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SHOULD MARITAL RIGHTS BE PROTECTED BY STATUTE?

RALPH E. THOMAS

The conflict between free alienability of property and restraints on disinheritance has existed for centuries.¹ It is a struggle between two fundamental principles of public policy; one which holds that ownership of property includes the inherent right to dispose of it as the owner deems proper, and the other which holds that a husband assumes the obligation to care for his wife and children during life and should be held responsible for their maintenance and support after his death, insofar as possible. His responsibility includes preventing his family from becoming a public charge when the means to so prevent are within his possession and control.

To this end, every state in the United States has enacted laws to grant to the surviving spouse and children certain interests in the estate of a deceased spouse.² These laws vary greatly in the manner in which they approach the problem, but the end toward which they all strive is universal; that of providing the support and maintenance due the family from the husband.

It is necessary at the outset to establish a fundamental understanding of the typical statutes in force throughout the United States. Exclusive of community property laws, there are two basic types of statutes intended to provide support and maintenance for the surviving spouse and family. The first type is essentially equivalent to common law dower. Although some states have merely codified the old common law dower right, the majority of states have enacted homestead laws or modified statutory forms of dower. But regardless of the form, these laws were derived from common law and create a present interest in real property as an incident of marriage. This interest can only be extinguished by the wife preceding her husband in death, by divorce or by voluntary release. Like common law dower, these statutes create interests or rights in real property only. The second type of statute is often referred to as a forced heir statute. Since at common law the widow was not considered an heir of her deceased husband, the forced heir statutes had no counterpart in common law. These statutes guarantee to the widow a specific share of her deceased husband's estate, including both real and personal property. But, the rights or interests in the property do not arise until the death of the husband. Thus if the husband dissipates his estate prior to his death, the rights created by these laws are valueless. The elective or election statutes are actually just extensions of these two basic types of statutes. They merely provide that if the husband dies testate and fails to make adequate provision for his surviving wife, she may elect to take her statutory share of his estate as though he had died intestate. Many states have both dower or homestead

1. Cahn, *Restraints on Disinheritance*, 85 U. Pa. L. R. 139 (1936).

2. National Association of Probate and Bank Attorneys, *Probate Law Digest*, 1955-1956; Alaska Stat. §§ 13.35.010 and 13.35.110 (1962); Hawaii Rev. L. §§ 319-1 and 319-14 (1955).

statutes and forced heir statutes. For an understanding analysis of the case law, it is essential that they be distinguished.³

In spite of the unanimous action by all states in their attempt to protect the surviving family, the protection sought has been elusive. With the exception of community property laws which operate to protect both present interests and those which only arise at the time of death, the statutory enactments have been directed primarily toward creating an interest in the decedent's estate existing at death. So the ingenuity of the learned has risen to the occasion, as always in property law, and various devices of inter vivos conveyance or transfer have been utilized to defeat what the forced heir statutes attempt to provide. From the apparent ease with which the statutes creating these valuable rights for widows and children may be evaded, the statement that "only the poor and the stupid need conform"⁴ appears to be quite accurate. A look at the case law establishes even more convincingly the fact that the public policy in favor of free alienability of property prevails over the public policy in favor of providing support to surviving widows and children.

The question arose in a recent Wyoming case⁵ whether a conveyance of real property by a husband without the knowledge or consent of his estranged wife, and apparently without consideration, was void on the ground of fraud on the wife's marital rights. The conveyance involved a homestead valued at approximately \$8,000. Since the homestead exemption of \$4,000 was equal to the wife's statutory elective share of one-half of decedent's estate, the court disposed of the case by holding the wife's homestead right to be a lien on the property conveyed, and the conveyance was held valid as to the excess value over the homestead exemption right.⁶ Because the court could dispose of the case in this manner, coupled with the fact that the plaintiff had cited precedent for her contention⁷ which had been overruled,⁸ and hence the court did not consider, the question of what constituted a "fraud on marital rights" remains somewhat at sea in Wyoming. It is therefore the rather presumptuous purpose of this article to attempt to establish some criterion as a basis for considering the question when it becomes necessary.

In this context the statutes of each jurisdiction are of particular significance. The basis for decision depends upon the construction placed upon the statute as to whether the wife's interest in the property comes into being prior to the husband's death or only arises coterminous with death. In those states which retain common law dower rights granting to the widow a life estate

3. See MacDonald, *Fraud on the Widow's Share*, pp. 21-24 (1960).

4. Cahn, *supra* note 1 at 150.

5. *Stollendorf v. Stollendorf*, 384 P.2d 969 (Wyo. 1963).

