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Harry Alexander, Ralph H. Alexander and Evelyn Alexander Howick v. Zion's Savings Bank & Trust Company and Hanna Wilson Alexander : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

HARRY ALEXANDER, RALPH H.
ALEXANDER and EVELYN ALEX-
ANDER HOWICK,
Plaintiffs and Respondents,

vs.

ZION'S SAVINGS BANK & TRUST
COMPANY, a corporation,
Defendant,
and

HANNAH WILSON ALEXANDER,
Defendant and Appellant.

Case No.
8042

FILED
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BRIEF OF APPELLANT

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and

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Defendant and Appellant.

Case No.
8042

BRIEF OF APPELLANT

PRELIMINARY STATEMENT

This is an appeal from a decree entered by the trial court, sitting without a jury. The facts involved in this case were not in serious dispute at the trial and the sole question raised by this appeal is whether or not the trial court erred in its application of the law to the facts presented.

Plaintiffs alleged in their complaint that they were beneficiaries under a certain trust agreement dated January 10, 1930, executed by Henry A. Alexander, Emily J. Alexander and Zion's Savings Bank & Trust Company and an amendment thereto dated July 2, 1940; that certain described property was the subject matter of the alleged trust and that by its terms the trust was ripe for distribution to the beneficiaries (R. 1). The complaint further alleged that Hannah Wilson Alexander, Appellant, claimed an interest in said property adverse to that of plaintiffs'. Plaintiffs prayed that the alleged trust be terminated, the property distributed according to its terms and that the claims of Hannah Wilson Alexander be declared invalid and title quieted against her.

A stipulation was filed by the parties to this action reciting that the defendant Zion's Savings Bank & Trust Company had no interest in the controversy herein involved, and that it should continue to hold said real property as trustee and to abide by the outcome of this action (R. 17). Hannah Wilson Alexander will be referred to in this brief as Defendant.

Defendant answered plaintiff's complaint denying generally the allegations concerning the trust agreement and admitting that she asserted a claim in and to said property adverse and hostile to plaintiff's claim (R. 9). As a Cross Complaint, defendant alleged that during his life time, Henry A. Alexander purchased from Louis DeYoung and Louise S. DeYoung, his wife, the property in question, paid the full purchase price therefor, and became the owner of

complete legal and equitable title thereto; that he caused and directed the sellers to convey legal title to Zion's Savings Bank & Trust Company and at all times subsequent to that time was the owner of full and complete equitable title to said property and was in possession thereof during his life time and at the time of his death; that at the time the property was so acquired defendant was the lawful wife of Henry A. Alexander and survived him as his widow; that she had at no time parted with or relinquished any of her right, title, inchoate dower or interest in said property and is and at all times has been the owner in fee simple of undivided one-third interest of said property. The Cross-Complaint prayed that her interest in said property be decreed and that the plaintiffs' claim against said interest be quieted and that the alleged trustee be ordered to convey to her legal title to an undivided one-third interest in said property. Plaintiffs' Reply in substance denied the claim of defendant (R. 12).

Subsequent to the commencement of this action, the parties entered into an agreement allowing Zion's Savings Bank & Trust Company to sell the real property and to hold the proceeds of said sale pending the determination of this cause (R. 57).

The case was tried by the Court, sitting without a jury, and after hearing the evidence and arguments of counsel, the Court granted judgment to the plaintiffs as prayed in their complaint and ordered that the proceeds from the real property be distributed to the plaintiffs as provided in the trust agreement. It is from the Decree of the trial court that this appeal is taken.

STATEMENT OF FACTS

On January 10, 1930, Henry A. Alexander and Emily J. Alexander, his wife, entered into the following agreement with Zion's Savings Bank & Trust Company (R. 4) :

TRUST AGREEMENT

THIS AGREEMENT made and entered into at Salt Lake City, Utah, this tenth day of January, A. D., 1930, by and between HENRY A. ALEXANDER and EMILY J. ALEXANDER, his wife, of Salt Lake City, Utah, FIRST PARTIES, herein called "TRUSTORS", and ZION'S SAVINGS BANK AND TRUST COMPANY, a corporation, of Salt Lake City, Utah, SECOND PARTY, herein called "TRUSTEE", WITNESSETH:

THAT, WHEREAS, the said Trustors desire to create a Trust respecting the property hereinafter described, for the benefit of the survivor of them, and for the benefit of their heirs hereinafter named, and for other reasons;

NOW, THEREFORE, for and in consideration of the foregoing, and of the sum of ONE (\$1.00) DOLLAR in hand paid, receipt whereof is hereby acknowledged, and of the performance of the terms of this Trust by the Trustee, the said Trustors have sold, assigned, transferred, set over and conveyed, and by these presents do sell, assign, transfer, set over and convey unto the said Trustee all of that certain real estate and personal property described in a list hereto attached, marked "EXHIBIT A", hereby referred to and made a part of this trust agreement.

