

# University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, November to June, by the University of Pennsylvania Law School,  
at 34th and Chestnut Streets, Philadelphia, Pa.

---

---

VOL. 79

JANUARY, 1931

No. 3

---

---

## THE USE, AS DISTINCT FROM THE TRUST, A FACTOR IN THE LAW TODAY.

CHARLES WILLIAM LEAPHART

A "Use" resembling closely both the use as it existed prior to the beginning of the fifteenth century, and the use upon a use employed during the period between the passage of the Statute of Uses in 1536<sup>1</sup> and the case of *Sambach v. Dalston* in 1634,<sup>2</sup> if we may correctly call any of these "uses", is still frequently employed in circumventing statutes. In the first period mentioned the use was not recognized by the law courts and it was not until somewhere between 1397 and 1403, according to Maitland,<sup>3</sup> and as early as the reign of Henry V (1413-1422) according to Ames,<sup>4</sup> that the chancellors began to enforce it. In the second period the statute of uses did not execute a use upon a use, and during that period, as Dean Ames has indicated, the chancellors did not enforce the second use.<sup>5</sup> Such a use must then have led the same sort of existence as did the original use in the first period. Although this was apparently a precarious contrivance to employ, yet it had considerable vigor for, as Professor Scott has pointed

---

<sup>1</sup> 27 HENRY VIII, c. 10 (1535).

<sup>2</sup> Tothill 188 (1820).

<sup>3</sup> 3 MAITLAND, COLLECTED PAPERS (1911) 273.

<sup>4</sup> AMES, LECTURES ON LEGAL HISTORY (1913) 237. Note the following: "The first decree for a *cestui que use*, whenever it was given, was the birth of the equitable use in land. Before that first decree there was and could be no doctrine of uses. One might as well talk of the doctrine of gratuitous parol promises in our law today."

<sup>5</sup> *Ibid.* 243-247.

out, Parliament had to interfere to prevent its employment for purposes too obviously opposed to the prevalent conception of public policy,<sup>6</sup> as, for instance, to defraud creditors,<sup>7</sup> to hinder disseisees for recovering land<sup>8</sup> and in 1391 it was necessary to extend mortmain statutes, whereby land conveyed to religious and other charitable corporations was forfeited to the overlord, to cases where land was conveyed to individuals for the use of such corporations.<sup>9</sup>

A class of statutes for the circumvention of which the scheme is still largely used resemble the ancient mortmain acts in that they restrict or limit a testator's power to devise or bequeath to charitable corporations, or societies, or to any person or persons in trust for charitable purposes. Generally the limitation is on a devise or bequest in a will executed within a certain period prior to the death of the testator. Sometimes provisions look to the further protection of members of the family, as for example, those in New York legislating against a devise or bequest "of more than one-half of the estate of the testator or testatrix over and above the payment of debts, liabilities and expenses, in case he or she shall have a husband, wife, child, or parent him or her surviving".<sup>10</sup> As in the early period mentioned, the court will be neutral with respect to the "use". Since these statutes cover trusts, to be successful, the testator must be careful not to employ that successor to the ancient use. He must also be careful to stay outside the present boundaries of the doctrines of constructive trusts. On the other hand, he must touch the conscience of the devisee or the legatee in order to have him do his will. Just as before the year 1400, or 1391 to make the analogy complete, it behooved the grantor to be careful in the selection of his feoffees, so now it behooves the testator using this scheme to be most careful in the selection of his devisees or legatees. Due to the

---

<sup>6</sup> Scott, *The Trust as an Instrument of Law Reform* (1922) 31 YALE L. J. 457, at 458 *et seq.*

<sup>7</sup> 50 EDW. III, c. 6 (1376).

<sup>8</sup> 1 RICH. II, c. 9 (1377).

<sup>9</sup> 15 RICH. II, c. 5 (1391).

