of his stock in a corporation stripped himself of all dominion and control, he thereby divested himself of title and ownership and the transfer was not illusory. See also, Spafford v. Pfeffer, 179 Misc. 867, 39 N.Y.S. (2d) 831 (1943); Krause v. Krause, 285 N.Y. 27, 32 N.E. (2d) 779 (1941).

[24] See Maruska v. Equitable Life Assurance Co. of United States, (D.C. Minn. 1938) 21 F. Supp. 841 (decided prior to Newman v. Dore), in which it was held that a husband might use all of his personal property to purchase an annuity for himself, even though it was alleged by the wife to have been done to prevent any claim she might have arising from a threatened divorce action.

See also Haskell v. Art Institute of Chicago, 304 Ill. App. 393, 26 N.E. (2d) 736 (1940), where decedent made a gift of pictures by formal deed, and the pictures were "leased" back to him for life, held, good transfer, citing Newman v. Dore; KERR, FRAUD AND MISTAKE 220 (1877); Padfield v. Padfield, 78 Ill. 16 (1875).

[25] Kerwin v. Donaghy, (Mass. 1945) 59 N.E. (2d) 299, in which the trust instrument renounced on its face any interest in the property aside from a life income and a power to revoke. The court reserved opinion on whether Newman v. Dore would have been followed if the circumstances had been the same.

[26] REPORT OF THE COMMISSION OF REVISION OF THE LAWS OF NORTH CAROLINA RELATING TO ESTATES 34-37 (1936), which reads in part:

"I. Any gratuitous transfer of property, real or personal, shall be deemed to be in fraud of a wife, unless she join therein or assent thereto in writing if:

"1. the husband retains the power to revoke it during his lifetime, whether exerciseable by him alone or in conjunction with any person not having a substantial adverse interest."

is void as to the donor's creditors.[27] In a majority of the cases in which the terms of the trust were similar to those of the trust in *Newman v. Dore*, i.e., where there is in the grantor the retention of income, the power to revoke and an element of control of management, the rule of that case has been recognized.[28] Some courts have followed the rule almost without variation;[29] one has specifically rejected it in favor of a public policy rule against an intent to defeat the wife's interest.[30] One has given it a different interpretation and reached the opposite conclusion on essentially the same set of facts;[31] and in one case, the court, making no mention of *Newman v. Dore*, held to the contrary on similar facts.[32]

The second question considered is, in which situations will the principle of illusory transfer apply. From the cases, it would seem that it has not been confined to trusts in their usual form but has been applied as well to analogous situations. Thus it has been argued that where a decedent in his lifetime made deposits of his own money in a joint savings account, opened by himself but in the name of himself and another, he was in effect making a conveyance of his property over which he retained control during his lifetime, but which passed to the survivor at his death. The New York cases[33] have refused to apply the illusory doctrine to this type of conveyance, holding that the situation

[27] TRUSTS RESTATEMENT, § 156 (c) (1935); PROPERTY RESTATEMENT, § 328 (1940).

[28] President and Directors of Manhattan Co. v. Janowitz, 172 Misc. 290, 14 N.Y.S. (2d) 375 (1939), but decided on different grounds on appeal; Burns v. Turnbull, (Nassau Co. S.Ct. 1942) 37 N.Y.S. (2d) 380; Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E. (2d) 75 (1944); Bolles v. Toledo Trust Co., (Ohio 1944) 58 N.E. (2d) 381; Merz v. Tower Grove Bank & Trust Co., 344 Mo. 1150, 130 S.W. (2d) 611 (1939).

[29] President and Directors of Manhattan Co. v. Janowitz, 172 Misc. 290, 14 N.Y.S. (2d) 375 (1939); Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E. (2d) 75 (1944); Bolles v. Toledo Trust Co., 144 Ohio 195, 58 N.E. (2d) 381 (1944).

[30] Merz v. Tower Grove Bank & Trust Co., 344 Mo. 1150, 130 S.W. (2d) 611 (1939).