6. Wyo. Stat § 1-498 (1957).

7. *Bolles v. Toledo Trust Co.*, 144 Ohio St. 195, 58 N.E. 2d 381 (1944); *Harris v. Harris*, 147 Ohio St. 437, 72 N.E. 2d 378 (1947).

8. *Smyth v. Cleveland Trust Co.*, 172 Ohio St. 489, 179 N.E. 2d 60, (1961).

in one third of all real property held by the husband during coverture,⁹ the conveyance by the husband of any such real property without the consent of his wife is in violation of a presently existing right of the wife and hence subject to the wife's claim. In those states which have abolished common law dower rights,¹⁰ the same principles or concepts apply with regard to statutory homestead rights. Depending primarily upon the wording and construction of the constitutional or statutory provisions for homestead, some states consider a conveyance by one spouse without the joinder of the other as completely void¹¹ while other states, like Wyoming, consider it void only to the extent of the homestead right.¹²

The interest of the wife in real property is readily protected by virtue of dower or homestead rights, but this does not answer the problem. Visualize the result dictated by the Wyoming rule as laid down in the *Stollendorf* case¹³ if the husband had conveyed real property valued at \$100,000. It is small consolation to the widow to have her homestead right protected in the form of a lien on the property in the amount of the homestead right of \$4,000,¹⁴ but allow the deed to remain valid as to the balance, thereby depriving her of her elective or statutory distributive share in decedent's estate amounting to \$50,000 or more.¹⁵ This then brings us to the true problem. Since forced heir statutes provide for a legal share in the estate of the decedent, under what circumstances will an inter vivos transfer be considered ineffectual to take the property out of the estate of decedent so as to defeat the claim of the surviving spouse? Insofar as homestead rights may be very inadequate protection for a widow's share of a large estate of real property, they are even less adequate to protect the widow's share when the bulk of the estate may be personal property. The widow has a present interest in the real property by virtue of her homestead right,¹⁶ and could conceivably contest the validity of a conveyance of such property by her husband without her consent. But, although the law will allow the widow the value of the homestead exemption in personal property if real property is not part of the decedent's estate,¹⁷ she has no present interest in her husband's personal property during his lifetime which she may assert in challenge to any conveyance he might make inter vivos. The problem becomes even more acute with the realization that in our present society, the average decedent's estate is composed of cash, credits and securities rather than real estate. Since there is no statutory restrictions re-

9. *Supra* note 2. Twenty-two states have retained common law dower.

10. *Supra* note 2. Fourteen states have expressly abolished common law dower and have substituted homestead rights therefor.

11. *Wise v. Thomas*, 117 Colo. 376, 188 P. 2d 444 (1948); *Marr v. Bradley*, 239 Minn. 503, 59 N.W.2d 331 (1953).

12. *Hughes v. Han*, 209 Miss. 293, 46 So. 2d 587 (1950); *Stollendorf v. Stollendorf*, *supra* note 5.

13. *Supra* note 5.

14. Wyo. Stat. § 2-217 (1957).

15. Wyo. Stat. §§ 2-37, 2-47 (1957).

16. Wyo. Const. art. 19 § 9; Wyo. Stat. § 34-53 (1957).

17. Wyo. Stat. § 2-213 (1957).

quiring joinder by the spouse in a conveyance of personal property, the widow is relegated to an assertion of the nebulous and elusive remedy of "fraud upon the marital rights" to supply the support and maintenance to which our public policy declares her to be entitled.

In the Maryland case of *Hays v. Henry*¹⁸ decided in 1848, the chancellor laid down the rule as follows:

if the disposition by the husband be bona fide, and no right reserved to him, then, though made to defeat the claim of the wife, it will be good against her, because an act cannot be denounced as fraudulent which the law authorizes to be done. But if it be a mere device or contrivance by which the husband, not parting with the absolute dominion over the property during his life, seeks at his death to deny his widow the share of his personal estate which the law assigns to her, then it will be ineffectual against her.

