The foremost difficulty in the present status of foreign corporation jurisdiction and qualification is that the laws in too many instances lag behind the constitutionally permitted opportunities that have been made available to accommodate modern needs. States, whether by statute or decision, or both, should take advantage of the greater jurisdiction made available by the recent constitutional developments. Concomitantly with this increase in jurisdiction, the qualification policy and especially the techniques of enforcement are in need of review. Perhaps qualification should remain "behind" jurisdictional standards as is the usual case today. Or perhaps a state will decide that the activity standard for qualification should approximate that for jurisdiction, especially if the no-suit sanction is eliminated and the fines for noncompliance are reduced. In either event the enforcement of qualification should be left entirely in the hands of the state. The non-jurisdictional benefits and the advantages of "automatic" jurisdiction from qualification can be acquired through the utilization of positive sanctions, now sufficiently efficacious since the infirmities of judicial jurisdiction have been significantly reduced. Reasonable pecuniary penalties could satisfactorily compensate the state for this burden of enforcement. If the no-suit sanctions are to be retained in any form, then the "subsequent compliance" type would seem clearly preferable.

THE EFFECT OF FORCED SHARE STATUTES ON INTER VIVOS CONVEYANCES OF PERSONALTY

The law has long favored the policy that some type of provision should be made for the support of a widow. This has commonly been accomplished by setting aside, for the benefit of the widow, a fixed portion of the deceased husband's estate. The evolution of this policy is both long and varied, with its most familiar manifestation being found in common law dower.[1] Dower, however, is no longer the most common means of its accomplishment. In a majority of states, a contemporary statutory scheme which utilizes a modified form of dower or a "forced heir" arrangement has replaced the common law estates of dower.[2] As a consequence of this legislative trend, the widow, in many instances, has been classified as an heir—an heir which the husband cannot exclude in

1. See Cahn, *Restraints on Disinheritance,* 85 U. PA. L. REV. 139 (1936).
2. 3 VERNIER, AMERICAN FAMILY LAWS, §§ 188, 189 (1935); Cahn, *Restraints on Disinheritance,* 85 U. PA. L. REV. 139 at 141 (1936).

his will. The Model Probate Code explains this transition by pointing out that not only did dower tend to restrain the free alienation of property, but that it also has become relatively ineffective in accomplishing the desired results.[3]

Conceding that a husband cannot make a testamentary disposition which excludes his wife, the question remains whether he can, nevertheless, exclude his wife by other means—namely those which are available in the form of inter vivos conveyances. This determination depends on whether the surviving wife has a basis for challenging the validity of her husband's inter vivos conveyances. The situations in which this problem has arisen have, in almost every instance, been those which involved a gratuitous inter vivos conveyance, either directly or in trust, made by the husband, to a child or other expectant heir. Therefore, in the following discussion, only this type of transfer shall be considered.

A reasonable estimate of the finality which the law attaches to such conveyances cannot be made until the policies embodied in the pertinent sections of the 1953 Probate Code are thoroughly evaluated. Sections 202 and 203 confer what has been termed the "widow's inchoate interest";[4] an interest which, in substance, is a statutory form of dower. With the exception that the statutory expectancy may subsequently become an interest in fee simple (common law dower conferring only an estate for life), the interests conferred by common law dower and Indiana's statutory form of dower are virtually identical. It is reasonable to deduce that the motivating policy which underlies the present statutory interest should be the same policy which prompted the original development of common law dower—the salutary policy of providing the widow

3. The comments to section 31 of the *Model Probate Code* point this out as the reasons for recommending the abolishment of the estates of dower and curtesy. Indiana has had such a provision since 1852 R.S. 1852 c. 27, § 16, p. 248, IND. ANN. STAT. § 6-211 (Burns 1953).

4. "Inchoate interest of widow.—(a) Any interest acquired by the widow in the decedent's real estate, including contracts for the purchase of real estate, whether by descent or devise, not exceeding one-third [1/3] of said decedent's real estate, shall be received by her free from all demands of creditors: . . ." IND. ANN. STAT. § 6-202 (Burns 1953).

"Inchoate interest of widow—How barred.—No act or conveyance, performed or executed by the husband without the assent of his wife, evidenced by her acknowledgment thereof in the manner required by law; nor any sale, disposition, transfer or encumbrance of the husband's property, by virtue of any decree, execution or mortgage to which she shall not be a party (except as provided otherwise by law), shall prejudice or extinguish the right of the wife to her third [1/3] of any real estate owned by him during the marriage except to the extent that she may have, pursuant to sections 213 or 306 of this code, entered into a binding written contract, agreement, or waiver thereof, or preclude her from the recovery thereof, if otherwise entitled thereto." IND. ANN. STAT. § 6-203 (Burns 1953).

a means of support.[5] The legislature was prompted to change the form of the wife's interest because common law dower tended to obstruct the free alienability of property.[6] It therefore seems apt to characterize the present form of statutory dower as a compromise between two conflicting, but socially desirable, principles: namely, the alienability of property and the providing of support for the widow.

Section 301 gives to the surviving spouse a power of election, a power whereby she may renounce the will of her deceased spouse taking in lieu thereof one-third of the realty and personalty included in the net estate.[7] The surviving spouse, therefore, becomes a forced heir which a testator cannot totally disinherit. To this limited extent, section 301 is coercive upon the free will of a testator; no longer may he retain the control and enjoyment of his property until his death with the anticipation of excluding his spouse from participating in its disposition at that time.

There is no disputing the effect of section 301 where such a disposition is attempted by will; clearly such a will is voidable if the surviving spouse exercises the election prerogative.[8] This in itself, however, does not reflect a complete recognition of the policy ramifications which are inherent in this section. For instance, certainly no one would contend that the prohibition of this section is based solely upon a legislative distaste for the use of a will as a dispositive instrument. The purpose of this prohibition is more than the prohibition of a device; it is the prohibition of a result which, prior to the section's enactment, could be obtained by the use of that device. The proscribed result is the attempted disinheritance of the surviving spouse where a decedent has retained for his own use and enjoyment the control and dominion of his property until the time of his death.[9] Thus, the policy of this section may be sum-

5. In Staser v. Garr Scott & Co., 168 Ind. 131, 79 N.E. 404 (1906), the Indiana Supreme Court indicates that the interest conferred under §§ 202 and 203 is an extension of common law dower, and as such is interpreted in light of dower. See also SCRIBNER, DOWER c. 1 and HENRY, PROBATE LAW AND PRACTICE c. 30, § 2 (6th ed. 1954).

6. "Dower and Curtesy abolished.—The estates of dower and curtesy are hereby abolished." IND. ANN. STAT. § 6-211 (Burns 1953).

7. "Election to take against will of deceased spouse.—When a married person dies testate as to any part of his estate, the surviving spouse shall have a right of election to take against the will under the limitations and conditions hereinafter stated.

(a) The surviving spouse, upon election to take against the will, shall be entitled to one-third [1/3] of the net personal and real estate of the testator: . . ." IND. ANN. STAT. § 6-301 (Burns 1953).