It is mutually agreed that all of the property above described, mentioned and referred to shall be

called the "TRUST FUND", and that the said Trustors may, at their option, add to said Trust Fund by depositing with and assigning and conveying to the Trustee other property, money or securities, and all such additions shall become a part of the Trust Fund, and be subject to all of the terms and conditions hereof.

All of the said Trust Fund shall be held and disposed of by the Trustee strictly for the following uses and purposes and upon the following trusts, to-wit:

1. Said Trustors hereby expressly reserve unto themselves, jointly, and to the survivor of them, the right to receive all of the income from said Trust Fund, and expressly reserve the right to revoke and terminate this Trust in whole or in part at any time during the joint lives of Trustors, or the lifetime of the survivor of them, and they, and the survivor of them, expressly reserve the right to change the beneficiaries herein named, and to change or modify the nature of the Trust hereby created, or the terms and conditions thereof in any respect. Such revocation or change shall be in writing signed by said Trustors, during their joint lifetime, and thereafter by the survivor of them, or by their attorney-in-fact thereunto duly authorized, but no particular or technical form thereof shall be required, and no such revocation or change need be acknowledged. Upon the revocation of this Trust, as above provided, the Trustee will assign, without recourse, or quitclaim back to said Trustors, or to such person as they, or the survivor of them, may designate in such revocation or change, all such property as may be included within the revocation or change.

2. During the lifetime of said Trustors, and the survivor of them, all taxes, assessments, insurance premiums, and all other costs, expenses, debts

and obligations of said Trustors, or either of them, in connection with the property included in this Trust, shall be paid by the said Trustors, and the survivor of them, and the Trustee shall not be responsible or liable in any manner for the nonpayment of any such taxes, assessments, premiums, costs, expenses, debts and obligations of any name or nature whatsoever.

3. If, upon the death of the survivor of said Trustors, this trust shall not have been revoked in full, as to all of the property covered hereby, then out of such as shall remain subject to this Trust, the Trustee shall pay the costs and expenses of the last sickness and funeral charges of said survivor and shall deduct for its compensation as Trustee hereunder such fees and expenses as are usually charged in like cases; and all of the rest, residue and remainder of said Trust Fund shall be distributed as follows:

One-half ($\frac{1}{2}$) to HARRY ALEXANDER, son of Trustors, if he be then living, and if not, then in equal shares to his then living heirs.

One-half ($\frac{1}{2}$) to RALPH HENRY ALEXANDER, grandson of Trustors, and EVELYN JUNE ALEXANDER, granddaughter of Trustors, share and share alike, with the understanding that if said two grandchildren be minors at the time the distribution of the Trust Fund shall take place, the Trustee shall continue to hold in trust the respective shares to which said two grandchildren are entitled hereunder, until they become of legal age, at which time their respective portions of the Trust Fund shall be delivered and paid over to them. If, however, before two said grandchildren become of legal age, Trustee shall deem it advisable or necessary to pay from their respective shares

for their support, maintenance, care or education, authority is hereby vested in said Trustee to pay such sums and at such times as Trustee shall, in its business discretion, consider necessary and advisable to supply for said two grandchildren proper care, support, maintenance and education. In the event that either of said two grandchildren shall die before receiving the full portion of the Trust Fund to which he or she is entitled hereunder, the share of such deceased grandchild shall go to the surviving grandchild, if there be a survivor, and if not, then such share shall go to Harry Alexander, son of Trustor, or his then living heirs.