<sup>10</sup> See General Municipal Laws of New York, § 146, N. Y. CONS. LAWS (Cahill, Supp. 1930) 1019. *Cf.* Decedent Estate Law of New York, § 17, N. Y. CONS. LAWS (Cahill Supp. 1930) 558.

neutral attitude of the courts the devisee or the legatee may keep the property for his own use in violation of the confidence that has been placed in but not communicated to him in the lifetime of the testator.

The method by which the testator whose death appears to be approaching within the limited period, can successfully accomplish his purpose is to select a thoroughly honest devisee or legatee, leave the property to him by will without mention of a trust, and take care that after his death the devisee or legatee shall learn for the first time that he is to dispose of it for the desired charitable purposes. The testator can be open and above board about the scheme. His lawyer can and should carefully explain the details to him and may suggest a fitting devisee. It may be perfectly clear to the court that the parties were contriving to defeat the purposes of the statute. Such indeed were the facts in *Schultz's Appeal*,<sup>11</sup> and yet the court did not think that it could defeat the scheme although the devisee testified in court that he would consider himself bound by the testator's wishes. The devisee could, if he so desired, change his mind and keep the property, as the court held that the devise was free of the trust. In *Flood v. Ryan*<sup>12</sup> the testator bequeathed and devised his property to St. Teresa's Church and St. Joseph's House for Industrious Boys but provided that in case of his death within thirty days it should go to the Archbishop of Philadelphia. The Archbishop testified that no communication had ever been made to him by the testator but indicated that he would prove true to the trust. Further, by reason of his oath as bishop and his office he would be under obligation to hold the property for church purposes at least, if not for the purposes which the testator desired. The court held that the bishop took the property absolutely.

The failure of the testator's adviser to explain carefully that the legatee corporation, of which the adviser was an officer, could keep free and clear was fatal to the success of the scheme in one case. In *In re Stirk's Estate*<sup>13</sup> the facts showed that the testatrix

---

<sup>11</sup> 80 Pa. 396 (1876). See also in accord *Flood v. Ryan*, 220 Pa. 450, 69 Atl. 908 (1908).

<sup>12</sup> *Supra* note 11.

<sup>13</sup> 232 Pa. 98, 81 Atl. 187 (1911).

had been informed by an officer of a trust company that if she died within thirty days the bequest for certain charitable purposes would fail. The officer had prepared in advance a codicil which provided that in case the bequest should fail that the property should go to blank. The testatrix had the officer put the name of the Trust Company, in the blank. It was clear that there could be no reason why she should want to leave a bequest absolutely to this business organization. The court stressed the fact that there was no evidence that the trust officer had carefully apprised the testator that the trust company could keep the property as its own if it is so desired. That apparently helped the court to reach the conclusion that there was an implied understanding that the property should be held on trust and therefore the bequest was void.

In *Geddis v. Semple*<sup>14</sup> the testator drew up his will leaving property to three persons as tenants in common, having learned that bequests and devises would fail if he bequeathed and devised for charitable purposes. He did this after consulting with one of the trustees who suggested one of the two other trustees as being perfectly reliable. The trust was not communicated to these two until after the testator's death. The court held that there was a resulting trust with respect to that proportion which was bequeathed to the tenant in common who had been consulted but that the portions to the two who had no knowledge, vested in them absolutely even though they intended to carry out the intentions of the testator.

In *Durkee v. Smith*<sup>15</sup> the testator devised and bequeathed property to named trustees, such trustees to form a corporation to hold property on certain charitable trusts. Then in a separate clause he provided that in case any devise or bequest be invalid that part should go to these named trustees absolutely, and not as trustees. The court said that while it undoubtedly appeared from the entire will that the testator desired that the property be devoted to charity, nevertheless it was not sufficient to prevent the devises

---

<sup>14</sup> [1903] Ir. R. 73.

<sup>15</sup> 171 App. Div. 72, 156 N. Y. Supp. 920, 218 N. Y. 619, 112 N. E. 1057 (1916), rehearing 219 N. Y. 657, 114 N. E. 1066 (1916).

and bequests from being absolute. The court did not disturb the lower court's findings that there was not sufficient external evidence to show a secret understanding and therefore affirmed the judgment in favor of these named persons.