8. IND. ANN. STAT. § 6-301 (Burns 1953).

9. In a testamentary disposition, the testator has retained the ownership of his property until his death. At his death, if he seeks to distribute this property to the exclusion of his surviving spouse, § 301 allows the surviving spouse to renounce the will and claim under the law. This mandate is to prevail regardless of the testator's manifested intent or desire. Thus, this is a legislative determination that a spouse shall

marized: If a man chooses to own property, he must accept his ownership subject to the incidents legally imposed by the state. One such incident is that if one retains his property until his death, he must share a portion of it with his surviving spouse. Justification of this policy is twofold: not only does it secure a minimal means of sustenance to the surviving spouse, but it also tends to relieve the state of providing support in situations where the surviving spouse is unable, because of advanced age or infirmities, to provide her own support.[10]

The particular mischief which section 301 seeks to proscribe is that of property dispositions, including both realty and personalty, which attempt to exclude the surviving spouse while reserving to the grantor an effective means of use, control, and dominion until the time of his death. The means of accomplishing this result are only a subordinate consideration; therefore, an inter vivos transfer which accomplishes this result may likewise be within the prohibition of this section. The interpretation of section 301 should be calculated to prevent circumvention of its obvious policy. Therefore, regardless of the means employed, if the result is identical to that prohibited by the use of a will in section 301, then those means should also be prohibited by section 301.[11] The comments to section 31 of the *Model Probate Code* (that estates of dower are frequently ineffective in carrying out the purpose for which they were created) show that the suggested interpretation of section 301 is not a

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not be disinherited. Therefore, it logically follows that the prohibition is of a result—not a mere means for accomplishing that result.

10. These are reasons which have been offered in justification of dower; they seem equally appropriate for justification of the interpretation of § 301 suggested above. See SCRIBNER, DOWER c. 1; HENRY, PROBATE LAW AND PRACTICE c. 30, § 2 (6th ed. 1954), for a discussion of these reasons as related to dower.

11. By this it is not urged that the section should be interpreted to give the wife a dower type interest in the personalty of her husband. This would seem undesirable; rather, it is urged that the interpretation of § 301 which is adopted should be one calculated to prevent circumvention of the obvious policy of that section. Such an interpretation would not be a strained one, inasmuch as it is the result which the legislature seeks to prohibit and not the mere device employed to accomplish that result. In support of this line of reasoning is the familiar maxim of equity—one may not do indirectly that which he cannot do directly. The Indiana Supreme Court expressed this very thought when it said: "It is a well-settled rule that a matter which is within the intent or spirit of a statute is as much within the law and the same in effect as if it were within its express letter." Board of Commissioners of the County of Clinton v. Given, 169 Ind. 468, 477, 80 N.E. 965 (1907). This was the precise line of reasoning invoked by the court in Sharp v. State of Indiana *ex rel.* Board of Commissioners of the County of Kosciusko, 54 Ind. App. 182, 194 (1913), where it was held that the defendant could not do indirectly that which he could not do directly. What he could not do himself he could not do by the means of an agency. Continuing, the court quoted from MAXWELL, INTERPRETATION OF STATUTES, (2d ed.), p. 133, "It is the duty of the judge to make a construction as shall suppress all evasions for the continuance of the mischief. To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do or avoid in an indirect or circuitous manner that which it has prohibited or enjoined."

misapplication of this support concept. The Indiana Probate Code, by continuing a statutory form of dower, demonstrates a clear intent to continue a means of providing support for the widow. The fact that such means are rendered less effective by the social and economic change in the type of property owned, strongly urges that section 301 be liberally interpreted to cope with this change.[12] Few Indiana cases have dealt with this proposition.

In *Pond v. Sweetser,* the court said, "[T]here is nothing in the law of this state which in any manner restricts his [the husband's] power of disposition during his life. In what he dies possessed of she [the wife] has an interest, but during life he may dispose of it by gift or otherwise, to the exclusion of any claim on her behalf."[13] There seems to be no dissent from this general proposition except in those few instances where the wife attains the status of a creditor.[14] The law merely requires that in disposing of one's property he do so in a manner which is not offensive or inconsistent with public policy; *e.g.,* he may not unduly suspend the power of alienation, create spendthrift trusts in his own behalf, or provide for an excessive period of accumulation. However, if one makes a complete and absolute inter vivos transfer of personal property consistent with public policy, the transfer is valid and impervious to any attack regardless of the motives which may have prompted the grantor.[15]

12. In this respect it should be remembered that the policy dower seeks to fulfill is that of providing support for the widow. The fact that realty was the only type of property which was subjected to this burden is explainable in part, if not in toto, by the fact that little if any personalty existed when the doctrine of dower was created. The wealth of society was in land; as a matter of everyday experience, we know that this is no longer true. Therefore, if the policy is to continue, it is only logical that the means employed to fulfill this policy must be suitable to cope with this change. There is nothing sacred about personalty which should render it immune to this policy, it can be charged with the responsibility of providing support for a widow as easily as realty.

Because a statutory form of dower is retained, it may be inferred that this shows a legislative intent that such provision should be considered the sole means for fulfilling the policy of dower. While such an implication can be drawn from the fact that §§ 202 and 203 are retained in our present Code, it is equally maintainable that the three sections (202, 203 and 301) were intended to create a scheme which would confer the maximum of desirable results in light of our contemporary needs.

13. 85 Ind. 144 (1882).

14. When a husband and wife are divorced, the wife attains the status of a creditor in respect to any alimony payments which the court has awarded her. Bishop v. Redmond, 83 Ind. 157 (1882). The wife is also a creditor where she is claiming under the statutory dower provisions; she is said to take such interests as a purchaser with the marriage serving as the consideration, May v. Fletcher, 40 Ind. 575 (1872); Derry v. Derry, 74 Ind. 560 (1881); Staser v. Gaar, Scott & Co., 168 Ind. 131, 79 N.E. 404 (1906).

15. This is basic law, law which cannot be changed without modifying or abandoning the concept of free alienation of property. In a commercial society this would be disastrous; the freedom and security of the commercial transaction is vital and fundamental. Nevertheless, in applying this concept of free alienation, its importance and desirability must not be allowed to distort the basic issues to the point that the concept

Public policy may limit this power of alienability. Where creditors are permitted to upset the gratuitous conveyances of their debtors, the concept of free alienation gives way in order that other values may be preserved. Similarly, it is urged that gratuitous conveyances which diminish the net estate out of which the widow's interest will be taken should not be treated as valid per se, but should be subjected to a close scrutiny in order to insure that they are in fact absolute, both in subtsance as well as in form. This is the mandate inherent in the policy of section 301.

A similar approach was taken by the court in interpreting section 3025,[16] which was the predecessor of section 301. In a precedent making opinion,[17] the court held invalid an inter vivos trust insofar as it affected the interests of the surviving wife. The decedent, a very wealthy man of advanced age and in poor health desired to create a charitable trust for the poor people of Crawfordsville, Indiana. After having made provisions for this trust in his will, the testator was advised that his wife, should she survive him, could frustrate his plans by exercising her power of election. In order to avoid this result the testator made inter vivos assignments of the numerous securities which were to form the trust corpus. All this was done a short time before the testator's death. The court in a rather long and not too clear opinion held that the transfer was not an inter vivos gift inasmuch as the proof was insufficient to show the donor intended an irrevocable gift. The court then discussed the transfer as a causa mortis gift. After reviewing the requirements of such a gift, the court concluded that a causa mortis gift does not vest absolute title in the donee at the time of delivery; instead, the donor remains "seized or possessed within the meaning of a statute giving dower in the personal property of which he [the husband] dies seized."[18] This conclusion is in accord with the views expressed by the Indiana Supreme Court in *Devol v. Dye*.[19] In drawing what is called the chief distinction between causa mortis and inter vivos gifts, the court said a gift inter vivos vests irrovocable title to the property at the time

is indiscriminately applied beyond its legitimate bounds—normally that of the commercial transaction. Much care should be used in applying this principle to transactions which it was not created to further, when in doing so other worthwhile values are jeopardized.

