usual presumption of due care on the part of the deceased in a wrongful death action apparently does not exist.[17] Thus, it would seem that the eyewitness rule should not bar habit evidence where the sole eyewitness is interested adversely to the plaintiff.

Family Relations—*Inter Vivos* Transfers—Protection of Spouse's Statutory Share —[New York].—Three days before his death, the husband transferred all his real and personal property in trust, reserving income for life, power of revocation, and control of the trustees as to the administration of the trust. The trial court refused to enforce the trust as against the widow's claim for her statutory share in her husband's estate.[1] On appeal, *held*, affirmed. The husband's transfer was "illusory" in respect to the widow's marital rights. *Newman v. Dore.*[2]

In place of common law dower and curtesy, many states have substituted legislation which gives the surviving spouse, even against a will, a percentage of the decedent's personal and real property remaining in the estate at the time of his or her death.[3] While the general policy motivating these statutes was to protect the spouse against disinheritance, the effectiveness of such statutes largely depends upon the extent to which either spouse is permitted to alienate his or her property during life. The statutes are generally silent on the problem of *inter vivos* transfers; and in order to give effect to the policy behind these statutes the courts have sometimes been compelled to nullify transfers made during coverture.

Such relief has been predicated upon two distinct grounds: (1) the subjective intent primarily to defeat the marital rights of the surviving spouse rather than to benefit the person to whom the property is given; or (2) the failure of the transferor to relinquish in part or in whole the incidents of ownership. Under the first theory, followed in a minority of jurisdictions, the main problem turns upon evidence of the transferor's intent.[4] Where definite evidence is lacking, the protection afforded the surviving spouse depends upon the presumptions invoked by the court. Thus, in *Murray v. Murray*[5] the court held that a presumption of an intent to defeat the widow's share arose where the gift constituted a principal part of the husband's estate. In Vermont, contrary to earlier decisions,[6] no presumptions are raised from the fact that the natural

[17] Contrast the refusal of the trial court to grant an instruction in accord with this presumption, as indicated by the record in Blumb v. Getz, 366 Ill. 273, 8 N.E. (2d) 620 (1937), with Anderson v. C.R.I. & P. Ry. Co. 189 Iowa 739, 175 N.W. 583 (1920); Gembolis v. Rydeski, 258 Mich. 521, 243 N.W. 44 (1932); 6 Iowa L. Bull. 55 (1920); *cf.* 44 Harv. L. Rev. 292 (1930).

[1] Cahill's Consl. Laws N.Y. 1930, c. 13, §§ 18, 83.

[2] 275 N.Y.371, 9 N.E.(2d)966 (1937); noted 37 Col. L. Rev. 1219 (1937), 7 Brooklyn L. Rev. 241 (1937).

[3] 3 Vernier, American Family Laws §§ 188, 189 (1935). These statutes establish a "legitime portion" for the surviving spouse, analogous to that of the Civil Law. See note 24 *infra.*

[4] Evans v. Evans, 78 N.H. 352, 100 Atl. 671 (1917); Nichols v. Nichols, 61 Vt. 426, 18 Atl. 153 (1889); Manikee v. Beard, 85 Ky. 20, 2 S.W. 545 (1887); see notes 5–7 *infra.*

[5] 90 Ky. 1, 13 S.W. 244 (1890); see also Payne v. Tatem, 236 Ky. 306, 33 S.W. (2d) 2 (1930).

[6] Thayer v. Thayer, 14 Vt. 107 (1842); Nichols v. Nichols, 61 Vt. 426, 18 Atl. 153 (1889) (mere gratuitous transfer is presumptively fraudulent).

consequence of a transfer is to reduce the size of the estate and ultimately the statutory share of the surviving spouse. Such intent must be proved "beyond a reasonable doubt,"[7] by a consideration of the circumstances surrounding the transfer. While the court does not specify what would constitute sufficient proof of such intent, it is probable that it would consider as relevant the time intervening between the transfer and the death of the transferor and the nature of the provisions made for the survivor.