[31] Burns v. Turnbull, 37 N.Y.S. (2d) 380 (1942). In this case the court interprets the rule as requiring bad faith on the part of the settlor. This is a lower court (Supreme Court) case and seems to be completely out of line with the other New York decisions of both the Appellate Division and the Court of Appeals.

[32] Rose v. Rose, 300 Mich. 73, 1 N.W. (2d) 458 (1942). The settlor in this case retained and exercised more control than in Newman v. Dore, but the court, after stating that conveyances prior to marriage are not fraudulent per se in Michigan, held that the widow had been provided for in other ways, and that therefore there was no fraud in the transfers.

[33] In re Lorch's Estate, (Queen's Co. Surr. Ct. 1941) 33 N.Y.S. (2d) 157; Inda v. Inda, 288 N.Y. 315, 43 N.E. (2d) 59 (1942), see also note in 52 YALE L.J. 656 (1942). And see In re Kalina's Will, 184 Misc. 367, 53 N.Y.S. (2d) 775 (1945), involving United States' bonds.

is controlled by the New York Banking Law.[34] The Massachusetts court arrives at the same general conclusion without benefit of any statute, holding that the reservation by the depositor of a right to withdraw both income and principal and to revoke the entire transaction was not inconsistent with a perfected creation, inter vivos, of a joint tenancy in the account.[35] However, certificates of deposit payable to the order of the depositor or another or the survivor of them, but retained by the depositor in his possession, have been held invalid as to the widow's distributive share.[36] The position of the courts on joint bank accounts may be in part explained by the contention of eminent authority that such accounts cannot be considered trusts at all but only contracts.[37] Savings bank trusts, called Totten Trusts in the New York cases,[38] have received treatment distinctly different from that accorded to joint bank accounts. The courts have uniformly held that the exceptional nature of trusts in bank deposits does not imply that they are on a different footing from other inter vivos transfers where husband and wife are concerned.[39] The only variance in the cases seems to be that the two give unqualified support to the *Newman v. Dore* doctrine,[40] while the others seem to modify the doctrine slightly.[41] A more complete discussion of the variance will be given in a later paragraph.

[34] N.Y. Laws (1914) c. 369, § 249 (3), providing that a deposit in the prescribed form creates a joint tenancy in the account during the joint lives of the depositors.

[35] Malone v. Walsh, (Mass. 1944) 53 N.E. (2d) 126.

[36] Hamilton v. First State Bank, 254 Ill. App. 55 (1929). But an absolute gift of certificates of deposit, duly certified, has been held to be good as against the widow's interest. Norris v. Bradshaw, 96 Colo. 594, 43 P. (2d) 638 (1935).

[37] SCOTT, TRUSTS, § 58.6 (3) (1939), stating: "What he [the depositor] is doing is paying consideration to the bank for its promise made to him and the other."

[38] See Matter of Totten, 179 N.Y. 112 at 125, 71 N.E. 748 (1904) in which the court held: "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 depositor. 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. . . ." For discussion see, I SCOTT, TRUSTS, §§ 58.2, 58.3 (1939); Larrimore, "Judicial Legislation in New York," 14 YALE L. J. 312 at 315 (1905).

[39] Krause v. Krause, 285 N.Y. 27, 32 N.E. (2d) 779 (1941); Murray v. Brooklyn Savings Bank, 258 App. Div. 132, 15 N.Y.S. (2d) 915 (1939); Schnakenberg v. Schnakenberg, 262 App. Div. 234, 28 N.Y.S. (2d) 841 (1941); Mushaw v. Mushaw (Md. 1944) 39 A. (2d) 465.

[40] Krause v. Krause, 285 N.Y. 27, 32 N.E. (2d) 779 (1941); Schnakenberg v. Schnakenberg, 262 App. Div. 234, 28 N.Y.S. (2d) 841 (1941); Mushaw v. Mushaw,

[41] In Murray v. Brooklyn Savings Bank, 258 App. Div. 132, 15 N.Y.S. (2d) 915 (1939), the court seems to limit the Newman doctrine to cases in which the widow elects to take against the will under the provisions of New York Decedent Estate Law (McKinney, 1939) § 18.