4. In order that the terms and conditions of this Trust may be fully consummated, said Trustee is hereby authorized and empowered to sell any part or all of the said Trust Fund, at private or public sale, without notice to or confirmation of any court, and is further vested with full power and authority to comply with all legal requirements as to the execution of writings, deeds, leases, assignments, conveyances and other documents and formalities, without the confirmation of any court; and is authorized to pay from the Trust Fund all expenses and costs necessary for the fulfillment of this Trust, or the protection of the property covered hereby, or the prosecution or defense of any action or proceeding in which any of the Trust Fund may be involved.

5. The respective interests of beneficiaries in the Trust Fund created hereby shall in no case vest in such beneficiaries until they, respectively, shall become entitled to receive and demand, absolutely and forthwith, the income or principal of the said Trust Fund to which they, respectively, may be entitled hereunder, and such beneficiaries shall have

no control whatsoever over, or interest in said Trust Fund except as herein provided; and they shall have no right or authority to assign or anticipate any income or share to which they may be entitled under the provisions of this Agreement, and the interests of said beneficiaries, and each of them, either in the principal or the income shall not be liable in any manner or to any extent for the obligations or liabilities, voluntary or involuntary, of the said beneficiaries, or either or any of them, of whatsoever character.

6. In the event that there shall be no beneficiaries, named herein, living at the time of the final distribution of the said Trust Fund, then, and in this event, the entire Trust Fund shall revert to the estate of Henry A. Alexander, and be distributed in accordance with the laws of the State of Utah governing estates of deceased persons.

IN WITNESS WHEREOF the said Trustors have hereunto set their hands and seals, and the Trustee to signify its acceptance of the Trust hereby created, has caused these presents to be executed on the day and year herein first above written.

(s) Henry A. Alexander

(s) Emily Jane Alexander

FIRST PARTIES

ZION'S SAVINGS BANK & TRUST COMPANY

BY (s) Wm. McEwan, Its Cashier

SECOND PARTY

Certain real property described in the exhibit to the trust agreement (R. 7) had been acquired by Henry A. Alexander in 1920 by a Warranty Deed in which he was the sole grantee (R. 52).

Subsequent to the execution of this agreement, Emily J. Alexander died. On November 3, 1936, Henry A. Alexander was married to Defendant, Hannah Wilson Alexander, sister of his first wife, at Salt Lake City, Utah. On May 21, 1940, Henry A. Alexander executed an instrument entitled "Withdrawal of Property From Trust" which described the real property referred to in the exhibit to the trust agreement, acknowledged receipt of this property and released the trustee from any obligation in relation to it (Exhibit 4). The property was then conveyed, at his request, to Louis DeYoung and Louise S. DeYoung, his wife. In consideration for the transfer by Henry A. Alexander of the property withdrawn from the trust, the DeYoungs, at his request and pursuant to an agreement with him conveyed to Zion's Savings Bank & Trust Company the real property involved in this case, known as 685 East 3065 South, Salt Lake County, Utah.

On July 11, 1940, almost four years after his marriage to defendant, Henry A. Alexander addressed a letter to Zion's Savings Bank & Trust Company for the purpose of amending the trust agreement (Exhibit 2). This letter reads as follows:

Zions Savings Bank and Trust Company
Trustee Under Trust No. 324

Gentlemen:

Pursuant to the right reserved in the above agreement to change the terms thereof, I have elected and do by these presents elect to change the provisions of said agreement as follows:

My wife, Emily J. Alexander, named in said agreement is now deceased and I have remarried; my present wife's name is Hannah Wilson Alexander, and I desire that the following paragraph shall be incorporated in the original trust agreement as though originally a part thereof:

"In the event Hannah Wilson Alexander shall survive Henry A. Alexander she shall be entitled to the use and occupancy of the family home at 685 East 3065 South, for so long as she shall desire to occupy the same. This right in her, however, shall not extend to a life estate so that she would be enabled to rent the property to a third person, but it shall be confined to her personal use and occupancy. In the event there are funds in the Trust Estate for the payment of taxes on said property and its maintenance, she shall have the use and occupancy as aforesaid free of all expense or upkeep and the taxes; but in the event there are not funds in the Trust Estate for the payment of these items, it will necessarily be her obligation to pay the same as they fall due. If the said Hannah Wilson Alexander does not survive Henry A. Alexander, then upon his death distribution of the Trust Estate shall be made as hereinafter provided. If she does survive him, then upon her death, such distribution shall likewise be made."