Most courts have disregarded the intent theory,[8] and have focused their attention on the character of the transfer. Thus the courts uphold a transfer against the surviving spouse if it is a completed gift *inter vivos;*[9] while they protect the surviving spouse against gifts *causa mortis,*[10] or against a pretended transfer which is actually a mere sham.[11] The survivor, however, was denied a distributive share in cases where the decedent reserved a life estate under an irrevocable trust.[12] Some courts have, against the claim of surviving spouse, upheld a trust arrangement which allowed the transferor the right of changing the beneficiaries.[13] In Pennsylvania[14] the courts have even sustained trusts, reserving a life estate and a power of revocation, against the marital claims of the survivor.[15]

In New York, the lower courts have given liberal interpretation to a statute de-

[7] Dunnett v. Shields, 97 Vt. 419, 123 Atl. 626 (1923); Patch v. Squires, 105 Vt. 405, 165 Atl. 919 (1933).

[8] Leonard v. Leonard, 181 Mass. 458, 63 N.E. 1068 (1902); Poole v. Poole, 129 Md. 387, 99 Atl. 487 (1916); Holmes v. Holmes, 3 Paige Ch. (N.Y.) 363 (1832); Padfield v. Padfield, 78 Ill. 16 (1875); Hall v. Hall, 109 Va. 117, 63 S.E. 420 (1909); Norris v. Bradshaw, 96 Colo. 594, 45 P. (2d) 638 (1935); Sederlund v. Sederlund, 176 Wis. 627, 187 N.W. 750 (1922); Lines v. Lines, 142 Pa. 149, 21 Atl. 809 (1891).

[9] Potter Title and Trust Co. v. Braum, 294 Pa. 482, 144 Atl. 401 (1928); Blankenship v. Hall, 233 Ill. 166, 84 N.E. 195 (1908).

[10] Hatcher v. Buford, 60 Ark. 169, 29 S.W. 641 (1895); Crawfordville Trust Co. v. Ramsey, 55 Ind. App. 40, 100 N.E. 1049 (1913); see also Harmon v. Harmon, 131 Ark. 501, 199 S.W. 553 (1917); *contra:* Chase v. Redding, 13 Gray (Mass.) 418 (1859).

[11] Smith v. Smith, 22 Colo. 480, 46 Pac. 128 (1898); Doane v. Doane, 238 Mass. 106, 130 N.E. 484 (1921); Hays v. Henry, 1 Md. Ch. 337 (1848).

[12] Patterson v. McClenathan, 296 Ill. 475, 129 N.E. 767 (1921); Hall v. Hall, 109 Va. 117, 63 S.E. 420 (1909); Robertson v. Robertson, 147 Ala. 311, 40 So. 104 (1906); *In re* Side's Estate, 119 Neb. 314, 228 N.W. 619 (1930).

[13] Kelly v. Snow, 185 Mass. 288, 70 N.E. 89 (1904); Roche v. Brickley, 254 Mass. 584, 150 N.E. 866 (1926); Merchants' Loan and Trust Co. v. Patterson, 308 Ill. 519, 139 N.E. 912 (1923); Boyle v. John M. Smythe Co., 248 Ill. App. 57, 86 (1928) (allowed beneficiary to be designated in will).