16. IND. ANN. STAT. § 3025 (Burns 1908).

17. Crawfordsville Trust Co. v. Ramsey, 55 Ind. App. 40, 100 N.E. 1049 (1913).

18. It is unfortunate that the court used the term "dower" in describing the interest which inured to the wife under the election statute. Dower in personalty is not a precise definition of the widow's interest. Dower is an interest which the husband cannot unilaterally destroy; the interests conferred by § 301 (3025 at the time of the *Crawfordsville* case) are not indestructable but are contingent and expectant. Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937).

19. 123 Ind. 321, 24 N.E. 246 (1889).

of delivery, whereas in causa mortis gifts the donee's title is "ambulatory and inchoate until the death of the donor." This would seem to mean that title does not pass until the time of the donor's death even though the donee receives actual or constructive possession of the property. Even in those jurisdictions which adopt the analysis that the delivery of a causa mortis gift effects a passage of title, the courts have held that the gift will not defeat the interests conferred by dower and election statutes.[20] Certainly, if under an analysis which holds that title has passed the wife can reach the property, then under a theory which holds that the title is still in the donor, the wife should be permitted to reach it. Therefore, regardless of how the technical question of when title passes may be resolved, the testamentary nature of a causa mortis gift should in itself be sufficient reason for bringing it within the prohibition of section 301.[21] Consequently, even though a causa mortis gift is perfected in every regard, the surviving wife can still render it ineffective, as to her, by exercising her right of election under section 301.

Had the court in the *Crawfordsville* case stopped with its causa mortis gift analysis, the precise foundation upon which the judgment rested would be clear. Instead, the court continued in an effort to support its interpretation of section 3025 (now 301) by concluding that regardless of the general rule as to the husband's power to make inter vivos dispositions of his personal property, "we think it equally well settled that there are some well defined exceptions to this rule." The court then quoted from court opinions of other jurisdictions. In these opinions, the courts had rested their decisions upon theories of fraud or illusory transfers, not upon a causa mortis gift analysis. In the first case cited, an inter vivos gift of securities was invalidated because the grantor had not parted with physical control. The donor had assigned the securities to his sons but did not surrender the actual possession. In return for this assignment, the father extracted their powers of attorney to assure himself complete control of the securities. Prior to his death, the father collected the dividends and interest, forwarded only those sums required by the needs of his sons, and expended the residue on his

20. For a very thorough discussion of the history and merits of the two opposing views, see Hatcher v. Burford, 60 Ark. 169, 29 S.W. 641 (1895).

21. The implied condition of revocation which is inherent in a gift causa mortis makes the disposition so nearly ambulatory, like that of a will, that the policy of the law should not differ in the two cases. SCHOULER, WILLS § 63; 3 REDF., WILLS 324, note; *cf. In re* Estate of Collinson v. McNutt, 231 Ind. 605, 106 N.E.2d 225 (1952), separate opinion of Bobbitt, J., where it is said, "There is no statutory law in Indiana regulating gifts causa mortis and it, therefore comes to us as part of the common law. . . . In considering any rule concerning the evidence required to establish a gift causa mortis, we should examine the public policy of our state on testamentary grants, as evidenced by our statutes, in order to secure a safe foundation on which to proceed."

own personal needs.[22] The court labeled the transfer a "mere device or contrivance" which could not succeed in defeating the wife's claim. In another case referred to by the court in the *Crawfordsville* case, a father conveyed to his children by a prior marriage the title to some slaves.[23] The surviving spouse renounced the decedent's will and alleged that he made the gift while in his last sickness, as a result of undue influence by his relatives, and for the sole purpose of defeating her marital rights. The court invalidated this transfer on the grounds that where the husband has enjoyed property to the fullest throughout his life, the law will not allow him to make a conveyance of that property at the approach of death for the purpose of defeating the interests which would have inured to the wife at the time of his death.[24]

In the first cited case, the test applied was the substance of the transaction; *i.e.,* was it a colorable or illusory transfer, a mere device to mask reality? In the second case, the test applied was the time of the transfer and the donor's motivating purpose. An interpretation of section 301 which would adopt this latter test—the time and intent (motive) test—would be an unwarranted expansion of the section's language, for the section envisions only a situation where the testator has retained control and dominion of his property until the moment of his death. The time and intent test, however, would strike down a transfer regardless of the fact that the donor had parted absolutely with all control in substance as well as form. The net effect would be a direct restriction of the power to make inter vivos transfers. This result, however, would

22. In this case, the court first attempted to establish a common law basis for allowing the wife to recover by referring to the customs of London: "Such, also, were the decisions under the ancient custom of London, from which our statute of distributions is said to have been borrowed. Thus in Hall v. Hall, 2 Vern. 277, it was held that if a freeman gives away goods in his lifetime, and yet retains the deed of gift in his own power, or retains the possession of the goods or any part of them, it is a fraud upon the custom, and will not conclude the widow. . . . The widow's claim for her share under the statute (statute of distributions) being strictly analogous to the claim of a widow of a freeman under the custom of London, if a contrivance to evade the rights of the widow under the custom was never tolerated, there is no reason why it should meet with more favor under the statute." The court then went on to find an additional basis for its decision, noting that the statute of 13 Elizabeth, c. 5 (adopted as part of the common law by New Hampshire) which sought to protect "creditors or others" from fraudulent conveyances included the widow within the terms "or others." Walker v. Walker, 66 N.H. 390, 31 Atl. 14 (1890).

23. Stone v. Stone, 18 Mo. 389 (1853).

24. It is interesting to note that in this case, the circumstances were such that a causa mortis gift analysis would have been very appropriate, the gift in trust being executed during the last sickness, just a few days prior to the donor's death. On the trial, it even appeared that the donor had said he was convinced that he had "consumption" and could not live long. Notwithstanding the nature of these facts, the court did not reason its result in terms of causa mortis gift, but adopted the broader and more inclusive theory of fraud on the marital rights.

not follow if section 301 were interpreted to prohibit only illusory or colorable transfers which create a result analogous to that prohibited by the restrictions imposed upon the use of a will in section 301—namely, those transfers which are absolute in form only. The legislature has not said, nor implied, that one cannot make an absolute inter vivos disposition of his personalty; at most, it has implied by the enactment of section 301 that circuitous devices which seek to accomplish an identical result identical to a testamentary should not be tolerated.[25]

In determining the propriety of the *Crawfordsville* decision,[26] the case of *Pond v. Sweetser*[27] must be compared. In the latter case, the court stated that a wife, under the then existing law, had no interest in her husband's personalty prior to his death. The court in the *Crawfordsville* case rejected the contention that the *Pond* case was a controlling precedent because the section conferring a power of election was not, at that time, in existence.[28] While this fact provides a valid ground for distinguishing the two cases, the court could have reinforced its position by bringing out the factual variations in such a way as to show that the decisions were not inconsistent. Had the court emphasized that the trust in the *Pond* case was created more than a year before the settlor's death, that it was made without any consideration of impending death, and that it was absolute in that the settlor was divested of all control and dominion, it could have shown that such a trust would have been valid even though the election statute then existed. Thus the court could have shown that the trust in the *Pond* case was precisely the type of inter vivos conveyance which the law recognized as valid, while the trust involved in the *Crawfordsville* case was the type of inter vivos transfer which was

25. Board of Commissioners of the County of Clinton v. Given, 169 Ind. 468, 80 N.E. 965 (1907); Sharp v. State *ex rel.* Board of Commissioners of the County of Kosciusko, 54 Ind. App. 182, 99 N.E. 1072 (1913); MAXWELL, INTERPRETATION OF STATUTES (2d ed.) p. 133.