Further I hereby declare said original trust agreement as hereby amended to be in full force and effect.

(s) Henry A. Alexander
TRUSTOR

During the remainder of his lifetime, Henry A. Alexander paid the taxes on the above property and had the full and unrestricted possession and control thereof (R.

4). He and his wife, Hannah Wilson Alexander, lived upon said property after its acquisition until his death in June, 1943 (R. 45). From the date of her husband's death until May, 1952, the defendant continued to reside on the property, make the necessary repairs to the home and premises, and paid all of the taxes (R. 46). Since May of 1952, due to her advanced age and poor health, the defendant has lived with her son (R. 27, 46). She was unable to appear at the trial of this case.

SUMMARY OF ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT HER ONE-THIRD STATUTORY INTEREST IN SAID PROPERTY SINCE THE PURPORTED TRUST WAS ILLUSORY AND TESTAMENTARY IN NATURE AND SHOULD NOT HAVE BEEN ALLOWED TO DEFEAT HER INTEREST.

POINT II

THE TRIAL COURT ERRED IN DENYING DEFENDANT HER UNDIVIDED ONE-THIRD STATUTORY INTEREST IN SAID PROPERTY SINCE HER DECEASED HUSBAND IN ANY EVENT OWNED THE FULL AND COMPLETE EQUITABLE TITLE TO SAID PROPERTY INCLUDING ALL INCIDENTS OF OWNERSHIP.

POINT III

THE TRIAL COURT ERRED IN DENYING DEFENDANT HER UNDIVIDED ONE-THIRD STATUTORY INTEREST IN SAID PROPERTY SINCE IN ANY EVENT HER INTEREST WOULD HAVE ATTACHED AT THE TIME THE PROPERTY WAS PURCHASED AND CONVEYED TO THE TRUSTEE.

POINT IV

THERE WAS NO EVIDENCE WHATSOEVER TO SUPPORT THE CONCLUSION THAT THE DEFENDANT AT ANY TIME RELINQUISHED OR PARTED WITH HER INTEREST IN SAID PROPERTY.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT HER ONE-THIRD STATUTORY INTEREST IN SAID PROPERTY SINCE THE PURPORTED TRUST WAS ILLUSORY AND TESTAMENTARY IN NATURE AND SHOULD NOT HAVE BEEN ALLOWED TO DEFEAT HER INTEREST.

The sole issue in this case is whether or not the trial court erred in holding that under the facts as stated above the appellant, Hannah Wilson Alexander, was not entitled

to an undivided one-third interest in said property or the proceeds thereof. Defendant's claim to an interest in this property arises by virtue of Section 74-4-3 U. C. A. (1953) which reads in part as follows:

"One-third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, to which the wife has made no relinquishment of her rights, shall be set apart as her property in fee simple, if she survives him. . . ."

So far as defendant has been able to ascertain, with the exception of the argument made under Point III, this Court has never considered the issues similar to those raised by this appeal. The decisions of this Court have, however, tended to favor the upholding of the wife's statutory dower interest whenever it could possibly be justified under the facts of the particular case.

It is defendant's first contention that the purported trust created by defendant's husband and his former wife was illusory and testamentary in nature and was, for the purpose of determining defendant's rights under the above statute, void. An examination of the provisions of the purported trust agreement as they existed at the time defendant and Henry A. Alexander were married reveals that during his lifetime, he parted with nothing. While the instrument in form purports to create a trust, in substance it in no way changed his ownership or control over the property. During his lifetime, he retained the power to revoke the trust, to change the beneficiary, to modify its terms in any respect he desired and in addition he retained

the full and complete beneficial use and enjoyment of the property (R. 4). He was in no way restricted in his power to sell or dispose of the property, as indeed the sale of the first parcel of property held in trust indicates. During Alexander's lifetime, the Bank had no right to control or manage the trust res in any manner whatsoever. He was required by the agreement to pay the taxes and in fact did so until his death. Had Henry A. Alexander retained a fee simple title, he could not have had any greater rights or powers over this property. Complete fee simple ownership in property gives one the uncontrolled right to enjoy the use of the same in any manner he pleases and to transfer or convey it in whole or in part during his lifetime or upon his death. Henry A. Alexander had all of these rights. He parted with nothing until his death. The trust agreement was purely testamentary.

