

ply of a future interest. Since it is assumed that the creditor cannot reach the future interest presently, the conveyance can operate to hinder him only in the future. It is true that time is not the determining factor in a fraudulent conveyance. Thus, a conveyance in anticipation of future obligations can be set aside.<sup>13</sup> However, in such a case there is a transfer of a present interest to the defeat of future creditors; but in the instant case there is the "transfer" of a future interest to the defeat of present creditors. Further, there are bankruptcy precedents permitting a debtor to be discharged through bankruptcy when the vesting of a future interest not reachable by creditors is imminent.<sup>14</sup> On the other hand, a court of equity has refused to uphold a transfer of an expectancy by an insolvent heir to defeat any creditors who became so prior to the vesting.<sup>15</sup>

But it should be noted that there are two kinds of fraudulent conveyances: those in which there is a retention of dominion by the debtor and those in which there is simply an outright gift while insolvent. The former is much more deserving of the opprobrium of fraud. Regardless of the solution of the case of a gift of a future interest which cannot be reached by creditors, it seems clear that where there is retention of dominion in the future when the interest vests the conveyance should be set aside. If retention of dominion is to be pivotal, actual intent again becomes relevant. The necessity for finding a joint intent is not a serious problem although in *Winchester-Simmons & Co. v. Culler*<sup>16</sup> it was held that there was not a fraudulent conveyance where a husband and wife made a voluntary conveyance of an estate by entirety to defeat a creditor of the husband since the joinder in the conveyance by the wife was in good faith. But the present case is distinguishable evidentially since a husband would presumably know more about his wife's business affairs than she about his, since he had an incurable disease and did in fact die a year later, and since he was a party to this prior litigation it must have made him conscious of plaintiff as a creditor. But more fundamentally the *Culler* case involved an outright gift. In fact it would seem arguable that neither spouse could be in good faith if the conveyance is made with a view toward retaining dominion. Thus, the court by refusing to pass on plaintiff's claim of secret trust would seem to have deprived themselves of a very useful *rationale* for their decision.

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**Husband and Wife—Enforcement of Void Separation Agreements—[Illinois].—**The husband, under a separation agreement, paid his wife \$5,000 for a release of her rights in his property and of his obligation to support her. In a suit by the wife to have the agreement declared null and void and to have separate maintenance decreed in her favor, the husband filed an answer conceding the illegality of the agreement, and a counterclaim asking that restitution of the \$5000 be required from the wife before she be allowed relief. *Held*, that although the contract was against public policy and void, the wife was not entitled to separate maintenance because she voluntarily consented to the separation and was not, therefore, living separate and apart from her husband without her fault, as required by statute. *Held*, furthermore, that the husband could

<sup>13</sup> Glenn, *Creditors' Rights and Remedies* § 169 (1915); 1 Moore, *Fraudulent Conveyances* 188, n. 19 (1908).

<sup>14</sup> *In re Swift*, 259 Fed. 612 (D.C. Ga. 1919).

<sup>15</sup> *Read v. Mosby*, 97 Tenn. 759, 11 S.W. 940 (1889).

<sup>16</sup> 199 N.C. 709, 155 S.E. 611, criticized in 29 Mich. L. Rev. 788 (1930).

not recover restitution of the sum paid the wife, for a court of equity will not, at the suit of one of the parties to an illegal contract, set that contract aside after it has been executed. *Vock v. Vock*.<sup>1</sup>

Contrary to the majority of jurisdictions,<sup>1a</sup> the Supreme Court of Illinois, although generally enforcing separation agreements,<sup>2</sup> has consistently refused to give effect to those in which the wife accepts a lump sum payment in lieu of support.<sup>3</sup> The language of the Illinois court is to the effect that the husband's duty to support his wife is a constituent element of the marriage relation as created by law, and that it cannot, therefore, be abolished or substantially modified by the parties without the consent of the state.<sup>4</sup> The underlying policy is apparently the apprehension that the wife may squander the lump sum or invest it imprudently and thus become a public charge.<sup>5</sup> The majority of courts, on the other hand, consider that such lump sum agreements recognize and define the monetary obligation to support, and that the arrangement, if fair and adequate, is satisfactory.<sup>6</sup>

In the present case, although apparently adhering to its view as to the invalidity of these contracts, and without overruling its former decisions on the subject, the Illinois Court took a step towards the results reached in the majority of jurisdictions. The agreement, though still declared invalid, is in effect enforced by the decision. Thus the wife is said to have lost her right to separate maintenance when she voluntarily separated from her husband, by operation of the Illinois statute.<sup>7</sup> This rule that a wife cannot enforce her right to separate maintenance if the separation is due to her fault is not only expressly stated in the Illinois statute, but is the general view in this country.<sup>8</sup> In other jurisdictions, however, this rule has been held not to apply where the separation is a voluntary one.<sup>9</sup> Also since the state's right to prosecute a husband for non-support cannot be barred either in Illinois or in the majority jurisdictions by a mere agreement between the parties, the husband who allows his wife to become destitute will have the same liability to such a criminal prosecution whether or not the contract is declared valid.<sup>10</sup> Again, the results of the majority view are reached through the holding that the court will not grant restitution of the money paid under the "illegal" contract. It remains doubtful, however, whether it follows from the present de-

<sup>1</sup> 365 Ill. 432, 6 N.E. (2d) 843 (1937).