In Mushaw v. Mushaw, (Md. 1944) 39 A. (2d) 465, there is some indication that the court considers an "illusory" transfer only evidence of fraud.

One lower court has held that the *Newman v. Dore* rule, having been applied to Totten Trusts, undoubtedly applies to life insurance policies where the insured reserves the right during his lifetime to change the beneficiaries. But this decision was overruled by the upper court, and the general rule would seem to be that there is nothing illusory in making a person a beneficiary of a life insurance policy and yet reserving the power to change the beneficiary.[42] The same rule has been applied to a life insurance trust.[43]

The primary principle that a husband may divest himself completely of his estate by means of absolute transfers inter vivos[44] would logically indicate that the position of the wife in protecting her distributive share is not that of a creditor, and the cases seem to bear that out.[45] Where, however, the wife has a claim against the estate of her husband arising from sources other than her statutory share, such as alimony or claims for maintenance, she is deemed to be a creditor.[46]

Before drawing our conclusions it might be well to direct our attention to certain other items that may have some influence on the decisions, and might be considered as qualifiying the general doctrine slightly. The first of these is that in most of the cases some com-

[42] Mitchell v. Mitchell, 177 Misc. 1050, 32 N.Y.S. (2d) 839 (1941), reversed in 265 App. Div. 27, 37 N.Y.S. (2d) 612 (1942).

[43] Bullen v. Safe Deposit & Trust Co. of Baltimore, 177 Md. 271, 9 A. (2d) 581 (1939). The court, after discussing the retention of control in the trust, said, "By these reservations Mr. Bullen had no other or additional authority, that he did not possess before he created the trust. These are all powers incident to policies of life insurance and such provisions or reservations do not confer upon the wife or widow any other or additional rights, privileges, or estate, that were not hers before the trust was created."

[44] See 64 A.L.R. 466 (1930), and cases previously cited.

[45] See Krause v. Krause, 285 N.Y. 27, 32 N.E. (2d) 779 (1941) where the court said, "Rules having to do with voluntary conveyances as fraud upon creditors have no bearing in this connection." See also In re Wrone's Estate, 177 Misc. 541, 31 N.Y.S. (2d) 191 (1941); Haskell v. Art Institute of Chicago, 304 Ill. App. 393, 26 N.E. (2d) 736 (1940). But see from the same state as the last case cited, Hamilton v. First State Bank of Willow Hill, 254 Ill. App. 55 (1929), in which the court states, "A husband cannot, by a voluntary conveyance without his wife's consent, deprive her of her right to the widow's award, *which is a debt against his estate, and she is a creditor to the amount of her award.*" For other cases see 10 WORDS AND PHRASES 419.

[46] Kuhlbarsch v. Sauter, 170 Misc. 955, 10 N.Y.S. (2d) 997 (1939); Maruska v. Equitable Life Assur. Soc. of United States, (D.C. Minn. 1938) 21 F. Supp. 841. See also cases collected in 10 WORDS AND PHRASES 419. It is interesting to note that as to claims of such nature, the wife stands in a position superior to that of an ordinary creditor in certain situations. Her claims may be satisfied out of funds received as awards under the Workmen's Compensation Law, Commons v. Bragg, (Okla. 1938) 80 P. (2d) 287, 290, 291, or the World War Veterans' Act, Hollis v. Bryan, 166 Miss. 874, 143 S. 687 (1932), even though these awards are exempt from claims of ordinary creditors.

parison has been made between the size of the decedent's estate, or former estate before reduction by gift, and the amount left to the widow by will, gift, or decent.[47] The second is that the length of time between the making of the transfer and the death of the decedent has been mentioned at least in a substantial number of the cases as a significant factor.[48]

IV

To draw some conclusions from our study it would seem first, that substantially all of the recent cases cite *Newman v. Dore* and at least consider the doctrine it sets forth.[49] A great majority of these follow it in general principle; [50] some give it a modified application. In *Mushaw*