The validity of a purported trust very similar to that involved in this case was considered by the United States Court of Appeals for the District of Columbia in *Betker v. Nalley*, 140 F. 2d 171 (1944). The trust in that case contained two parcels of land. The settlor retained the beneficial use of the property during her lifetime together with the power to direct the trustees to convey or mortgage the land at any time. Upon her death, the property was to be sold and the proceeds divided among certain of the settlor's children. The trust was thus in all respects similar to the one involved in this case. After considering the question, the Court concluded that such a trust was testamentary in nature and invalid. At page 173, the Court states:

"The only thing the grantor parted with irrevocably was the remainder of the trust property, if there should be any remainder after her death; and the only possibility that any discretion or power might have to be exercised by her trustees after her death arose from the possibility that she might elect not to dispose of the entire trust property before her death. Even in that event they were to be mere channels through which title would flow for the purpose of distribution. It seems obvious, therefore, that the deed of June, 1930, was ineffective to create a trust. Instead, it was, and was intended to be, merely testamentary in character."

In many cases where Courts have been faced with this question, it has been held that where the settlor parts with nothing during his lifetime, no valid trust is created and unless the statutes relating to the execution of wills are complied with, the conveyance must fail.

In *Warsco v. Oshkosh Sav. & Tr. Co.*, 182 Wis. 458, 196 N. W. 829 (1924), the Supreme Court of Wisconsin held:

"An instrument whereby donor retains or may retain the whole beneficial interest in trust property by execution of the instrument according to its terms does not constitute a valid trust. . . In such cases the so-called trustee is only the agent of the donor. And it has uniformly been held that a devise or bequest in trust which is subject to the future directions of the donor is void unless executed in conformity with the statute of wills."

A number of cases have considered the validity of trusts of this type under similar circumstances to those raised in the present case. Under the laws of New York,

a widow is allowed to elect upon the death of her husband whether or not she will take her intestate share or property devised to her by her husband. An exception to this rule is made in the case where a valid trust has been created with income payable to the surviving wife. The New York Courts have uniformly held that a trust such as involved in the present case is invalid so far as defeating the wife's election to claim an outright interest in the property. In *Newman v. Dore*, 175 N. Y. 371, 9 N. E. 2d 966 (1937), the deceased husband had created a trust with income reserved for life, power to revoke and control over the trustee in the management of the property. After first determining that the intention of the settlor was not material, the Court held the purported trust invalid. The opinion specifically notes that:

“The settlor reserves substantially the same rights to enjoy and control the disposition of the property as he previously had possessed.”

The Court's conclusion is summarized as follows:

“Judged by the substance, not by the form, the testator's conveyance is illusory, intended only as a mask for the effective retention by the settlor of the property which in form he had conveyed. We do not attempt now to formulate any general test of how far a settlor must divest himself of his interest in the trust property to render the conveyance more than illusory. Questions of whether reservation of the income or of a power of revocation, or both, might even without reservation of the power of control be sufficient to show that the transfer was not intended in good faith to divest the settlor of his property must await decision until such ques-

tion arises. In this case it is clear that the settlor never intended to divest himself of his property."

For other New York cases reaching the same result, see:

Burns v. Turnbull, 294 N. Y. 889, 62 N. E. 2d 785 (1945)

Bodner v. Feit, 247 App. Div. 119, 286 N. Y. S. 814 (1936)

Other Courts considering the question have reached the same conclusion:

Bolles v. Toledo Trust Company, 144 Ohio St. 195, 58 N. E. 2d 381 (1944)

Harris v. Harris, 72 N. E. 2d 378 (1947)

Russell v. Webster, 213 Mass. 491, 100 N. E. 637 (1913)

Rabbitt v. Gaither, 67 Md. 97, 8 Atl. 744 (1887)

The Restatement of the Law of Trusts, Section 57 (2) reads as follows:

"Where the settlor transfers property in trust and reserves not only a beneficial life estate and a power to revoke and modify the trust, but also such power to control the trustee as to the details of the administration of the trust that the trustee is the agent of the settlor. The disposition so far as it is intended to take effect after his death is testamentary and invalid unless the requirements of the statutes relating to the validity of wills are complied with."