A California case <sup>16</sup> has carried the doctrine so far as to hold valid a bequest where one of the legatees informed the testatrix that it would fail should she leave it to them on trust or to them as park commissioners. Whereupon the testatrix said, "I will leave it to you absolutely", to which the legatee responded, "You can do that if you wish". In her will the testatrix related that she had abandoned her desire to leave it for charitable purposes and desired to leave it to the named legatees absolutely. The court stated that the fact that the legatees had, after the death of the testatrix, executed a declaration of trust for the charitable purpose which testatrix desired, made no difference in the result; the property was theirs absolutely and they could do as they pleased. In this latter case an implied promise to hold in trust might well have been found.

In all the preceding cases it appears that the party received the property under such circumstances that in good conscience he should not keep it for himself. In a period of strict law when the scope of the law activities was narrow there might well be a justification for judges closing their eyes to what was actually going on. But where there is a conscious legislative endeavor to prevent property being left to charity under certain conditions it would seem that these courts have not been sufficiently liberal with respect to the doctrines of constructive trusts.

The South Carolina Supreme Court has reached what seems to the writer a preferable result. In *Gore v. Clark* <sup>17</sup> it appears that the South Carolina statute made illegal and void a devise or bequest by a testator of more than one-quarter of his property

---

<sup>16</sup> O'Donnell v. Murphy, 17 Cal. App. 625, 120 Pac. 1076 (1912), cited with approval in *In re Holt's Estate*, 61 Cal. App. 464, 215 Pac. 124 (1923).

<sup>17</sup> 37 S. C. 537, 16 S. E. 614 (1892). In connection with these cases under discussion see *Kendrick v. Cole*, 61 Mo. 572 (1876); *Matter of the Will of O'Hara*, 95 N. Y. 402 (1884); *Trustees of Amherst College v. Ritch*, 151 N. Y. 282, 45 N. E. 876 (1897); *Fairchild v. Edson*, 154 N. Y. 199, 48 N. E. 541 (1897); *Scott, Conveyances on Trusts Not Properly Declared* (1923) 37 HARV. L. REV. 653, at 671 *et seq.*

to his bastard children. It further appears that the testator, after leaving one-fourth of his property to such children, had left the balance to a person upon whom he could depend to carry out his desires. The fact that he wanted this property held in trust for his illegitimate children was not communicated to this devisee and legatee until after his death; there was no doubt as to the fact that the testator made the arrangements in this way so as to evade the law in question. At the suit of one of the heirs and next of kin, the court ordered the executor to pay over the property to the heirs and next of kin.

There is a further note of dissent to the prevailing doctrine in the latest pronouncement of the Pennsylvania Supreme Court in a case in which the point was directly involved. In *In re Bickley's Estate*<sup>18</sup> the court felt that it was bound to follow *Schultz's Appeal*<sup>19</sup> because of the number of Pennsylvania cases that had followed it, and because of the further fact that twenty-five sessions of the legislature had not changed the law. The court, however, said that if the question were an open one it would take the opposite view, and in a severe criticism gave five reasons:

1. The decisions made valid admitted attempts to evade the law.
2. The law was applied to those within the letter and not within the spirit, and not to those cases within the spirit but not within the letter.
3. Devisees and legatees were tempted to commit a moral wrong by keeping for their own uses.
4. Lawyers, contrary to their duty to obey the law in spirit, were tempted to advise their clients how to evade the law.
5. Courts were tempted to seize on slight circumstances to create a trust with illogical distinctions as a result.<sup>20</sup>

This pronouncement by a court which has had a long experience with the doctrine might well serve as a warning to jurisdictions

---

<sup>18</sup> 270 Pa. 101, at pages 104, 105, 106, 113 Atl. 68, at 69, 70 (1921).

<sup>19</sup> *Supra* note 11.