The court decided the case in favor of the wife on the basis of the control reserved to the husband in the trust deed. The court conceded that, had the husband conveyed the property absolutely, by sale or gift, together with relinquishment of possession, the conveyance would have been valid even though done with the express purpose of depriving the widow of her share of his estate; but, they chose to rest their decision not upon equities, but upon retention of control.

In a later Maryland case of *Rabbitt v. Gaither*,¹⁹ the court construed the holding of the *Hays* case²⁰ as meaning that the bona fide transaction referred to in the rule had no reference to the intent or good faith on the part of the husband toward his wife, but rather to the transaction between the husband and his donee or grantee. The transfer itself must be bona fide, meaning absolute and unconditional, and not "colorable merely". The rule thus established that the husband's right to convey his personal property was inviolate, regardless of its effect upon his wife's right to share in his estate upon his death, and regardless of the husband's intent and purpose towards his wife, so long as the conveyance itself was absolute. This is the rule supported by the apparent weight of authority at the present time.²¹

At approximately the same time the Maryland courts were establishing much of the precedent still relied upon today, the Vermont courts were also struggling with the problem of marital rights. In the case of *Thayer v. Thayer*

18. 1 Md. Ch. 337 (1848).

19. 67 Md. 94, 8 A. 744 (1887).

20. *Supra* note 18.

21. *Dunnock v. Dunnock*, 3 Md. Ch. 140 (18); *Feigley v. Feigley*, 7 Md. 537 (1855); *Poole v. Poole* 96 Kan. 84, 150 Pac. 592 (1915); *Thuet v. Thuet*, 260 P.2d 604 (Colo. 1953); *Holzbeierlein v. Holzbeierlein*, 91 F.2d 250 (D.C. 1937); *Cheatham v. Sheppard*, 31 S.E.2d 457 (Ga. 1944); *Beirne v. Continental-Equitable Trust Co.*, 161 A. 721 (Pa. 1932); *Leonard v. Leonard*, 63 N.E. 1068 (Mass. 1902); *Milewski v. Milewski* 114 N.E.2d 419 (Il. 1953); *Wright v. Holmes*, 62 A. 507 (Me. 1905); *West v. Miller*, 78 F.2d 479 (Mo. 7th Cir. 1935).

er,²² the husband conveyed real property in trust for his children by a former marriage. It should be noted that Vermont had abolished the common law dower²³ and had provided by statute a dower interest in real estate to the widow of a deceased person. The court held in favor of the widow on the ground of fraud. The court concluded that

the oratrix had, in the lifetime of her husband, such rights as should be recognized, protected and enforced; that the attempt to elude these rights, in the manner disclosed in this case, was mala fide, and a fraud upon the law and upon the marital rights of the oratrix, and that, as a consequence, the husband, so far as respects the widow, must be regarded, at the time of his death, as being the owner and having the seizin of the property in question.

This construction of the statute granting a present interest in real property was in accord with common law doctrines.

In a subsequent Vermont case of *Nichols v. Nichols*,²⁴ the court again held for the widow on the ground of bad faith or fraud implied from the intent of the husband to deprive the widow of her rights to share in his estate. The holding of the *Thayer*²⁵ case was construed to mean that the marriage relation created certain vested rights which would be protected by law, and since a conveyance of his property by the husband had the inevitable consequence of depriving the widow of her share of that portion of his estate conveyed, fraudulent intent would be implied from the knowledge of this unavoidable consequence imputed to the husband and his grantee.

The extreme position established by the *Nichols* case²⁶ was modified by *Dunnett v. Shields*.²⁷ The fraudulent intent cannot be implied, but must be

22. 14 Vt. 107, 39 Am. Dec. 211 (1842).

23. *Dunnett v. Shields*, 123 A. 626, 630 (Vt. 1924). "The interest during coverture in the husband's property is not a vested interest. A statute enacted in 1797 gave the widow of a deceased person as dower the use during the term of her natural life one-third of the real estate of which he died seized in his own right. R. 1797, p. 225, § 32." *Thayer v. Thayer*, 14 Vt. 107, 39 Am. Dec. 211, 213, 214 (1842). "The common law doctrine of dower in all the lands of which the husband was seized during coverture, was considered by this, and some of the other states, as an unreasonable and unnecessary clog upon the free alienation of estates, and, as the usual course is for the wife, upon an alienation, to join with the husband in the conveyance, of little practical use. If the husband is required to act in good faith, this change in the law does not essentially impair the rights of the wife for a support during widowhood. If, however, her claims to dower are to depend upon the caprice of the husband, and to be superseded by his conveyance, concocted and executed mala fide, and without consideration, our statutory provision might well receive our severest animadversion. . . . Most certainly the rights of dower, under our law, during coverture, cannot be more fragile than at common law . . ." The conveyance in this case was made in contemplation of death without consideration. The court concedes that the wife's right must exist during coverture to be protected from inter vivos conveyance by the husband. They base their decision upon an analogy to a conveyance of property prior to marriage, which defeats the consideration on which the contract of marriage is founded. They reason that if the wife has rights existing in the husband's property prior to marriage, they must continue as present rights existing during coverture.

