



1941

Husband and Wife--Conveyance in Fraud of Material Rights of the Wife

Joe R. Johnson Jr.
University of Kentucky

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Estates and Trusts Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Johnson, Joe R. Jr. (1941) "Husband and Wife--Conveyance in Fraud of Material Rights of the Wife," *Kentucky Law Journal*: Vol. 30 : Iss. 1 , Article 11.

Available at: <https://uknowledge.uky.edu/klj/vol30/iss1/11>

This Comment is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@sv.uky.edu.

the assignment for which he can be taxed; but *quære*, does he receive anything in the year the donee collects the commissions out of which he can pay the tax? The assignor has exercised his power of disposition of the income irrespective of whether he receives consideration for the assignment. In the case of a gift, a present value may be given this contractual right upon the basis of statistics even though the exact amount of the commissions can not be determined now. The Wisconsin Court upon the decease of an agent assigned a present value to the decedent's right to renewal commissions, if any, on certain policies.² Where consideration is received, the assignor would be taxed on the amount thereof; and the assignee would pay income tax on the commissions collected in excess of the purchase price.

CLARENCE CORNELIUS

HUSBAND AND WIFE—CONVEYANCE IN FRAUD OF MATERIAL RIGHTS OF THE WIFE

In contemplation of marriage, Tom Martin transferred to his sister all of his personal property amounting to approximately \$30,000. There was evidence that the sister gave to Tom such sums as he should from time to time require and that the transfer was made for the purpose of depriving the wife of any rights she might acquire as a result of the prospective marriage. Upon the death of Martin, his wife brings an action seeking to have the sister declared a trustee for the \$30,000 and claiming \$15,000 as her interest under Kentucky Statute 2132 which provides: ". . . survivor shall have an absolute estate in one-half of the surplus personalty left by such decedent." It was held that the transfer of the personal property to the sister was a fraud on the marital rights of the wife, and the sister is declared to be a constructive trustee of the amount received by her. *Martin v. Martin*, 282 Ky. 411, 138 S. W. (2d) 509 (1940).

The theory by which the court decided the case, raising a constructive trust, is a remedy afforded by courts of equity for fraud.¹ It does not arise out of an express or implied agreement of the parties, but arises by operation of law, and may in fact be exactly contra to any intention of the parties. It is a remedy imposed under circumstances which render it unconscionable for the holder of the legal title to enjoy the beneficial interest in the property.² The fraud may be actual or implied or in a number of cases the courts have discovered a constructive trust³ where it is felt that the donor held property unjustly from one truly and equitably entitled to it although perhaps he may never have had any legal estate therein.⁴

² *Herzberg v. Wisconsin Tax Commission*, 194 Wis. 126, 215 N. W. 936 (1927).

¹ 3 *Scott on Trusts*, (1939) 2313.

² *Pomeroy, Equity Jurisprudence*, (4th ed. 1918) 2404.

³ 3 *Scott on Trusts*, (1939) 2314.

⁴ *Supra*, note 2.

To come within this jurisdiction of equity it must appear that the act was done *secretly and for the purpose of depriving the intended wife of her marital interests.*⁵ Both of these elements would seem to be essential. Surely the transfer must be secret for if the woman married him knowing of the transfer of the property there is no fraud on her. It must further appear that the gift was for the purpose of depriving her of her marital interests for if the property was given for a legitimate purpose there is no fraud or unjust enrichment to serve as a basis for a constructive trust. Suppose, for example, the mother of the husband were ill and property was given to her to aid in her recovery. The purpose of such a gift is certainly a good one and there is no basis for a claim that the mother was unjustly enriched.