[47] In re Newman v. Dore, decedent had transferred substantially all his property to the trust; in Rose v. Rose, 300 Mich. 73, 1 N.W. (2d) 458 (1942), he had transferred a large part of his property to his wife inter vivos; in Bullen v. Safe Deposit & Trust Co. of Baltimore, 177 Md. 271, 9 A. (2d) 581 (1939), he had given his wife inter vivos and at his death property worth more than $150,000; in Cochran's Admx. v. Cochran, 273 Ky. 1, 115 S.W. (2d) 376 (1937), inter vivos gifts of more than $100,000 were given to the children, property of negligible value to the wife; Merz v. Tower Grove Bank & Trust Co., 344 Mo. 1150, 130 S.W. (2d) 611 (1939) trust of $330,000, $200 per month to widow; Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E. (2d) 75 (1944) trust constituted all of estate except a pension; Mitchell v. Mitchell, 265 App. Div. 27, 37 N.E. (2d) 612 (1942); Mushaw v. Mushaw, (Md. 1944) 39 A. (2d) 465.

[48] Newman v. Dore, 275 N.Y. 371, 9 N.E. (2d) 966 (1937); Merz v. Tower Grove Bank and Trust Co., 344 Mo. 1150, 130 S.W. (2d) 611 (1939); Cochran's Admx. v. Cochran, 273 Ky. 1, 115 S.W. (2d) 376 (1937); Haskell v. Art Institute of Chicago, 304 Ill. App. 393, 26 N.E. (2d) 736 (1940); Martin v. Martin, 282 Ky. 411, 138 S.W. (2d) 509 (1940); Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E. (2d) 75 (1944).

[49] Krause v. Krause, 285 N.Y. 27, 32 N.E. (2d) 779 (1941); Inda v. Inda, 288 N.Y. 315, 43 N.E. (2d) 59 (1942); In re Wrone's Estate, 177 Misc. 541, 31 N.Y.S. (2d) 191 (1941); In re Lorch's Estate, 33 N.Y.S. (2d) 157 (1941); Spafford v. Pfeffer, 179 Misc. 867, 39 N.Y.S. (2d) 831 (1943); Mitchell v. Mitchell, 265 App. Div. 27, 37 N.Y.S. (2d) 612 (1942); Clavin v. Clavin, 267 App. Div. 760, 41 N.Y.S. (2d) 377 (1943); Burns v. Turnbull, 37 N.Y.S. (2d) 380 (1942); President and Directors of Manhattan Co. v. Janowitz, 172 Misc. 290, 14 N.Y.S. (2d) 375 (1939), on appeal 260 App. Div. 174, 21 N.Y.S. (2d) 232 (1940); Hochster v. City Bank Farmers Trust Co., 260 App. Div. 712, 24 N.Y.S. (2d) 110 (1940); Murray v. Brooklyn Savings Bank, 258 App. Div. 132, 15 N.Y.S. (2d) 915 (1939); Schnakenberg v. Schnakenberg, 262 App. Div. 234, 28 N.Y.S. (2d) 841 (1941); Merz v. Tower Grove Bank and Trust Co., 344 Mo. 1150, 130 S.W. (2d) 611 (1939); Mushaw v. Mushaw, (Md. 1944) 39 A. (2d) 465; Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E. (2d) 75 (1944); Bolles v. Toledo Trust Co., 144 Ohio 195, 58 N.E. (2d) 381 (1944); Kerwin v. Donaghy, (Mass. 1945) 59 N.E. (2d) 299; Haskell v. Art Institute of Chicago, 304 Ill. App. 393, 26 N.E. (2d) 736 (1940).

[50] Krause v. Krause, 285 N.Y. 27, 32 N.E. (2d) 779 (1941); Inda v. Inda, 288 N.Y. 315, 43 N.E. (2d) 59 (1942); In re Wrone's Estate, 177 Misc. 541, 31 N.Y.S. (2d) 191 (1941); In re Lorch's Estate, 33 N.Y.S. (2d) 157 (1941);

v. Mushaw,[51] while the court cites the rule with approval, the general tenor of the case would indicate that it does not consider the rule conclusive in itself, but only evidence of fraud. It is interesting to note that the court distinguishes the instant case from a former Maryland case,[52] rather largely on the basis of whether the widow was left well provided for by other means or was left destitute by the transfer. In *Burns v. Turnbull*,[53] it is held that not only must the transfer be illusory, but it must also be in bad faith. This is a lower court case, however, and it would seem to be completely out of line with the decisions of the New York Court of Appeals and the Appelate Division.