[14] The language in some of the earlier Pennsylvania decisions, while confusing, suggests that the courts have followed the intent theory. Ross's Appeal, 127 Pa. 4, 17 Atl. 682 (1889); Dickerson's Appeal, 115 Pa. 198, 8 Atl. 64 (1886). The later decisions have discarded this theory. See note 15 *infra.*

[15] Lines v. Lines, 142 Pa. 149, 21 Atl. 809 (1891); Windolph v. Girard Trust Co., 245 Pa. 349, 91 Atl. 634 (1914); Beirne v. Continental-Equitable Trust Co., 307 Pa. 570, 161 Atl. 721 (1932); see also Stewart v. Stewart, 5 Conn. 316 (1824). *Cf.* Cameron v. Cameron, 18 Miss. 394 (1848).

signed "to increase the share of a surviving spouse."[16] Thus, in *Rubin v. Myrub Realty Co.*[17] the court held that an antenuptial conveyance made with intent to deprive the widow of her share was void as against the wife's marital rights; and in *Bodner v. Feit*[18] the court, in setting aside a transfer by the husband, considered such an intent as one of the operative facts. The Court of Appeals, however, though protecting the widow in the instant case, rejects this fabric of protection afforded the surviving spouse by the intent theory, and apparently aligns itself with the majority rule that only the degree of control retained by the transferor will be considered.[19] This position of the court is not only likely to nullify the purpose of the statute, but is also inconsistent; for in eschewing the intent theory it could not logically, following the control theory, brand as "illusory" a conveyance which it assumes to be otherwise valid.

In order to reach the desired result, the court might have, contrary to *Van Cott v. Prentice*,[20] followed the suggestion of the Restatement and declared the trust testamentary and therefore invalid.[21] Preferably, it might have, consistent with the earlier decisions in the lower courts,[22] set aside the transfer upon the finding in the trial court that the trust was established with intent to defeat the widow's share. The courts' reluctance to follow the intent theory can be explained only in that it might result in too great a restraint on alienation.[23] While such a criticism was perhaps applicable to dower, which placed a restriction on commercial transactions, it has no application to gratuitous transfers. Therefore, even apart from legislation that might be passed[24] to protect the distributive share against *inter vivos* transfers, it is suggested that in construing the present statutes the policy of solicitude for the surviving spouse should be paramount.

[16] N.Y.L. 1929, c. 229, § 20.

[17] 244 App. Div. 541, 279 N.Y. Supp. 867 (1935); see also Le Strange v. Le Strange, 242 App. Div. 74, 273 N.Y. Supp. 21 (1934).

[18] 247 App. Div. 119, 286 N.Y. Supp. 814 (1936); noted 46 Yale L. J. 884 (1937), 37 Col. L. Rev. 317 (1937). The courts have held, however, that the widow has no claim against a "Totten trust," where there is a bank deposit, revocable at will, by one person as trustee for another. *In re* Clark, 149 Misc. 371, 268 N.Y. Supp. 253 (1933); *In re* Schurer's Estate, 157 Misc. 573, 284 N.Y. Supp. 28 (1935), aff'd 248 App. Div. 697, 289 N.Y. Supp. 818 (1936).

[19] It is interesting to note that in the instant case, Finch, J., concurred only in the result.

[20] 104 N.Y. 45, 10 N.E. 257 (1887).

[21] Rest., Trusts § 57(2) (1935); *In re* Tunnell's Estate, 325 Pa. 554, 190 Atl. 906 (1937).

[22] Rubin v. Myrub Realty Co., 244 App. Div. 514, 279 N.Y. Supp. 867 (1935); Bodner v. Feit, 247 App. Div. 119, 286 N.Y. Supp. 814 (1936).

[23] Brown v. Fidelity Trust Co., 126 Md. 184, 94 Atl. 523 (1915); Cahn, Restraints on Disinheritance, 85 U. of Pa. L. Rev. 139, 151 (1936).

[24] *Cf.* German Civil Code, §§ 2325–2331; French Civil Code, arts. 920–930. These European statutes are entitled to consideration in this country, since they are based on long experience with the "legitime," an indefeasible interest in the decedent's estate.

Statutes might be enacted, whereby the wife's marital rights remain undefeated if the husband in his transfer reserves a power of revocation; or if the transfer is made in contemplation of death (with a presumption arising within a stipulated period). See 46 Yale L.J. 884, 887, n. 19 (1937).