<sup>20</sup> Referring to *Stirk's Estate*, *supra* note 13; *Russell v. Jackson*, 10 Hare 204; *Edson v. Bartow*, 154 N. Y. 199, 48 N. E. 541.

which have not as yet passed upon the question. It must, however, be admitted that there are difficulties in the way of reaching the desired result. The rule is well established that if property is left by will to a devisee or legatee with no trust indicated, and the testator intends that he shall hold in trust for another but without communication of that intention to him in the lifetime of the testator, the devisee or legatee will take free of the trust. To impose a constructive trust upon him for the intended beneficiary would, it seems, violate the spirit of the statute of wills. It would, of course, leave wide open the possibility of vesting the equitable interest in property effectively at the death of the testator without an instrument properly attested. It has also been suggested by Professor Scott<sup>21</sup> that it would violate the spirit to impose it for the benefit of the heirs or next of kin.<sup>22</sup> In *In re Boyes*<sup>23</sup> the legatee promised to hold personal property in trust for such person as the testator named in a letter to be given him. This letter was never given to him but was found among the papers of the decedent. The legatee was willing to hold upon trust. The court imposed a constructive trust for the benefit of the next of kin; Professor Scott approves this case.<sup>24</sup> It is submitted, however, that the spirit of the statute is not violated in one case more than the other; that the only question is whether it is unconscionable from the point of view of equity for a devisee or legatee to keep that which comes to him by the will when he knows that he is not intended to keep it. The majority of courts are in agreement that if the devisee or legatee has promised the testator that he will hold in trust for another that a constructive trust will be imposed for the intended beneficiary. Professors Scott<sup>25</sup> and Costigan<sup>26</sup> have excellent articles on the cases,<sup>27</sup> taking differing views as to whether it should be for the heirs or next of kin, or for the intended beneficiary. To the majority of

---

<sup>21</sup> For a collection of cases see an article by Austin W. Scott, *op. cit. supra* note 17, at 678, n. 69.

<sup>22</sup> *Ibid.* 678.

<sup>23</sup> 26 Chan. Div. 531 (1884).

<sup>24</sup> Scott, *loc. cit. supra* note 22.

<sup>25</sup> *Ibid.* 670.

<sup>26</sup> Costigan, *Constructive Trusts Based on Promises Made to Secure Bequests, Devises, or Intestate Succession* (1915) 28 HARV. L. REV. 237, 366.

<sup>27</sup> For a collection of cases see SCOTT, CASES ON TRUSTS (1919) 458, n. 2.

the courts it seems unconscionable for the devisee and legatee to keep under those circumstances, but to date they have not seen fit to extend the doctrine to the case we have been discussing. In view of the fact that many courts have not yet reached a point where they will impose a constructive trust on one who murders a testator and profits by his untimely death, and in the light of such cases as *Kent v. McHaffey*<sup>28</sup> where the Ohio court refused to impose a constructive trust on a legatee who thwarted a blind testator's desire to revoke a will by purporting to burn it in the presence of the testator, and *Bohleber v. Rebstock*<sup>29</sup> in which the Illinois court stated the remedy was with the legislature, apparently unconvinced that a constructive trust might be imposed on two sons who prevented access by lawyers and others to their feeble and infirm father and thus prevented the revocation of his will, one may be justified in believing that it will be some time before a court will impose a constructive trust on a devisee or legatee who has taken no hand in procuring the devise or legacy and whose only wrongful act, if it could be so called, is in keeping that which was not meant for him.

Granted, however, that the courts are correct in refusing to impose a trust in the simple situation mentioned above, it by no means follows that the same view must be taken when the device is used to accomplish a purpose forbidden by the legislature. While keeping the property under these added circumstances will be no more unconscionable than before, yet the court which looks the situation squarely in the face cannot help but see that any ordinary self-respecting man will prove true to the confidence imposed in him if the property is given to him absolutely, and that unless a constructive trust for the heirs and next of kin is imposed, the statutes can be easily circumvented. The number of cases which have already reached the courts of last resort indicate a comparative widespread knowledge of how to evade these legislative provisions. The doctrine of constructive trusts has not crystallized within the bounds set by *Kent v. Mahaffey* nor *Bohleber v. Reb-*

---

<sup>28</sup> 10 Ohio St. 204 at 220-222 (1859).