Some courts attempt to limit the scope of its application. In *Murray v. Brooklyn Savings Bank*,[54] the court held that the rule applies only where the widow elects to take against the will under the provisions of the Decedent Estates Law, section 18, and does not apply in cases of intestacy, but in *Schnackenberg v. Schnackenberg*,[55] another division of the court refused to follow and sharply criticized the opinion.[56]

Others consider the rule, and reject it in favor of a rule concerned with fraud or public policy,[57] and still others make no mention of either the case or the principle.[58] It would seem that some carry-over from "fraud on the marital right" is still in the minds of the courts in spite

Spafford v. Pfeffer, 179 Misc. 867, 39 N.Y.S. (2d) 831 (1943); Mitchell v. Mitchell, 265 App. Div. 27, 37 N.Y.S. (2d) 612 (1942); Clavin v. Clavin, 267 App. Div. 760, 41 N.Y.S. (2d) 377 (1943); Manhattan Co. v. Janowitz, 172 Misc. 290, 14 N.Y.S. (2d) 375 (1939), on appeal, 260 App. Div. 174, 21 N.Y.S. (2d) 232 (1940); Hochster v. City Bank Farmers Trust Co., 260 App Div. 712, 24 N.Y.S. (2d) 110 (1940); Schnakenberg v. Schnakenberg, 262 App Div. 234, 28 N.Y.S. (2d) 841 (1941); Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E. (2d) 75 (1944); Bolles v. Toledo Trust Co., 144 Ohio 195, 58 N.E. (2d) 381 (1944).

[51] (Md. 1944) 39 A. (2d) 465.

[52] Sturgis v. Citizens Nat. Bank of Pocomoke City, 152 Md. 654, 137 A. 378 (1927).

[53] Burns v. Turnbull, (Nassau Co. S.Ct. 1942) 37 N.Y.S. (2d) 380.

[54] 258 App. Div. 132, 15 N.Y.S. (2d) 915 (1939).

[55] 260 App. Div. 234, 28 N.Y.S. (2d) 841 (1941).

[56] See also Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E. (2d) 75 (1944); Spafford v. Pfeffer, 179 Misc. 867, 39 N.Y.S. (2d) 831 (1943), and Clavin v. Clavin, 267 App. Div. 760, 41 N.Y.S. (2d) 377 (1943), all cases in which the rule was applied to intestacy. See also Kerwin v. Donaghy, (Mass. 1945) 59 N.E. (2d) 299 where the court says, "The right of a wife as distributee stands no higher than the similar right of a child."

[57] Merz v. Tower Grove Bank & Trust Co., 344 Mo. 1150, 130 S.W. (2d) 611 (1939). In its final analysis, however, the court seems to hold that the trust was testamentary.

[58] Rose v. Rose, 300 Mich. 73, 1 N.W. (2d) 458 (1942); Martin v. Martin, 282 Ky. 411, 138 S.W. (2d) 509 (1940).

of the cases that have clearly pointed out that there can be no fraud unless some right is invaded by misrepresentation.[59]

Others, while adopting the doctrine of illusory transfer, consider it only evidence of fraud.[60] Even in the cases that embrace the illusory doctrine completely do we find mention made of the percentage of the decedent's property conveyed[61] and the length of time elapsing between the transfer and the decedent's death.[62] This would appear to be inconsistent, for it is hard to see how either of these items would contribute to the determination of whether a transfer is absolute or illusory. Their consideration can be explained in part by the need for determining, in the case of the amount, whether the distributive share was adequately provided for in the will even if the transfer was set aside, and, in the case of the time, whether the transfer might be a gift *causa mortis*, but the frequency of the appearance of these items may indicate that, subconsciously, the judges still have a vestigial concept of fraud deep in their minds.