24. 61 Vt. 426, 18 A. 153 (1889).

25. *Supra* note 22.

26. *Supra* note 24.

27. 97 Vt. 419, 123 A. 626 (1923).

actual intent. The intent of the husband in all such cases is the true test of the validity of the transaction. If it be done with a fraudulent intent as to the wife, the transaction is invalid.²⁸ The court criticized the use of the words "vested right" as being "unfortunate and inaccurate" and said what the court really meant was that the wife, during the life of the husband, has such an interest in his property as the law recognizes and protects.

This interest, correctly defined, is not a present estate in his property, but it gives her an equitable right of action to protect her against any conveyance thereof, made by him with fraudulent intent to deprive her of such rights therein, as by statute would accrue to her at his decease.²⁹

The rules of the Vermont cases³⁰ can be applied properly if limited to conveyances of real property. The Vermont statute created a homestead right in lieu of the former common law dower right. The court construed the statute to create a presently existing property interest which attached to the real estate owned by the husband during his lifetime. The right belongs to the wife and could not be conveyed by the husband without her knowledge or consent, and for him to do so was a violation of her rights which the law could and would protect. In this context, the reasoning that the conveyance by the husband, with the intent to deprive the wife of her interest in the property, was actual fraud against the wife can be justified. But to hold that conveyance of personal property, in which the wife has no existing claim or right, is fraud upon the wife is unsound in logic and in law.³¹ There can be no invasion or injury or violation of a right which does not exist.³² When

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28. *Green v. Seaver*, 59 Vt. 602, 10 A. 742, 747 (1887). "It is settled, as was said in the argument, that the law imposes no restraint upon the husband in the free and unlimited exercise of his right to alienate his personal property at will, and his real estate also, except his wife's homestead and dower right therein, even though, in the exercise of this right, he strips himself of all means of supporting and maintaining his wife, provided he does so bona fide, and with no design of defrauding her of her just claim upon him and his estate; the intent, in all such cases, being the true test of validity of the transaction. If it be done with a fraudulent intent as to the wife, the transaction is invalid, and she may assail the same under the statute." This case, cited as authority for the rule that the intent of the husband toward his wife is the test of fraud, arose from a conveyance by the husband in contemplation of a divorce action by his wife. The court held that the conveyance was within the scope of a statute which provided protection for creditors against fraudulent conveyances to defeat their creditor rights. Compare *Norris v. Bradshaw*, 45 P.2d 638 (Colo. 1937) for discussion of wife's rights as a creditor; *Walker v. Walker*, 31 A. 14 (N.H. 1891) where court speaks of marriage as equivalent to a pecuniary consideration as actual purchase of her distributive share in husband's estate.
29. *Supra* note 27 at 630.
30. *Supra* notes 22, 24 and 27.
31. *Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d 966 (1937); *Clavin v. Clavin*, 41 N.Y.S. 2d 377 (1943).
32. *Wright v. Holmes*, 100 Me. 508, 62 A. 507 (1905); *Martin v. Martin*, 138 S.W.2d 509 (Ky. 1940). (In *Martin v. Martin supra*, the court concedes that the majority of jurisdictions distinguish between real and personal property, and that no present right exists in personal property which can be violated, even though Kentucky holds to the contrary.)

applied to personal property, the only possible application for the test of fraud is as it relates to the transaction between the grantor and grantee, and thereby affects the rights of the widow when they arise upon the death of the husband-grantor. In this context, the question becomes one of collusion between the grantor and grantee, which in turn suggests the test as applied by the Maryland courts.³³ In the final analysis, it becomes a question of whether the conveyance is absolute and unconditional, or is illusory or colorable. Having thus traveled full circle of the test as laid down in *Hays v. Henry*,³⁴ the construction placed on the test by *Rabbitt v. Gaither*³⁵ appears to be the most logical, more readily justified in terms of substantive property law, and more easily applied. The bona fide transaction referred to in the rule had no reference to the intent or good faith on the part of the husband toward the wife, but rather to the transaction between the husband and his donee or grantee.