The most that can be said for the trust agreement in question is that it constituted Zion's Savings Bank & Trust Company a mere agent or bailee of Henry A. Alexander during his lifetime. If, as the cases above indicate, a trust is invalid where the settlor retains a life interest plus the power to revoke the trust and control the management of the trust res, then certainly the present trust must fail. In the present case, the trustee was given no duties whatsoever during the lifetime of Alexander. The property was in the settlor's possession and subject to his sole and exclusive control and management. It is respectfully submitted that at least for the purpose of determining the existence and validity of a wife's statutory dower right, this trust cannot be upheld.

POINT II

THE TRIAL COURT ERRED IN DENYING DEFENDANT HER UNDIVIDED ONE-THIRD STATUTORY INTEREST IN SAID PROPERTY SINCE HER DECEASED HUSBAND IN ANY EVENT OWNED THE FULL AND COMPLETE EQUITABLE TITLE TO SAID PROPERTY INCLUDING ALL INCIDENTS OF OWNERSHIP.

By its very terms, Section 74-4-3 U. C. A. (1953) gives to the wife an undivided one-third interest in the *equitable* estates in real property possessed by the husband at any time during marriage. Assuming the trust created by Henry A. Alexander was valid, how can it possibly be denied that during his lifetime he had an equitable estate

in the property in question? The very most that the trustee held was the bare legal title. The settlor retained the very greatest interest in this property possible without having legal title. Even in states not having an express statutory provision, it has been held that a wife may claim dower in her husband's equitable estates.

Fletcher v. Felker, 97 F. Supp. 755 (1951)

It might be argued that the equitable estate of defendant's husband was limited to a life estate and thus dower could not attach. Such a construction, however, would render the term "equitable" as used in the statute, meaningless. All equitable estates in one sense of the word terminate upon the death of the owner. The beneficial use necessarily ceases at that time. However, if any equitable estate can be deemed a fee simple, then the interest of the settlor under this trust should certainly qualify since in addition to the full beneficial use he had the power to convey the property outright, change the beneficiary who would receive it upon his death or even modify the trust to provide that it would continue beyond his lifetime. The only limitations present were those restricting the creation or existence of any equitable interest. For a case holding that the unequivocal power of absolute disposition elevates an equitable life estate into a fee simple, see *National Surety Co. v. Jarrett*, 121 S. E. 291 (1924).

It has been said that whether or not dower attaches to a particular estate is dependent upon whether or not the husband at the time of his death is in a position to enforce a conveyance of the property.

Kathman v. Sheehan, 331 Ill. 420, 163 N. E. 692 (1928)

Under this test, certainly the wife's statutory dower right should attach, since as noted above, her husband at the time of his death had the uncontrolled power to convey the property.

While there are relatively few cases considering the question of whether or not dower attaches to the equitable estate of a beneficiary under a trust, the Courts that have considered the question, have had little difficulty upholding the wife's dower interest. In *Chalk v. Chalk*, 291 Ky. 702, 165 S. W. 2d 534 (1942), the Court noted:

"It may be observed that there is a distinction between a husband's mere equity in land or the holding of title as an agent or trustee and an equitable title of a character that entitles him to have or enforce a conveyance of the legal or fee simple title, i. e., when he is seized of a beneficial interest. The decedent Jule Chalk had such title. Therefore, it makes no difference whether it should be held that the decedent had legal title to the property subject to the liens of his son, or that he owned an equitable title, for it is manifest that the son 'was seized of an estate in fee simple' for the use of the father. That being the condition, the widow had dower in it. The wife's inchoate right of dower attached when the property was acquired, and not having joined in the conveyance of the part sold in 1929, her potential right became consummated as a vested one at the husband's death and the widow is entitled to have it recognized."

In the more recent case of *Pursifull's Adm'x v. Pursifull*, 299 Ky. 245, 184 S. W. 2d 967 (1944), the same Court said:

"In the absence of a specific statute there is some conflict in the decisions as to whether a widow is entitled to dower in an equitable estate of her husband, but, as said in 17 Am. Jr., Dower, § 39: 'A freehold interest as cestui que trust is now recognized as an adequate basis for dower, since in many states the statutes specifically or by necessary implication provide for dower in equitable estates, or, as some of the authorities put it, a dowable quality is imparted to trust estates by the statutes.'"