26. The *Crawfordsville* case was decided in 1913; at that time there were five sections of the Indiana statutes controlling the interest a wife took when she survived her husband. Section 3013 abolished dower and curtesy estates. Section 3014 provided that a wife was to receive one-third of her husband's realty regardless of whether he died testate or intestate. Section 3025 provided a surviving wife with the power of election when her husband died testate; a one-third interest in the personal estate was assured her by this section. Section 3344 provided the minimum a wife was to inherit under the intestacy section was a one-third part in the personal property of her husband. Section 3349 provided a statutory form of dower to cover lands which the husband may have conveyed but in which the wife had not joined. Thus it seems that the substantive content of the various sections is the same as the content of the corresponding sections in the present Code. In substance, the present Code represents, at least in the portion pertinent to this discussion, a mere reorganization and clarification of the existing law.

27. 85 Ind. 144 (1882).

28. Section 3025 (Burns 1908) was passed in 1891. The *Pond* case was decided in 1882.

viewed as illusory and within the exception created by the statutory change. Moreover, if one is willing to accept that the election power is but a legislative device to proscribe a result, the soundness of the *Crawfordsville* case cannot be criticized on any grounds except that its reasoning was not precise or clear.

The Indiana Reports disclose only a few cases where an inter vivos transfer of personalty could be described as illusory. Therefore, in order to further our inquiry, resort is made to the New York cases which have dealt with such transfers under legislative provisions which are analogous to those in Indiana.[29] The leading case in this area is *Newman v. Dore*,[30] a 1937 case which involved the use of a trust to circumvent legislative provisions analogous to section 301 of the Indiana Probate Code. A few days prior to the settlor's death, he conveyed all his property to a trustee. The settlor retained not only the income for life with a power to revoke the trust, but also the power to direct the trustee in all matters relating to the trust management. In analyzing the interest which the statutes gave the surviving spouse, the New York Court of Appeals concluded that, at most, it was an expectant interest which was capable of destruction by an inter vivos conveyance of the husband. Postulating that the right to convey is an inherent part of ownership, the court concluded that a lawful act which destroys an expectant interest, regardless of the motive or intent inspiring the transfer, cannot be viewed as fraudulent. Therefore, the court reasoned, the only sound test to apply is "whether the husband has in good faith divested himself of ownership of his property or [whether he] has made an illusory transfer."[31] Note

29. "Election by surviving spouse against or in absence of testamentary provision.—(1) Where a testator dies after August thirty-first, nineteen hundred and thirty, and leaves a will thereafter executed and leaves surviving a husband or wife, a personal right of election is given to the surviving spouse to take his or her share of the estate as in intestacy, subject to the limitations, conditions, and exceptions contained in this section." N.Y. DECED. EST. § 18.

"Descent and distribution of estate of decedent.—The real property of a deceased person, male or female, not devised, shall descend, and the surplus of his or her personal property, after payment of debts and legacies, and if not bequeathed, shall be distributed to the surviving spouse, children, or next of kin or other persons, in manner following:

1. One third part to the surviving spouse, and the residue in equal portions to the children, and such persons as legally represent the children if any of them have died before the deceased." N.Y. DECED. EST. § 83.

The remaining portions of §§ 18 and 83 of the DECEDENT ESTATE LAW are omitted for it is felt that their inclusion would add nothing to that already quoted. In § 18, the deleted portions deal with the manner of election, time, and the extent of the right in certain situations; in principle the election right is analogous to that in Indiana. In § 83, the deleted sub-sections deal with the portions allotted where different combinations of heirs exist.

30. 275 N.Y. 371, 9 N.E.2d (1937).

31. This intent test is decidedly different from the one used by the Missouri court in Stone v. Stone, 18 Mo. 389 (1853). There the intent was intent in the sense of the

that the good faith required is not that which refers to the motive or intent inspiring the transfer, but rather to the intent of the transferor to divest himself of complete ownership in the property which he purports to convey. Testing the transfer by this standard, the court held the *Newman v. Dore* transfer to be illusory—a conveyance in form only. Therefore, it was ineffective as to the statutory interests secured to the surviving spouse. The court specifically avoided any line of reasoning which would label the transfer a testamentary disposition. Rather the court said:

> "We assume, without deciding, that except for the provisions of section 18 of the Decedent Estate Law the trust is valid . . . Judged by the substance, not the form, the testator's conveyance was illusory, intended only as a mask for the effective retention by the settlor of the property which in form he had conveyed."

The fact that the court rested its decision squarely on the provisions of the Decedent Estate Law after having assumed that the trust was valid in all other respects is significant in determining the proper effect to be given to section 509 of the Indiana Probate Code.[32] This section provides that an inter vivos trust shall not be invalidated for failing to comply with the requirement of form in section 503 even though the settlor reserves a power of revocation, alteration, control of investment, and invasion of principal.[33] This section would seem to prevent the

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motive which prompted the transfer; whereas here, the intent with which the court is concerned goes to the good faith in divestment. Thus, under *Newman v. Dore,* motive is irrelevant, the essential test being whether or not the donor intended to divest himself of ownership.

32. "Inter vivos trusts—Instrument creating—Execution.—An instrument creating an inter vivos trust in order to be valid need not be executed as a testamentary instrument pursuant to section 503 even though such trust instrument reserves to the maker or settlor the power to revoke, or the power to alter or amend, or the power to control investments, or the power to consume the principal, or because it reserves to the maker or settlor any one or more of said powers." IND. ANN STAT. § 6-509 (Burns 1953).

33. "Execution of Wills—Number of Witnesses required.—The execution of a will, other than a nuncupative will, must be by the signature of the testator and of at least two (2) witnesses as follows:

(a) The testator shall signify to the attesting witnesses that the instrument is his will and either
  (1) Himself sign, or
  (2) Acknowledge his signature already made, or
  (3) At his direction and in his presence have someone else sign his name for him, and
  (4) In any of the above cases the act must be done in the presence of two (2) or more attesting witnesses.

(b) The attesting witnesses must sign
  (1) In the presence of the testator, and

application of the illusory transfer doctrine in Indiana.[34] However, on closer analysis such an implication appears unjustified.