<sup>29</sup> 255 Ill. 53, 99 N. E. 75 (1912).

*stock*<sup>30</sup> nor by those courts which refuse to impose a constructive trust upon a profiting murderer.<sup>31</sup> It may well be that other courts will follow the view of *Gore v. Clark*<sup>32</sup> and the one suggested as preferable in *Bickley's Estate*.<sup>33</sup>

The problem is further complicated by reason of the fact that there are at least three other methods which apparently can be used to accomplish the same purpose. The first is the creation of a revocable trust by a conveyance *inter vivos*; the second, the use of a power; and the third, the use of precatory instead of mandatory words.

From the viewpoint of the person seeking to evade the statute the first method seems preferable to the scheme which is most frequently used, if one may judge frequency of use from the frequency of litigated cases. One may transfer property upon trust reserving to himself the life interest therein and the power to revoke in whole or in part and thus obtain what amounts in substance to a testamentary disposition of the property yet the courts will not treat the conveyance as testamentary.<sup>34</sup> Care should be taken to reserve the right to revoke in whole or in part since the power to revoke the entire trust does not carry with it the right to revoke in part<sup>35</sup> and there should not be such control over the trustee as to make him simply an agent.<sup>36</sup> But with this power to revoke in whole or in part there is no doubt about the ultimate control of the grantor. Until the time of his death he is in the saddle with respect to his property.

In general the statutes which we have been discussing in their terms cover only devises and bequests so that the trust device appears outside their scope.<sup>37</sup> The use of the trust would seem

<sup>30</sup> *Supra* notes 28 and 29.

<sup>31</sup> For cases *contra* see also *Scott, loc. cit. supra* note 27.

<sup>32</sup> *Supra* note 17.

<sup>33</sup> *Supra* note 18.

<sup>34</sup> *Leaphart, The Trust as a Substitute for a Will* (1929) 78 U. OF PA. L. REV. 626.

<sup>35</sup> *National Newark & Essex Banking Co. v. Rosahl*, 97 N. J. Eq. 74, 128 Atl. 586 (1925).

<sup>36</sup> *Leaphart, op. cit. supra* note 34, at 629, and cases cited in n. 18 of same.

<sup>37</sup> Note however that in Pennsylvania the Act of July 7, 1911, P. L. 702, § 1 covers not only bequests and devises of property but also conveyances to charitable uses. It does not seem that the Wills Act of June 7, 1917, P. L. 403, § 27 has repealed this provision as to conveyances, although it includes in its terms only bequests and devises of property to charitable uses.

safe in that we have a trustee, whose duties the courts will enforce. The creator of such a trust would not have to take the chances of a devisee or legatee who might be unfaithful to his moral obligations. That this device was deliberately and successfully used in California for the benefit of Bowdoin College appears in the case of *President, etc. of Bowdoin College et al. v. Merritt et al.*<sup>38</sup> The statutes of California in effect made invalid a devise or bequest for charitable purposes of more than one-third of the property of a testator leaving legal heirs.<sup>39</sup> The testatrix intended to make a will but was advised of this difficulty and so made a deed of trust reserving a life interest and possibly controlling the investment and management.<sup>40</sup> The court held that the disposition of the property was by deed and hence did not violate the statute.

The use of a power also seems safer than the modern use previously discussed. *Thomas v. Board of Trustees of Ohio State University*<sup>41</sup> is a case which shows how a lawyer testator successfully made use of the power. Section 5915 of the Revised Statutes then in force in Ohio<sup>42</sup> provided in substance that if a testator died leaving issue of his body his devises and bequests for charitable purposes were void unless the will were executed more than one year prior to his death. The testator devised all his real property to Ohio State University subject to a life interest in his wife and daughter. He then provided that in case, and only in case the devise should fail for any cause, the property should go to two sons of his brothers. Then followed these provisions:<sup>43</sup>

"I now provide and declare that my said daughter is fully authorized and empowered to ratify and confirm said devise and bequest to the said university in case of my death within a year from the date of said will, and she is desired and requested by me to do so.