Many cases determine the validity of the transfer of property on whether the transfer was illusory or "colorable" rather than absolute. Whether the transfer is illusory or "colorable" in turn depends primarily upon the amount of control over the property retained by the grantor or donor. Although some decisions are phrased in terms of the donor's intent, or motive³⁶ as indicating fraud, the true basis of the decision is the retention of sufficient control over the property as to effectively retain all the benefits of ownership and to relinquish legal title only. In *Kerwin v. Donahy*,³⁷ the limitation that a conveyance or gift must not be "colorable" meant that it must be legally binding upon the settlor or donor. The test seems to be whether "from a technical point of view such a conveyance does not take back all that it gives, but practically it does."³⁸

The contention that the deed was voidable because it was an illusory transfer, testamentary in nature, and deprived the plaintiff of a widow's election right, was raised in the Wyoming case of *Stoll Dorf v. Stoll Dorf*.³⁹ As mentioned previously, the court was able to avoid deciding the issue directly because the plaintiff had cited precedent for the contention which had been overruled and was no longer law. However, the court did refer to two prior Wyoming decisions as partially answering the question. A deed conveying real property from the mother to her son was held valid over a contention that it was testamentary in nature, even though the deed was found among the deceased grantor's effects and contained a provision upon the face of the instrument that it was to be null and void unless, within one year after the grantor's death, the grantee paid certain sums of money to designated persons. The court found an intent at the time of execution to pass a present

33. *Supra* notes 18 and 19.

34. *Supra* note 18.

35. *Supra* note 19.

36. *Milewski v. Milewski*, 114 N.E.2d 419 (Ill. 1953).

37. 317 Mass. 559, 59 N.E.2d 299 (1945).

38. *Leonard v. Leonard*, 181 Mass. 458, 63 N.E. 1068 (1902).

39. *Supra* note 5.

interest in the property, from the words of the instrument, and held this sufficient to prevent the deed from being testamentary.⁴⁰ In *Forbs v. Volk*⁴¹ a deed was held valid and not testamentary in nature although the grantor, subsequent to the execution of the deed, continued to reside in a store on the premises, paid a mortgage against the property, built and paid for a house and garage on the property and collected the rent therefrom, reimbursed the grantee for taxes paid, attempted to sell the property on several occasions and listed it for sale with three different parties, paid the insurance premiums on the property and collected for hail damage. These decisions clearly indicate that a grantor may retain many of the benefits of ownership, or much control over the ultimate disposition of the property, and still make a valid and effective conveyance of property in Wyoming. The court looked not to the equities, but only to the legal requirements for a valid conveyance, intent to pass a present interest and delivery.

The cases are quite generally in accord that retention of a life estate in the property conveyed is not sufficient to render the conveyance ineffective when challenged by the surviving spouse.⁴² Inter vivos trusts, which form a great bulk of the litigation in this area are held valid with few exceptions, when the trust is irrevocable, though the settlor retains the income from the trust for life.⁴³ A majority of jurisdictions hold the trust to be valid and beyond the claim of the surviving spouse, when the settlor retains income for life and the power to revoke, the power to change beneficiaries or to alter their beneficial interests.⁴⁴ It is when the settlor retains the power to supervise the actions of the trustee or to control the trust property that some courts have declared the trusts illusory and invalid.⁴⁵

The placing of such emphasis on the retention of control over the management of the trust corpus is questionable, because as pointed out in *Farkas v. Williams*⁴⁶ the power to consume the principal, the power to sell the property and appropriate the proceeds, the power to appoint or remove the trustees, the power to supervise and direct investments, or the power to supervise the trustees in the administration of the trust could all be accomplished by the simple expedient of revocation. The settlor who retains the power to revoke retains all the power necessary to effectively control the property and to dispose of it as he sees fit at any time prior to death. This is the position taken by the Internal Revenue Service in establishing estate

40. *Watts v. Lawrence*, 26 Wyo. 367, 185 Pac. 719 (1919).

41. 358 P.2d 942 (Wyo. 1961).