The question remains whether the wife had such interests here as the court of equity will protect. It is admitted that a prospective husband before marriage and a husband during covert may make such reasonable gifts of his personal property as he may see fit.⁶ Further that the wife may expect losses on the part of the husband's estate during coverture and as such she has no interest in his personal estate. To this extent, and only to this extent, the wife's interest in personalty differs from her interest in realty which is subject to inchoate right of dower and which cannot be conveyed away without being relinquished or forfeited by her.⁷ It is well established that the inchoate right of dower and which cannot be conveyed away without being relinquished or forfeited by her.⁷ It is well established that the inchoate right of dower is an interest, which arises at the time of marriage, in property then owned by the husband.⁸ Such interest is also acquired in personalty.

A conveyance of realty in contemplation of marriage is a fraud upon the marital rights of the wife and as to her the conveyance may be declared of no effect.⁹ Kentucky Statute 2132¹⁰ provides that the survivor shall take a life estate in one-third of the realty plus an absolute interest in one-half of the personal property left by the decedent. A fair interpretation of the statute would seem to be

⁵ *Brownwell v. Briggs*, 173 Mass. 529, 54 N. E. 251 (1899); 1 Perry, Trusts and Trustee, (7th ed. 1929) 373, 375.

⁶ *Wilson v. Wilson*, 23 K. L. R. 1229, 64 S. W. 981, 983 (1901); *Murray v. Murray*, 90 Ky. 1, 13 S. W. 244 (1890); *Gains v. Gains*, 48 Ky. 295, 48 Am. Dec. 425 (1848).

⁷ *Anderson v. Anderson*, 194 Ky. 763, 240 S. W. 1061 (1922); *Whitaker v. Casheberry*, 10 Ky. Opinions 413 (1878); *Petty v. Petty*, 43 Ky. (4 B. Mon.) 215, 39 Am. Dec. 501 (1843).

⁸ *Maryland Casualty Co. v. Lewis*, 276 Ky. 263, 124 S. W. (2d) 48 (1939); *Berger v. Berger*, 264 Ky. 225, 94 S. W. (2d) 618 (1936).

⁹ *Daniker v. Daniker*, 201 Ill. 489, 66 N. E. 239; *Anderson v. Anderson*, 194 Ky. 763, 240 S. W. 1061 (1922); *Leach v. Duvall*, 71 Ky. (8 Bush) 201 (1871); *Petty v. Petty*, 43 Ky. (4 B. Mon.) 215, 39 Am. Dec. 501 (1843); *Kavanaugh v. Kavanaugh*, 279 Mass. 238, 181 N. E. 181 (1932); *Gedant v. Ejdrygiewiez*, — Mass. —, 25 N. E. (2d) 371 (1940); *Smith v. Smith*, 6 N. J. Eq. 515, 522.

¹⁰ Kentucky Statutes (Carroll, 1936) Sec. 2132.

that the legislature, in addition to giving to the wife the common law right of dower, intended to give a comparable interest in personalty as well. A wife or wife-to-be is granted a right to this expectancy by the state. Prior to marriage there seems to be little ground for a valid distinction between realty and personalty.²¹ Under the statute the right to neither is complete until death of the husband, and no absolute legal rights vest until that time. It is the expectancy that the court of equity seeks to protect. As early as 1868 the Kentucky court said that the word "dower" meant the widow's legal portion in both kinds of estate, real and personal.²² Other Kentucky cases have failed to make a distinction in this regard between real and personal property.²³ This view is supported by decisions in other states which have failed to make the distinction.²⁴ In one early Kentucky case, *Petty v. Petty*,²⁵ the court apparently drew a distinction between realty and personalty. After marriage the wife discovered that the husband just prior to marriage had conveyed land and slaves to his children. The court held that the deed as to her was void since she had a potential right which was valuable for her future maintenance, but that no such potential right existed in the slaves during the life of the husband. However, the decision was qualified by the statement that:

"Though she has no right during coverture we are not prepared to say that after death of the husband without an act of confirmation she might not assert her legal right to the personal estate."²⁶