"In case she complies with this request the devises and bequests to the said children of George Folsom and Charles Folsom are hereby revoked."

---

<sup>38</sup> 75 Fed. 480 (C. C. N. D. Cal. 1896); dismissed 167 U. S. 745, 17 Sup. Ct. 996 (1896); 169 U. S. 551, 18 Sup. Ct. 415 (1898).

<sup>39</sup> *Ibid.* 483.

<sup>40</sup> *Ibid.* 484.

<sup>41</sup> 70 Ohio St. 92, 70 N. E. 896 (1904).

<sup>42</sup> For pertinent sections of statute see *ibid.* at 99, 70 N. E. at 898.

<sup>43</sup> *Ibid.* at 94, 70 N. E. at 897.

The testator died within one year after the execution of the will. The court held that the daughter had a valid power and the exercise of it cut off the estate of the nephews; the testator's purposes were thus accomplished. It will be noted that by this device the donor may so arrange it that the donee of the power will not profit if he fails to carry out the wishes of the testator.

In *In re Keleman's Will* the testatrix made use of the third method. In the instrument she made bequests to certain charitable institutions which would be invalid. Four days later she made a codicil reading as follows:

"Doubts having arisen as to the validity of the bequests made for charitable purposes in my said will I hereby modify said will dated February 18, 1889, by making my friend Townsend Wandell my residuary devisee and legatee, and hereby request him to carry into effect my wishes with respect thereto; but this is not to be construed into an absolute direction on my part, but merely my desire."<sup>44</sup>

The view of the court indicated the following:

"It is true that the expression of a wish or a desire may sometimes serve to found a trust or effect a charge, but such expressions are by no means conclusive. We must still examine the will to discover the testamentary intention. *Phillips v. Phillips*, 112 N. Y. 205, 19 N. E. Rep. 411. In the present case the testatrix expressly guards against a mistaken interpretation. She says that the expression of her wish is not to be construed as an absolute direction; by which she evidently means, that while she desires that her residuary legatee shall deal with the charities as she would have been glad to, yet she does not mean to fetter his ownership or qualify his right. She leaves him absolutely owner, and free to do as he shall choose. She puts upon him no obligation, legal or equitable, but contents herself with the bare expression of a wish which she hopes will influence his free agency; and so the bequest was absolute, and therefore valid on the face of the will."

In order to accomplish his desire by this method it is apparent that the testator will have to select carefully his devisee or legatee,

---

<sup>44</sup> 126 N. Y. 73, 74, 26 N. E. 968, 969 (1891).

<sup>45</sup> *Ibid.* at 80, 26 N. E. 969.

and he should also be careful as to communications to the devisee or legatee prior to his death. Thus in *Fairchild v. Edson*<sup>46</sup> the court followed *In re Kelemen's Will*, but as to a third of the property sustained the lower court's findings that there was a secret trust by reason of an implied understanding on the part of one of the three trustees that he would hold in trust for the desired charities.

With our courts continuing to handle legislative material as they do it seems a fairly easy proposition to evade these statutes dealing with devises and bequests to charities by any one of the four methods. The trust *inter vivos* and the power seem the safest.

Returning now to the discussion of the modern use, the field of its employment is larger than the evasion of this one class of statutes. It is also of importance in evading the estate or succession taxes of those states in which trusts created *inter vivos* with the creator reserving a life interest are held subject to the tax.<sup>47</sup> Before the case of *May v. Heiner*<sup>48</sup> it seemed useful for the purpose of evading the Federal Estate Tax. In *Nichols v. Coolidge*<sup>49</sup> the grantors of a trust apparently had this in mind. They conveyed residence property worth \$274,000 to their children by absolute deed. The children leased back to the grantors at a nominal rental with provisions for renewal until notice to the contrary. "All parties understood that renewals would be made if either lessee wished to occupy the premises." Under these circumstances one might think that the courts would impose a constructive trust in favor of their parents in case the children proved unfaithful to their trust, but American courts have almost unanimously refused to impose a constructive trust in case of an absolute deed upon an oral trust for the grantor.<sup>50</sup> Probably

<sup>46</sup> *Supra* note 17.