42. *Leonard v. Leonard*, *supra* note 38.

43. *Windolph v. Girard Trust Co.*, 91 A. 634 (Pa. 1914).

44. *Beirne v. Continental-Equitable Trust Co.*, 161 A. 721 (Pa. 1932); *National Shawmut Bank v. Cummings*, 91 N.E.2d 337 (Mass. 1950).

45. *Newman v. Dore*, *supra* note 28; *Smith v. Northern Trust Co.*, 32 Ill. App. 168, 54 N.E.2d 75 (1945); *Compare Ascher v. Cohen*, 131 N.E.2d 198 (Mass. 1956) where settlor retained power to revoke, power to invade the principal, or to alter the terms of the trust, and the income for life, as well as naming herself co-trustee to supervise investments.

46. 5 Ill. 2d 417, 125 N.E.2d 600 (1955).

tax liability. The trust assets are considered as part of the settlor's gross estate for tax purposes if settlor has retained a life estate,⁴⁷ a general power of appointment,⁴⁸ or a right to revoke.⁴⁹

When retention of control has been found sufficient to declare the trust invalid, the courts have taken divergent views as to what the consequences should be. The New York⁵⁰ and Illinois⁵¹ courts have declared the trust invalid as to the surviving spouse, thereby allowing her to claim her elective share out of the trust assets, but allow the balance of the assets to pass under the terms of the trust. The Ohio courts have declared that the trust is either valid or invalid.⁵² If invalid, because the conveyance of the legal title was illusory, the entire trust assets revert to the settlor's estate and pass by will or by intestacy. Thus the wife is granted her elective share of the settlor's estate in accordance with the statutory procedure. Under the doctrine adopted by the New York and Illinois courts, when the wife is designated as a beneficiary of the trust, a problem arises when she is allowed to remove her statutory elective share from the trust assets. Does this terminate her interest in the trust or is she allowed to receive her elective share and also remain a trust beneficiary? If her interest in the trust is terminated by her election against the trust, how is her proportionate share of the trust assets distributed? That the conveyance is either valid or invalid against the claims of the whole world is obviously the better reasoning.

Some states have taken steps to offer more substantive protection for the rights of the surviving spouse than reliance upon judicial interpretation and discretion. Eight states have enacted community property laws which give each spouse an equal share in all property acquired during coverture.⁵³ Recognizing the fact that protection of marital rights by means of the forced heir statute was incompatible with substantive rules of property law, Pennsylvania enacted a statute which allows the wife to elect to treat a trust with right of revocation or power of appointment as testamentary for purposes of her distributive share.⁵⁴ Since "self-interest generally prevents a person from stripping himself of all control over his wealth during his lifetime in order merely to spite his wife",⁵⁵ the inter vivos trust offers the best device for conveying legal title while still retaining the benefits of ownership. Although the Pennsylvania statute does not protect the wife from gifts or sales made by her husband, it does offer protection against this very common form of inter vivos conveyance.

47. Int. Rev. Code of 1954 § 2036.

48. Int. Rev. Code of 1954 § 2041.

49. Int. Rev. Code of 1954 § 2038.

50. Newman v. Dore, *supra* note 31.

51. Smith v. Northern Trust Co., *supra* note 45.

52. *Supra* note 7.

53. *Supra* note 2. The states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington.

54. 20 Pa. Stat. Ann. § 301.11 (1947).

55. Smith, *Trusts—Descent and Distribution—Wife's Forced Share and an Inter Vivos Trust*, 60 Mich. L.R. 1197, 1198 (June, 1960).

CONCLUSIONS:

The mass confusion which exists in the case law concerning this problem results primarily from a failure or a refusal of some courts to distinguish between real and personal property, and at the same time attempting to justify their decisions by the application of common law doctrines.⁵⁶ Common law dower attached to real property as an incident of marriage. It created a "protected expectancy".⁵⁷ This protected expectancy was a present interest in the land in the sense that it could not be conveyed by the husband without the consent or joinder of the wife. In an agrarian economy where land was the principal source of wealth, this was an adequate and effective means of providing social and economic security for a widow who was not considered an heir of her deceased husband, and who otherwise would have no means of support after his death.