Section 509, by its own language, restricts the application of section 503; section 503 regulates property dispositions which are testamentary. It follows that section 509 is intended to prevent the application of section 503 requirements to an inter vivos trust solely on the grounds that the trust includes one or more of the enumerated powers reserved to the settlor. Section 509 was enacted for the purpose of eliminating all speculation as to whether the retention of the enumerated powers by the settlor would give the transaction a fatal testamentary taint.[35] If section 509 is construed in this manner it would still fulfill a useful purpose, viz., that of preventing the invalidation of a trust solely on the grounds that certain reserved powers tend to give the trust a testamentary connoation. However, if section 509 is interpreted to abrogate the doctrine of *Newman v. Dore,* the policy of section 301 would be frustrated. Such an interpretation would legalize a means of circumvention—a settlor could enjoy control until his death. Such a result would not only offend common sense, but also vitiate the principle of equity that one cannot do indirectly that which the law forbids him to do directly. This principle was the heart of the court's reasoning in the case of *Newman v. Dore* and one to which the Indiana courts have subscribed on countless occasions.[36] There is no reason to believe that the prohibition which is expressed in section 301 should, or would, be treated in a different manner. Therefore, though a trust might be validated by section 509 for all other pur-

(2) In the presence of each other."
IND. ANN. STAT. § 6-503 (Burns 1953).

34. In HENRY, PROBATE LAW AND PRACTICE c. 30, § 6 (6th ed. 1954), the editor says: "It would appear that the doctrine of Newman v. Dore has been abrogated by § 509 of the Probate Code." This would seem to be a matter of statutory interpretation for the editor cites § 509 for his authority.

35. In a recent law journal article, Professor Simes said: "Section 6-509 of the Indiana Code, which has no counterpart in the Model Code, provides that an inter vivos trust is not rendered testamentary by the reservation in the settlor of a power to amend or revoke or similar power. Doubtless this is sound common law, but, in view of the litigation which has arisen on this question, it may be desirable to state the rule in statutory form." Simes, *The Indiana Probate Code and the Model Probate Code: A Comparison* 29 IND. L. J. 341. This would seem in accord with the views expressed by the American Law Institute in the comments to the RESTATEMENT, TRUSTS § 57(2) at 179, where it is said: "The rule stated in Subsection (2) is applicable, however, only where the settlor reserves such power of control that the transferee is his agent. The intended trust is not testamentary merely because the settlor reserves power to direct the trustee as to the making of investments or the exercise of other particular powers, or power to appoint a substituted trustee."

36. On the rehearing the court in the *Crawfordsville* case relied upon this precise proposition: "The conclusion reached in the original opinion is also supported by the numerous decisions of the Supreme Court and this court which expressly hold that the courts will not permit one to do indirectly that which the law expressly forbids him from doing directly." 55 Ind. App. 40, 77, 100 N.E. 1049 (1913).

poses, it could still be an illusory transfer with respect to the surviving wife under section 301, because the husband-settlor retained control or dominion.

Thus far, the analysis has been primarily limited to a consideration of whether the illusory transfer doctrine is compatible with, if not inherent in, the fundamental policies embodied in the Indiana Probate Code. It is urged that regardless of the analyses adopted by the many courts, the one thread of consistency which unifies the various doctrines peculiar to the different jurisdictions—be they reasoned illusory transfer, colorable transfer,[37] fraud,[38] transfer contrary to public policy,[39] or causa mortis gifts—is the unvoiced belief that such transfers are both morally unfair and in derogation of an obligation which the courts have viewed with tenderness.[40] The fact that the supporting theories are couched in different terms in different jurisdictions is explainable to some extent by noting that the matter is one governed by state statutes which often vary both in language and in approach.[41] Therefore, it is not so much what

37. 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 the husband conveyed land to the 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. And, as in Stroup v. Stroup, 140 Ind. 179, 39 N.E. 864 (1894), where husband invested funds in land, title to which was taken in the name of another but colorably, and was in fact held to the use and benefit of the husband with intent to defeat any claim of the wife by virtue of her marital relation.

38. Stone v. Stone, 18 Mo. 389 (1853), the facts of which were developed in the text, *supra*.

39. In Merz v. Tower Grove Bank & Trust Co., 344 Mo. 1150, 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 the husband, said: "We are unwilling to repeal by implication the statutes of this State and to say that a husband 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).

40. In Staser v. Garr, Scott & Co., 168 Ind. 131, 135, 79 N.E. 404 (1906), it was said: "The right of a widow to the maintenance out of her deceased husband's estate is so generally recognized where the common law obtains that it is regarded as one of the institutions of the state, and, as it rests on moral, equitable and legal rights, it may be the main-spring of some of the strongest equities. 1 STORY, EQ. JURISP. (13th ed.), §§ 628-30; Crawford v. Hazelrigg (1889), 117 Ind. 63, 2 L.R.A. 139. This tenderness of the law for the sustenance of the widow has also prompted this court to regard as benificent, and entitled to a liberal interpretation, legislation which is designed to guard or even amplify the right of the wife in her husband's real estate." While it is obvious that the court is here discussing the rights which inure to the benefit of the wife under §§ 202 and 203, if it can be accepted that § 301 is intended to supplement this right, because of the transition in the pattern of property ownership outlined above, the remarks should be appropriate to guide the interpretation of § 301. This was the contention of the court in the *Crawfordsville* case.

41. As a court must work with its own state's statute, it is only natural that it formulate its result in language consistent therewith. Thus, where a statute confers dower in personalty, or has been so interpreted, the concept of fraud on the marital rights (which developed under common law dower) is quite naturally adopted as op-

the courts have said that is important, but rather what they have done.

Section 301 is, therefore, a very significant provision even though its potentialities are masked in the subtleties of the election device. An heir is foreclosed from upsetting any inter vivos disposition unless he can successfully maintain that it does not meet the legal requirements of such a transfer. The surviving spouse, however, is more than an heir; she is a forced heir because of section 301. Under the provisions of that section she, alone, can challenge the finality of a perfected causa mortis gift or a valid settlor-controlled trust. In these situations, an heir lacks the standing to make such a challenge. A creditor, however, can upset such transfers because of the provisions made for him in section 704.[42] Causa mortis gifts and settlor-controlled trusts are ineffective with respect to the wife because, as to her—though valid in form—they are invalid in substance. They are ineffective as to a creditor because they are fraudulent. While only in the causa mortis gift and settlor-controlled trust situations is the transfer invalid in substance with respect to the wife, any transfer may be invalid in substance with respect to the creditor. Therefore, stripping section 301 of its mechanics, it becomes apparent that the implications of its policy elevate the surviving spouse to a status which is second only to that of a creditor.

Section 301 expresses a policy which allows the surviving wife to challenge the validity of any property disposition regardless of whether the issue of validity is cast in a testate or intestate situation. The section's policy is to prohibit the disinheritance of a surviving spouse—a result not a device. To comprehend the import of this simple admonition, one must differentiate between the policy which section 301 expresses and the legislative device adopted to fulfill that policy. The limitations of form which attend the election device should not be interpreted to limit the application of the section's policy. Thus, the determination by a court that the election power presumes a valid will,[43] would not, un-

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posed to some foreign or unfamiliar line of reasoning. In jurisdictions where the court believes that actual fraud cannot be said to exist, as was the case in *Newman v. Dore*, the court must work out another rationale when it is felt that the statutory implications demand such a result, *e.g.*, an illusory transfer. For a collection and comparison of the various state laws, see, 3 VERNIER, AMERICAN FAMILY LAWS, §§ 188 and 189 (1935).