<sup>47</sup> *People v. Taverner*, 300 Ill. 373, 133 N. E. 211 (1921); *Moore v. Bugbee*, 128 Atl. 679 (N. J. 1925); *In the matter of Green's Estate*, 153 N. Y. 223, 47 N. E. 292 (1897); *In the matter of Cornell*, 170 N. Y. 423, 63 N. E. 445 (1902); *Re Dobson's Estate*, 73 Misc. 170, 132 N. Y. Supp. 472 (1911); *Dubois Appeal*, 121 Pa. 368, 15 Atl. 641 (1888); *Re Todd's Estate*, 237 Pa. 466, 85 Atl. 845 (1912); *Note* (1926) 75 U. of Pa. L. Rev. 168.

<sup>48</sup> 281 U. S. 238, 50 Sup. Ct. 286 (1930).

<sup>49</sup> 274 U. S. 531, 47 Sup. Ct. 710 (1926).

<sup>50</sup> See *Scott, op. cit. supra* note 17, at 658.

for this reason the Supreme Court felt no uncertainty in reaching the conclusion that this property should not be included in the estate of the grantor for purposes of the estate tax. At any rate the court did not discuss what effect the reservation of a life estate in 1917 would have.

*May v. Heiner*<sup>51</sup> has apparently made it unnecessary to take the chance of an unfaithful trustee. The court in this case, in reversing the Circuit Court of Appeals<sup>52</sup> held that the value of property conveyed by a grantor upon trust for her husband for life, then to herself for life, then to be distributed among her children was improperly included in the estate for purposes of the tax irrespective of whether the husband predeceased her. The lower federal court had held<sup>53</sup> in line with the majority of the state courts<sup>54</sup> that such trusts were to be included. The opinion of the Supreme Court, citing *Reinecke v. Northern Trust Company*<sup>55</sup> as though it were controlling, is very inadequate and perhaps leaves the question doubtful. At any rate the scheme is still useful with regard to state inheritance taxes.

Without purporting to exhaust the field of employment of this ancient scheme, the two instances, the frequent use of it for the evasion of testamentary laws, and the apparent use of it for the purpose of evading inheritance taxes, at least causes the query as to whether the courts have not failed to extend constructive trust doctrines as far as they might wisely do. In any event, it must be admitted that the "use" of the Fourteenth Century, or a creature most closely resembling it, and with its weaknesses, is at the present time a very handy contrivance for circumventing legislation.

---

<sup>51</sup> *Supra* note 48. The Circuit Court of Appeals, Third Circuit, has so understood *May v. Heiner* in deciding in *McCaughn v. Carnill*, 43 F. (2d) 69 (C. C. A. 3d, 1930), that a person may make an actual gift reserving a life interest to himself without subjecting the property on his death to the Federal Estate Tax.

<sup>52</sup> 32 F. (2d) 1017 (C. C. A. 3d, 1929).

<sup>53</sup> *Reed v. Howbert*, 8 F. (2d) 641 (D. Colo. 1925); *McCaughn v. Girard Trust Co.*, 11 F. (2d) 520 (C. C. A. 3d, 1926); *Bradley v. Nichols*, 13 F. (2d) 857 (D. Mass. 1926); *May v. Heiner*, 25 F. (2d) 1004 (W. D. Pa. 1928), 32 F. (2d) 1017 (C. C. A. 3d, 1929).

<sup>54</sup> *Supra* note 47.

<sup>55</sup> 278 U. S. 339, 347, 348, 49 Sup. Ct. 123, 125, 126, annotated 66 A. L. R. 397 (1929).