While the general theory of illusory transfers has been widely accepted, its application is still difficult and not always uniform. Where the gift or transfer has been made in a somewhat standardized form, such as in the case of joint savings accounts, "Totten Trusts," and life insurance policies, we can predict the application of the theory with reasonable accuracy,[63] at least after one decision has been handed down in a particular state, because all such transactions follow the same general pattern.

The real difficulty comes in the application of the principle to trusts of the common type, because each trust is different, and a different amount of control may be retained in each. In an earlier paragraph we reviewed the decisions pertaining to retention of income, power to revoke, and control of the trustee, but there is some indication that in some states even the presence of all three may not be conclusive.[64] It also seems quite evident that the courts do not sharply

[59] Newman v. Dore, 275 N.Y. 371, 9 N.E. (2d) 966 (1937); Leonard v. Leonard, 181 Mass. 458, 63 N.E. 1068 (1902); Benkart v. Commonwealth Trust Co., 269 Pa. St. 257 (1927).

[60] Mushaw v. Mushaw, (Md. 1944) 39 A. (2d) 465.

[61] See note 47, supra.

[62] See note 48, supra.

[63] See notes 33 to 43, supra.

[64] In Newman v. Dore the court quotes with approval from Benkart v. Commonwealth Trust Co., 269 Pa. 257 at 259, 112 A. 62 (1920), in supporting the illusory doctrine, but immediately follows the quotation with citations of other Pennsylvania cases (Lines v. Lines, 142 Pa. St. 149, 21 A. 809 (1891); Beirne v. Continental-Equitable Title & Trust Co., 307 Pa. 570, 161 A. 721 (1932) sustaining trusts in which a life income, power to revoke and substantial control had been retained by his settlor. Also see Kerwin v. Donaghy, (Mass. 1945) 59 N.E. (2d) 299; and

differentiate between the terms "colorable" and "illusory" to the extent indicated in the definition given earlier in this discussion.[65] Whether a transfer is "illusory" because on its face it takes back almost all it gives, or absolute on its face and "colored" by a secret or tacit understanding, underlying each is the intent on the part of the settlor to retain ownership in the property. The distinction between the two classifications then becomes a matter of evidence.[66]

What have we then which we can call a basic principle that will give coordination to our thinking and lend a degree of harmony to the decisions? Only the bare fundamental principle of *Newman v. Dore* that the test is whether the settlor intended to divest himself of his property or whether he intended only to cover up the fact that he was retaining full control.

You may feel that this conclusion merely brings us back to our starting point; but we must keep in mind that the intent by which we test the transfers is not the "intent to defraud" of the earlier decisions, but an intent to retain, or part with, the ownership of the property in question. If arriving at the end of our discussion with a rule of intent seems somewhat disappointing, we must remember that we have not only a rule of intent, but a rule of intent—with guide posts.

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Shawmut Bank v. Joy, 315 Mass. 457, 53 N.E. (2d) 113 (1944), in which the court reserved opinion as to whether such a trust would be sustained, but seemed to lean strongly toward the Pennsylvania cases cited. Recent Pennsylvania cases cite the Bierne case but none have decided the exact problem. See DeNoble v. DeNoble, 331 Pa. 273, 200 A. 77, (1938); and Kirk v. Kirk, 340 Pa. St. 203, 16 A. (2d) 47 (1940).

[65] See Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E. (2d) 75 (1944) which cites with both Newman v. Dore, and Martin v. Martin, 282 Ky. 411, 138 S.W. (2d) 509 (1940) as supporting the doctrine of illusory transfers. In Martin v. Martin the transfer was absolute, but could be supported under our "colorable" classification. See also Kerwin v. Donaghy, (Mass. 1945) 59 N.E. (2d) 299 which seems to make no such distinction, and it seems probable that the Pennsylvania cases have in mind any type of transfer which is sham.

[66] See Kerwin v. Donaghy, (Mass. 1945) 59 N.E. (2d) 299 which considers the effect of the "parol evidence rule" in determining what testimony is allowable to show that a transfer by deed was in fact "illusory."

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