42. IND. ANN. STAT. § 7-704 (Burns 1953).

43. "In other words the election statute is predicated upon the existence of a valid will." Haas v. Haas, 121 Ind. App. 335, 342, 98 N.E.2d 232 (1950). *Accord*, Murray v. Brooklyn Savings Bank, 15 N.Y.S.2d 915, 919, 258 App. Div. 132 (3rd Dep't 1939). "Whatever may be the rights which the surviving spouse acquired by Section 18, they exist only where a decedent 'dies * * * and leaves a will' and then only where written notice of election is served * * *." *Contra*, Burns v. Turnbull, 266 App. Div. 779, 41 N.Y.S.2d 448 (1942), *affirmed*, 294 N.Y. 889, 62 N.E.2d 785 (1945).

der this analysis, imply that the section creates no rights unless a valid will exists. Such remarks do not limit the policy of section 301, they merely define the mechanics of the election device. To interpret them otherwise would enable a husband to circumvent the section's policy by making an illusory, inter vivos disposition in lieu of a will.[44] The substantive interpretation of section 301 cannot be arbitrarily limited; the substance of the prohibition must be carried to its legitimate conclusion or its purpose will be frustrated. Thus, the contention that the policy of section 301 is restricted to testate situations is unsound.[45] This is the

44. For instance—suppose that Mr. Smith, an aged widower who has married a second time, desires to make a disposition of his property which will totally exclude his present wife. Suppose also, that Mrs. Smith resigned from a career position when she married Mr. Smith as a result of his assurances that he had sufficient wealth to provide for both of them so long as they should live. Subsequently, Mr. and Mrs. Smith have experienced marital difficulties. Mr. Smith now feels that he has made a mistake in marrying Mrs. Smith, but will be content if he can dispose of his property to her exclusion. To accomplish this, Mr. Smith conveys all his property (principally investment securities) to a trustee naming himself income beneficiary for life. After his death, the trustee is directed to sell the securities and distribute the proceeds equally among his two children by his former marriage. Since the trust corpus represents Mr. Smith's entire wealth, he reserves to himself the powers to revoke, amend, invade the corpus, and direct investments. Mr. Smith, feeling that he has made a complete disposition of his wealth, makes no will. Subsequently when Mr. Smith dies, Mrs. Smith learns what her husband has done. Since the powers retained by Mr. Smith are those allowed by § 509, there is no basis for declaring the trust invalid for failing to comply with § 503. As Mr. Smith did not execute a will, under the narrower interpretation of § 301 which restricts the surviving spouse's rights to situations where a valid will exists, Mrs. Smith cannot attack the trust on the grounds that it is an illusory transfer. Thus Mr. Smih has accomplished the very same result which § 301 prohibits, the control and dominion of his property until the time of death with a subsequent disposition which excludes his surviving wife. How can such a result be justified if it is conceded that § 301 prohibits a result, not a mere device for accomplishing that result? Therefore, § 301 must be viewed as expressing a policy which embraces both testate and intestate situations. This is the result which the New York courts have subsequently reached. The reasons for reversing the earlier interpretation are not stated by the courts; it is merely stated that a surviving spouse may rely upon the policy of the election statute in seeking to overturn illusory transfers regardless of whether a valid will exists. Burns v. Turnbull, 266 App. Div. 779, 41 N.Y.S.2d 448 (1943), *affirmed*, 294 N.Y. 889, 62 N.E.2d 785 (1945).

45. In Haas v. Haas, 121 Ind. App. 335, 342, 92 N.E.2d 232 (1950), the court says almost exactly the same thing as said by the New York court in Murray v. Brooklyn Sav. Bank, *supra* note 43: "The purpose and effect of § 6-2332, *supra*, (now § 301 in the Probate Code) is to make it impossible for a married man, by testamentary disposition of his property, to deprive his widow of a full one-third thereof. It has no application in cases of intestacy and therefore the choice a widow has between the one-third, of which the law says she cannot be deprived, and what she gets under the terms of a valid will. In other words the election statute is predicated upon the existence of a valid will. If a testator makes a will which is of no force and effect the mere failure of his widow to elect to take under the law cannot be considered as raising a presumption of any kind." Standing alone, these remarks would seem to be a definite limitation upon the policy which is embodied in § 301. Such a conclusion is, however, not justified for we cannot view this section as if it were in a vacuum. This section must be correlated with the other sections in the Code which govern the devolution of property.

Section 201 (IND. ANN. STAT. § 6-201 (Burns 1953)), provides for the distribution of a decedent's estate when he has failed to make a will. Under this section the wife as

conclusion which has been reached by the New York courts working with analogous statutory provisions.[46]

The relationship of benefit to burden which inheres in the ownership of property, is a relationship which is usually recognized and preserved. If one receives the benefit of property ownership, he must usually accept the equal, but opposite, attendant burdens. In this sense, an illusory transfer by the husband is an attempt to destroy this relationship; it is an attempt to preserve in the owner the control and enjoyment of property while freeing him of its burdens. Under the interpretation of section 301 which has been urged above, this result cannot be obtained insofar as the law requires a decedent to share his property with his surviving spouse. Such a result is not inconsistent with the principles of free alienation for section 301 does not restrict the power to make an absolute transfer of property. Conceding that an absolute transfer of property is beyond the prohibition of that section, the question remains, to what extent a donor can retain the beneficial incidents and dominion of the transfered property without subjecting the transfer to subsequent invalidation on the grounds that it is illusory.

A transfer is illusory on its face when the form in which it is made leaves the grantor in substantially the same position, in respect to the property, as that which existed prior to the transfer. Consequently, the

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surviving spouse is assured, with certain exceptions, a minimum of a one-third part of her husband's net estate. Section 301 limits a testator's ability to make a testamentary property disposition to the exclusion of his wife. Considering these sections together, it becomes apparent that the Legislature has, by these two sections sought to secure to the surviving spouse a minimum portion of her husband's estate. In this respect, § 301 is very important for it is by this section that the element of coercion is introduced. It is the sanction and the catalyst which enables the fulfillment of the policy. It is a means which is calculated to preserve our concept of free alienation of property (i.e., it would not restrain alienation in the sense that common law dower would) while at the same time fulfilling the policy which the Legislature seeks to establish.

We must therefore differentiate between the policy established and the means provided. As was pointed out earlier, the election prerogative, which obviously presumes a valid will, is but an expression, a means of fulfilling the policy which seeks to secure certain rights of inheritance to a surviving spouse. The power of election was adopted as the method of fulfilling this policy because the will, as a device, offered a means for accomplishing a result the Legislature now sought to prohibit. Therefore, we cannot allow a discussion which relates wholly to the means, the power of election, to cloud or restrict the basic policy of the section.

Similarly, in estimating the content of § 301, one must realize that a will is not the only means one may utilize in accomplishing the prohibited disinhertance of a spouse. This realistic fact is incontestably established by the cases which follow an analogous pattern to that of *Newman v. Dore*. Thus, considered in this light, the comments made by the court in *Haas v. Haas*, which dealt with the requirements of the power of election, are not inconsistent with the view that the policy of § 301, as distinguished from its means, can have an application in intestacy situations.