The inclusion of the widow as a legal heir is statutory. Granting to the widow by means of elective or forced heir statutes a statutory share of her deceased husband's estate, both real and personal, had no counterpart at common law. They were made necessary by the decline of land as a common source of wealth, thus causing dower to become an inadequate and ineffective means of protecting the surviving widow. But these statutes operate only upon the decedent's estate; the property which he owned at the time of his death. These statutes were not meant to limit or prohibit inter vivos conveyances of property, and to confuse them with dower or homestead rights, or to attempt to use them for this purpose leads only to a perversion of substantive property law and complete desecration of *stare decisis*.

There are two basic tests applied by the courts in arriving at their decisions. Although couched in varied terminology, the decisions are based upon either (a) fraud, or (b) retention of control over the property conveyed by the grantor. Those courts which apply the fraud test are split over how it should be applied. Those which say that collusion between the grantor and grantee, whereby the grantor is able to retain all of the benefits of ownership during his lifetime and relinquish these benefits only by his death, is fraud, are in reality saying merely that the grantor has retained sufficient control to make the conveyance invalid. In the final analysis, the cases may be distinguished between those which hold that a conveyance of property by the husband is a fraud going to the marital rights of the wife, because of the inevitable consequences of thereby depleting his estate, and those which hold the conveyance valid or invalid, wholly upon whether sufficient control was retained to make the conveyance illusory.

56. "Our first basic consideration is the distinction between real and personal property. . . . There is a genuine difference in kind between these two categories of property and all systems of law take some notice of the cleavage. . . . Artificial distinctions which obfuscate the law and complicate its practice should be abolished but the real difference should never be lost to sight." Cribbet, *Principles of the Law of Property*, 9-10 (1952).

57. Moynihan, *Introduction to the Law of Real Property*, 55 (1962).

Those courts which hold an inter vivos conveyance of personal property as constituting a fraud going to the marital rights of the wife, in the absence of statutory authority other than elective or forced heir statutes, are guilty of judicial legislation. Fraud is an all-inclusive, nebulous term, difficult to define, and often used for want of a better description for a wrong. Hundreds of years ago we were told that "the devil himself knoweth not the mind of man." One simple definition by Black⁵⁸ calls fraud a "breach of a legal or equitable duty". There must be an existing right and a violation thereof. The wife had no existing right in the personal property of her husband at common law. The rights created by forced heir statutes do not exist during the life time of the husband. A man with a \$500,000 estate does not need his wife's joinder in the conveyance if he chooses to give his children \$10,000. But, if the same donor made a gift of \$350,000 to the same donee, or made the \$10,000 gift to his mistress, the courts who apply the fraud test would be quick to set the gift aside. This raises the simple question, does the wife have a right in the donated property or not? If so, she should be required to release those rights by joinder in the conveyance, regardless of whether the gift was \$10,000 or \$350,000, and regardless of the relationship of the donee. If her rights exist, they should attach to all property, and her joinder should be required for all conveyances. It should not be left to the whim of the court to decide which wife has rights and which does not, or when and to what property those rights attach. The courts should not be left to apply these ambiguous, judicial "community property" laws at their discretion. They should not be made to confess a higher proficiency than the devil in knowing the minds of men.

Retention of control of the property conveyed, as a test for determining the validity of the conveyance, although ambiguous, at best, is more susceptible to uniform application. The increasing use of the inter vivos trust in estate planning has developed a more liberal attitude toward retention of control by the grantor,⁵⁹ resulting in greater difficulty in applying the test when attempting to protect the surviving widow by having an inter vivos conveyance declared invalid. But at least it can be applied with equal uniformity to both real and personal property, and it does not depend upon non-existent "rights" for justification.

If the social and economic security for the surviving widow and children sought to be established by adoption of elective or forced heir statutes and dower or homestead rights is to be effective, it will require legislation governing inter vivos conveyances. Admittedly, it would be impossible to provide for all conceivable situations by statute, and legal ingenuity would undoubtedly devise means of avoidance. But in the absence of statutory guidelines, the misapplica-

58. Black, *Law Dictionary*, 789 (1951).

59. Restatement, *Trusts* § 57 (1935). Cf. Restatement (Second), *Trusts* § 57 (1959).

tion of precedent, the avoidance or application of substantive law as fits the equities, and the use of question-begging formulas such as fraud can only result in compounding the already overwhelming maze of confusion in the case law.⁶⁰

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60. See MacDonald, *Supra* note 3 at 301 for his suggested Model Decedent's Family Maintenance Act.