<sup>1a</sup> Madden, *Persons and Domestic Relations* 334 (1931); Lindey, *Separation Agreements* 225-6 (1937); 15 *Harv. L. Rev.* 147 (1901); 3 *Mich. L. Rev.* 240 (1905).

<sup>2</sup> Luttrell v. Boggs, 168 Ill. 361, 48 N.E. 171 (1897); Boyd v. Boyd, 188 Ill. App. 136 (1914); Patterson v. Patterson, 111 Ill. App. 342 (1903); 35 *Yale L. J.* 233 (1925).

<sup>3</sup> Lyons v. Schanbacher, 316 Ill. 569, 147 N.E. 440 (1925); Van Koten v. Van Koten, 323 Ill. 323, 154 N.E. 146 (1926); see also Hill v. Hill, 74 N.H. 288, 67 *Atl.* 406 (1907); 35 *Yale L. J.* 233 (1925).

<sup>4</sup> See cases cited in note 3 *supra*.

<sup>5</sup> Lindey, *op. cit.* note 1 at 225; but see also *id.* at 198-9.

<sup>6</sup> See note 1 *supra*; 7 *Cornell L.Q.* 393 (1922).

<sup>7</sup> Smith-Hurd Ill. Stats. c. 68, par. 22 (1935).

<sup>8</sup> See note in 6 *A.L.R.* 6, at p. 7 (1920).

<sup>9</sup> *Ibid.*

<sup>10</sup> Lindey, *op. cit.* note 1 at 83, 204; State v. Karagavoorian, 32 *R.I.* 477, 79 *Atl.* 1111 (1911); *In re Tierney's Estate*, 148 *Misc.* 378, 266 *N.Y.S.* 51 (1933); Ill. L. 1915, 470, Smith-Hurd Ill. Stats. c. 68, par. 24 (1935).

cision that the wife is also prevented from charging her husband's credit, as she would be were the agreement enforced.<sup>11</sup> Logical carrying out of the fault notions applied to deny her separate maintenance should bring about such a result; but there are a few early decisions indicating that she may not be so barred.<sup>12</sup>

The court in the *present* case contrived, through notions of fault and illegality, to reach a fair result; but these same rules would effect a very harsh result if applied to the case where the contract is completely or partially executed. For example, in the case where no money has been paid under the contract, although the agreement will be unenforceable by the wife, she will be barred from claiming separate maintenance. Moreover, a relinquishment, by either party, of dower or inheritance rights, will be ineffective in a contract where there has been a release of support,<sup>13</sup> because the fault required to bar dower is limited by statute to cases of adultery and desertion.<sup>14</sup> Instead of relying on unsound notions of fault to obtain the enforcement of a reasonable separation agreement and to reach in a limited group of cases only a result which is just and in conformity with its policies, the Illinois court should overrule its notion of "invalidity" as applied to these agreements and should line itself up behind the majority of jurisdictions.

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Labor Law—Conflict in Jurisdiction between Labor Board and Federal Court—[Federal].—Despite the known and somewhat successful efforts of the United Electrical and Radio Workers of America, a union affiliated with the C. I. O., to organize the employer's workers, the employer refused its request for a collective bargaining conference and instead signed a contract with an A. F. of L. union, the Brotherhood of Electrical Workers. This contract provided that the employer would hire only members of the Brotherhood or in event of failure of an employee to join such union, the employer would deduct from his wages an amount equal to the dues of the union. The C. I. O. union filed a complaint with the National Labor Relations Board to contest the validity of this contract on the ground that its negotiation and its terms involved the use of unfair labor practices. Before service of this complaint, the Brotherhood obtained in the federal district court a decree for the specific performance of the contract. The National Labor Relations Board, maintaining its own exclusive jurisdiction, declared the contract illegal because of unfair labor practices. *In re Matter of National Electric Products Corp. and United Electrical and Radio Workers of America.*<sup>15</sup>

Section 10 of the National Labor Relations Act grants jurisdiction to the National Labor Relations Board as follows: "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . affecting commerce. This power shall be exclusive, and shall not be affected by any other means of

<sup>11</sup> *Lindley, op. cit.* 205 (1937); but see *id.* at 226 and cases cited, for peculiar New Jersey rule.

<sup>12</sup> *Seybold v. Morgan*, 43 Ill. App. 39 (1891). See also, *Ross v. Ross*, 69 Ill. 569 (1873); *Evans v. Fisher*, 10 Ill. 569 (1849); *Bensyl v. Hughs*, 109 Ill. App. 86 (1902); *Todtleben v. Rudowski*, 181 Ill. App. 318 (1913); *Schnuckle v. Bierman*, 89 Ill. 454 (1878).

<sup>13</sup> *Lyons v. Schanbacher*, 316 Ill. 569, 147 N.E. 440 (1925).

<sup>14</sup> *Smith-Hurd Ill. Stat. c. 41 § 15* (1935); *Landreth v. Casey*, 340 Ill. 519, 173 N.E. 84 (1930).

<sup>15</sup> N. L. R. B. Cases, C-219, R-241 (Aug. 30, 1937), 5 U.S. Law Week 1, 7 (Sept. 7, 1937).