46. Burns v. Turnbull, 266 App. Div. 779, 41 N.Y.S.2d 448 (1943), *affirmed* 294 N.Y. 889, 62 N.E.2d 785; Schnakenberg v. Schnakenberg, 262 App. Div. 234, 28 N.Y.S.2d 841 (1941), *appeal denied* 262 App. Div. 966, 30 N.Y.S.2d 399.

type of interests and powers which a grantor may reserve should be analyzed first. The decisions make it clear that the retention of a life interest in the transferred property is not, in itself, a sufficient basis for rendering a transfer illusory.[47] Even though retention of a life interest enables a grantor to exercise a significant amount of control over the transferred property, such a transfer does deprive the grantor of a great amount of control which he previously enjoyed as absolute owner. Accordingly, a life tenant may not perpetrate any waste, convert the property to cash in order to satisfy his personal neds or obligations, nor do any act which would injure or impinge upon the remainder interest. Consequently, a transfer with a life interest retained represents an absolute transfer which does not controvert the policy of section 301. Similarly, the retention of a power to invade the corpus for the support and maintenance of the settlor-beneficiary, when vested in an independent trustee, is not a power which should invalidate a transfer. Such a transfer is not illusory, but is absolute in all respects, insofar as the settlor-beneficiary is concerned. However, where such a power is lodged in the settlor, the transfer should be viewed as illusory inasmuch as the settlor retains, in substance, the same powers and privileges previously enjoyed when he was absolute owner of the transferred property.[48] Reservation of the power to withdraw money and property from the corpus when vested in a settlor-trustee, where he is the beneficiary of the life interest, would seem no different than a reservation of a like power in a settlor-beneficiary where there is an independent trustee. The wife, the real party in interest, would have no standing to challenge the control of her husband in the capacity of trustee were it not for section 301.

The effect of retaining a power of revocation is not so clear. Numerous New York cases have stated that a revocable trust is illusory;[49] however, this proposition is rejected by other jurisdictions.[50] The sound-

47. Krause v. Krause, 285 N.Y. 27, 32 N.E.2d 779 (1941).

48. Not only does the settlor-husband continue to enjoy the same basic powers and control over the transferred property, but by coupling the trust device with a reserved power to withdraw the corpus, he has effectively placed the property beyond the reach of the wife's expectancy while preserving the right to make piecemeal withdrawals of corpus without dstroying the trust's efficacy. This fact is crucial inasmuch as it is this result which makes the transfer illusory—the husband can regulate his withdrawals so that they are immediately consumed leaving nothing to which the wife's claim can attach.

49. Schnakenberg v. Schnakenberg, 262 App. Div. 234, 28 N.Y.S.2d 841 (1941); *In re* Cohen's Will, 90 N.Y.S.2d 776, (N.Y. Sup. Ct. 1949); Murray v. Brooklyn Savings Bank, 258 App. Div. 132, 15 N.Y.S.2d 915 (1939); Krause v. Krause, 285 N.Y. 27, 32 N.E.2d 779 (1941).

50. Kerwin v. Donaghy, 317 Mass. 559, 59 N.E.2d 299 (1945); Leahy v. Old Colony Trust Co., 326 Mass. 43, 91 N.E.2d 920 (1950); Ascher v. Cohen, 333 Mass. 397, 131 N.E.2d 198 (1956).

ness of the generalization in these New York cases seems somewhat questionable. In each of these cases, the settlor retained other powers which were sufficient to render the transfer illusory without considering the power of revocation.[51] Furthermore, the retention of the power to revoke does not create any power in the settlor to treat the property as his own; rather, until he revokes, the settlor is as a stranger to the transferred property.[52] Thus, while the power remains unexercised, the settlor as well as his wife are foreclosed from asserting any claims in the transferred property. Should the power be exercised, the property becomes vested in the settlor and it is once again subject to the claims of the wife provided she survive her husband. Consequently, it is erroneous to contend that this power renders a transfer illusory, for while the power remains unexercised the transfer is absolute and when it is exercised there is no need to invoke the illusory transfer doctrine.

A transfer which is not illusory on its face may be shown to be illusory by the facts and circumstances which attend the transfer. This proposition finds support in the cases which have considered the validity of non-trust transfers. In these situations, the courts have looked to the extrinsic facts which accompany and follow the transfer to determine whether the form of the transfer is a true reflection of its substance.[53]

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51. In Schnakenberg v. Schnakenberg, 262 App. Div. 234, 28 N.Y.S.2d 841 (1941), the decedent placed the major portion of his wealth in trust while retaining the powers to revoke, alter or amend in part or total, and to withdraw any portion of the trust corpus. The court concentrated on the power to revoke making no mention of the power to withdraw corpus. As indicated in footnote 48 *supra,* the power to withdraw corpus is in itself sufficient grounds for invalidating a transfer. Furthermore, this power is more significant when considering the illusory nature of a transfer inasmuch as the exercise of the power does not terminate the trust; conversely, the exercise of a power to revoke terminates a trust bringing the husband-settlor's property within the reach of the wife's claim should she be the surviving spouse. In Krause v. Krause, 285 N.Y. 27, 32 N.E.2d 779 (1941), the decedent created a Totten Trust; the court invalidated the transfer with respect to the wife's claim on the grounds that it was a revocable trust—the settlor having retained possession of the passbook. Retention of the passbook can, however, be criticized in terms of an unrestricted power to withdraw corpus as well as a power to revoke. In substance, the objection to such a transfer is the ability of the settlor to unrestrictedly convert the transferred property to his own needs while foreclosing the claims of his wife. The court in *In re Cohen's Will* concluded that a revocable trust was illusory. In support of this, the court relied on the Schnakenberg case without noting that additional powers were retained which rendered the transfer illusory.

52. Furthermore, to say that a revocable trust is illusory is to reject the fundamental principle that a vested interest can be conveyed on a condition subsequent. This, in itself, is contrary to the New York cases which indicate that a vested remainder subject to a general power of appointment is not illusory. City Bank Farmer's Trust v. Miller, 278 N.Y. 134, 15 N.E.2d 553 (1938); *In re* Burchell's Trust, 278 App. Div. 450, 105 N.Y.S.2d 431 (1951).

53. In Thomas v. Louis, 284 App. Div. 784, 135 N.Y.S.2d 297 (1954), the husband successfully overturned an inter vivos transfer made by his wife. In 1939, the estranged wife gratuitously conveyed by warranty deed to her sister, the title to her residence. Subsequently, the husband and wife were re-united and lived in the residence until the

Thus, where the donor and donee conduct their affairs in a manner inconsistent with a transfer of ownership, the courts have uniformly held the transfers to be illusory.[54] On the other hand, where the donor and donee have conducted their affairs in a manner consistent with a change of ownership, a challenge that the transfer is illusory has been consistently rejected.[55] Accordingly, it has been argued that where decedent has

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wife's death. Shortly after the wife's death, the sister recorded the 1939 deed. In sustaining the husband's claim that the conveyance was illusory, the court relied upon the fact that the husband and wife had lived in the residence for eleven years after the conveyance without paying rent, made substantial improvements to the property, made the mortgage payments, carried insurance on the property in the wife's name, paid the property taxes, and exercised complete dominion and control over the property. The importance of the parties' conduct following the transaction was emphasized when the court distinguished the present conveyance from a conveyance in the *Krause* case where a life estate had been reserved but the deed had been recorded. The Krause transfer was characterized as being open and above board, whereas the instant transfer was permeated with secret limitations and agreements.