Prior to the marriage no legal right arises either in the realty or personalty and in the eyes of equity in establishing a constructive trust there is no question of a vested legal right in the instant case. The real basis of the action on the part of equity comes from its abhorrence of fraud coupled with the fact that the sister by voluntary conveyance received and is holding property which actually or, at least, equitably belongs to another. The situation is analagous to the case where the father took by deed the children's share in their deceased mother's estate, promising to hold the same for them. In fraud of them he conveyed the property to his second wife. Although the children had no legal right, the court of equity protected their expectancy by finding a constructive trust.²⁷ It is the expectancy that the court of equity is protecting in the instant case. The wife has a right to expect to receive her legal share of her husband's estate given to her by law as a result of her marriage. Although the Ken-

²¹ For distinction see (1940) 54 Harvard L. Rev. 336.

²² *Smith v. Smith*, 3 Ky. Opinions 642 (1863).

²³ *Wilson v. Wilson*, 23 K. L. R. 1229, 64 S. W. 981 (1901); *Murray v. Murray*, 90 Ky. 1, 13 S. W. 244 (1890).

²⁴ *Taylor v. Taylor*, 197 N. C. 197, 148 S. E. 171 (1929); *Le Strange v. LeStrange*, 273 N. Y. S. 21 (1934).

²⁵ 43 Ky. (4 B. Mon.) 215, 39 Am. Dec. 501 (1843).

²⁶ *Id.* at 217.

²⁷ *Gregory v. Bowlsby*, 115 Iowa 327, 88 N. W. 822 (1902).

tucky court in this case speaks of a "quasi-vested" right in the bride-to-be, it states the real reason for the declaration of a constructive trust when it says:

"After all, an action of this character is based on a fraudulent act of a husband, or intended husband, seeking to deprive a wife, or intended wife, of a share in his property."¹⁸

The question of fraud or the purpose of the transfer would seem to be primarily a question of fact. But the Kentucky court has gone so far as to say that a voluntary conveyance of all or a greater part of one's property on the eve of marriage is a prima facie case of fraud and the burden is on the beneficiaries to explain it away.¹⁹

The voluntary transfer by Tom Martin on the eve of marriage operated as a fraud upon any and all interests given to the wife by the Kentucky Statute. The necessary elements are present for a constructive trust, the deprivation of the prospective wife of the right to take one-half of the personal property left by the husband at his death if she shall survive him. Thus, it would seem that the court in *Martin v. Martin* is not only supported by a decided weight of Kentucky decisions but also by sound principles of equity and sound legal thought.

JOE R. JOHNSON, JR.

EQUITY; RESTRICTIVE COVENANTS; CONSTRUCTION OF COVENANT TO USE PROPERTY FOR ERECTION OF A RESIDENCE

Appellant Woodward was the owner of property, the deed to which contained the following provision: "the property shall be used only for the erection of a single residence." A covenant by his grantor provided that the grantor "will restrict all its other lots in said subdivision, fronting on Windsor Place, for residence purposes only." A residence was erected on appellant's lot, and thereafter, Woodward sought to dispose of the property to appellant Meyers to be used as a funeral home. Appellees, who were owners of property within the subdivision, sought to enjoin the proposed sale and use on the ground that the use would violate the restrictive covenant. Appellants contend that the covenant had been satisfied when the residence *was erected*, and that the subsequent use thereof did not violate the restriction. The court granted the injunction, and, on appeal, it was affirmed by the Kentucky Court of Appeals.¹

The problem presented by the instant case is whether a covenant, "that the property shall be used only for the erection of a single residence" shall be construed as one limiting the use to which the property may thereafter be put. There is some authority for the

¹⁸ *Martin v. Martin*, 282 Ky. 411, 138 S. W. (2d) 509, 514 (1940).

¹⁹ *Murray v. Murray*, 90 Ky. 1, 13 S. W. 244 (1890).

¹ *Meyers et al. v. Stein et al.*, — Ky. —, 145 S. W. (2d) 105 (1940).