54. *In re* Sanchez Estate 58 N.Y.S.2d 230 (N.Y. Sup. Ct. 1945), offers a typical example. The decedent-husband and his brother had incorporated their partnership. The capital stock (100 shares) was issued: twenty-five shares to the decedent, twenty-five shares to the brother, twenty-five shares to the brother's wife, and twenty-five shares to a third party. Subsequently, through numerous gratuitous transfers at the decedent's instances, the capital stock became the property of the decedent and the third party. During this time, the decedent and his wife were legally separated though not divorced. After the husband's death, the wife elected to take under the law and claimed a one-third interest in all the stock. The court sustained the widow's claim holding the transfers to be illusory inasmuch as the husband—after the transfers—continued to exercise the voting rights of the transferred stock, executed waivers as sole owner to dispense with shareholder meetings, and continued to conduct the business as sole owner. The third party, in resisting the wife's contention, asserted that the transfers were inter vivos gifts; the court rejected this assertion pointing out that the pseudo-owner never attended shareholder meetings nor did any acts consistent with a fifty percent ownership of the corporation. While the court did not comment on the relationship between the husband and the woman (the third party) claiming the stock under his gifts, it would seem that the relationship was such as to support the court's conclusion that the transfer was a mere sham. In a similar case, Marano v. LaCarro, 62 N.Y.S.2d 121 (N.Y. Sup. Ct. 1946), the husband was sole owner of a corporation. He transferred his capital stock to a corporate trustee in exchange for its promise to support and care for him. Following the transfer, the husband continued to reside on company property, manage and control the corporation as its only active officer, collect all monies due the corporation, mingle his funds with corporate funds, pay his debts with corporate funds, and keep all documents of title, leases, and insurance in his own name. The court sustained the widow's contention that the transfer was illusory even though it appeared valid on its face. In rejecting the trustee's contention of ownership, the court pointed out that it (the trustee) had not paricipated in any shareholder meetings as a sole owner would undoubtedly do, nor done anything in fulfillment of its promise to support the decedent.

55. In *In re* Wrone's Estate, 177 Misc. 541, 31 N.Y.S.2d 193 (1941), the husband was sole owner of a corporation. During his life he transferred fifty shares of capital stock to a third party who made subsequent dispositions of the stock pursuant to the husband's direction. The husband continued to manage the corporation as before, but in respect to the transferred stock, the record was void of any evidence from which it could be inferred that the transfer was not absolute and complete. The court, rejecting the widow's claim that the transfer was illusory, characterized the transfer as a completed inter vivos gift. Similarly, in *In re* Galewitz Estate, 206 Misc. 218, 132 N.Y.S.2d 297 (1954), the court rejected the widow's claim that a "buy and sell" contract executed

made deposits of his money in a joint savings account, he has, in substance, made an illusory conveyance of his property, since he has retained absolute control during his lifetime. Nevertheless, the New York courts have refused to apply the illusory transfer doctrine to this type of transaction, holding that the situation is controlled by the New York Banking Law.[56] The courts of Massachusetts have reached a similar result through a common law analysis—the rationale being that a present interest has been created and conveyed.[57] While this result can be justified by distinguishing between a conditional gift and an absolute gift of a conditional interest, such a distinction fails to satisfy the policy inherent in section 301. When a joint bank account is created, the donor retains the unrestricted right and power to withdraw any amount for his personal use. While in theory, he may have created an interest in his joint tenant, he has surrendered no real control. Furthermore, in these situations, the donor usually retains the passbook and the donee is not aware that the joint tenancy has been created. Certainly this is a transfer which violates the policy of section 301. Inasmuch as Indiana does not have a statute which requires the result reached in New York and Massachusetts, it would seem that joint bank accounts should be viewed as illusory when employed to circumvent the policy of section 301.[58] United States Savings Bonds are, however, beyond the scope of the illusory transfer doctrine even though the purchaser has complete control of such bonds throughout his life. This result was first reached by the courts of New York;[59] subsequently, the legislature codified the rule. Indiana,

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between the father and son was illusory under the Decedent Estate Law. In sustaining the validity of the contract, the court said that this was a contract creating present rights enforceable in the future. Inasmuch as the contract required a purchase price to be paid to the estate of the seller, there was no significant diminution of the estate. Here there was no attempt to reduce the amount available to the widow, but rather an intent to continue the ownership and management of the corporation within the present group of owners—the father and son.

56. The court in Inda v. Inda, 32 N.Y.S.2d 1001 (N.Y. Sup. Ct. 1941), conceded that joint bank accounts violated the policy of the Decedent Estate Law, but regardless of this, the court felt compelled to follow the mandate of the New York Banking Law which created a conclusive presumption vesting title in the donee-depositor. However, the court distinguished between a joint savings account and a joint commercial account on the grounds that the latter was not governed by the section creating the statutory presumption; therefore, the joint commercial bank account was invalidated on the grounds that it was illusory.

57. Malone v. Walsh, 315 Mass. 484, 53 N.E.2d 126 (1944).

58. *But see* Hibbard v. Hibbard, 118 Ind. App. 292, 73 N.E.2d 181 (1948), where the execution of the registration card for a joint bank account followed by subsequent deposits was said to create gifts in praesenti of a joint interest with rights of survivorship. In this case the validity of the account was challenged by the legal representative of the donor; consequently, the case is not binding authority where the surviving spouse is making the challenge inasmuch as the policy of § 301 inures only to a surviving spouse.

59. Hart v. Hart, 194 Misc. 162, 81 N.Y.S.2d 764 (1948).

like New York, has a statute which forecloses the application of the illusory transfer doctrine in this situation.[60] This position is completely defensible even though it may seem inconsistent with the illusory transfer doctrine, inasmuch as state policy and law must yield where conflict results in an area subject to exclusive federal regulation.

Thus, the amount of control retained by the donor, demonstrated either by actual control or by express reservation of the power to control, would seem to be the crucial consideration from which the genuineness of the transfer is inferred. In this evidentiary capacity, control or the power to control furnishes the means by which the court pierces the form of the transaction. Control or the power to control is the ingredient which gives content and meaning to the principle of *Newman v. Dore*—the principle that a transfer, in order to foreclose the claims of a surviving spouse, must be made with a "good faith" intent to divest the transferror of the property he purports to convey. Since this test is, in a sense, subjective—though it is applied to objective crtieria—the degree of predictability in many situations is rather limited. After having made a rather extensive review of the New York authorities, one court commented, "In its subsequent decisions the Court of Appeals has continued to judge the validity of the transfer upon the facts in each case."[61] However, as indicated above, there are certain types of powers and transfers which can be categorized because of their special characteristics. Beyond this point, however, further specificity is difficult because of the emphasis placed upon the facts attending each individual transaction. Therefore, while the precedents can serve as helpful guides, they cannot be viewed as conclusive. The ultimate determination of whether a transfer is illusory turns upon the factual circumstances which surround the individual transfer.

ALLOCATING TENANT TORT LIABILITY THROUGH THE FIRE INSURANCE POLICY

If real property is destroyed by fire, the holder of the fee must normally bear the loss to the premises, unless there is another party upon whom the loss may be shifted. If the fire which destroys the premises has been caused by a negligent third party, well established principles of

60. IND. ANN. STAT. § 5-104 (Burns 1953).

61. *In re* Kalina's Will, 184 Misc. 367, 53 N.Y.S.2d 775 (1945).