The case of *Meyer v. Barnett*, 60 W. Va. 467, 56 S. ^{E.}~~W.~~ 206, was almost identical to the case at bar. A husband conveyed property to a trustee for the use and benefit of himself and to collect the rents, issues and profits and to pay to him the net amount thereof after expenses. The husband had the absolute and unlimited power of disposition over the land and could direct the trustee to convey it to whomever he pleased. Upon his death, that portion of the property that was undistributed was to be conveyed to his children. After considering the argument that the most the husband had was a life estate, the Court concluded that, looking at the instrument as a whole, the grantor-husband remained the owner of at least an equitable estate in fee simple and the widow was entitled to dower in the land. The Court was impressed by the fact that although the income from the property would only be paid to the grantor during his lifetime, he had the absolute power of disposition over the property.

Other cases have recognized a wife's right to dower in a husband's equitable estate of this nature.

Burhans v. Burhans, 121 Atl. 749 (N. J. Eq. 1923)

Wildeman v. Wildeman, 130 Atl. 717 (N. J. Eq. 1925)

Telis v. Telis, 132 N. J. Eq. 135, 26 Atl. 2d 249 (1942)

Fletcher v. Felker, 97 F. Supp., 755 (1951)

Pope v. Bain, 6 N. J. 351, 78 Atl. 2d 820 (1951)

If the word "equitable" in the Utah dower statute is to be given any effect whatsoever the defendant in this case is entitled to her statutory one-third interest in the property held in trust for her husband during his lifetime. Henry A. Alexander had as great an equitable estate in this property as could conceivably have been created.

POINT III

THE TRIAL COURT ERRED IN DENYING DEFENDANT HER UNDIVIDED ONE-THIRD STATUTORY INTEREST IN SAID PROPERTY SINCE IN ANY EVENT HER INTEREST WOULD HAVE ATTACHED AT THE TIME THE PROPERTY WAS PURCHASED AND CONVEYED TO THE TRUSTEE.

Apart from the above arguments, there is a third basis upon which the defendant's dower right can and should be sustained. On May 21, 1940, Henry A. Alexander withdrew

from the trust the real property described in the exhibit to the original trust agreement (Exhibit 4). On the same day, pursuant to an exchange agreed upon between them, this property was conveyed by Zion's Savings Bank & Trust Company to Louis DeYoung by a quitclaim deed and Louis DeYoung and Louise S. DeYoung, his wife, conveyed to the trustee the property involved in this litigation. At that time, Henry A. Alexander executed a form provided by the trustee stating that "I now deliver to you the following:" and described the property (Exhibit 3). There was no doubt a contract or agreement between Henry A. Alexander and Louis DeYoung pursuant to which this sale or exchange took place. A reading of the letter signed by Alexander transferring the new property to the trust makes it clear that prior to the DeYoungs' formal conveyance to the trustee, Henry A. Alexander became the full legal and equitable owner of this property. Thus the statutory dower right of the defendant became fixed as of that time.

Even if it be assumed that legal title to the property did not pass through Alexander in the transfer between the time he contracted to purchase the property from DeYoung and the actual conveyance to the trustee, he would have still become the equitable owner of the property under an executory contract of purchase. The cases uniformly hold that a husband's equitable interest in property under a contract of purchase is subject to a wife's dower interest.

This question was considered by this Court in *McNeil v. McNeil*, 61 Utah 141, 211 Pac. 988 (1922). The question there presented was whether dower attached to a husband's interest under an installment contract or certificate of sale

with the State for the purchase of land. In that case, before completing the payments, the husband entered into an agreement to convey a one-half interest in the land to another party. After completing the purchase price, the third party brought suit to compel specific performance of the contract and to recover his interest. The wife asserted her dower in an attempt to defeat this action. The Court held that since the purchase price had not been fully paid that no dower right attached prior to the sale to the third party. The Court noted, however, that a wife would be entitled to dower if the husband had performed his part of the contract and would have been in a position to compel specific performance. In *Young v. Corless*, 56 Utah 564, 191 Pac. 647 (1920), this Court had held that a purchaser under such a contract was possessed with an equitable estate of inheritance "that could be mortgaged, one that could descend to his heirs, and such as could be alienated or encumbered as other real estate." In the *McNeil* case, this pronouncement was qualified to the situation where the purchaser had performed. In view of the *Young* case, it would have been difficult to deny that a wife would be entitled to dower under such circumstances. When read with the earlier dower cases of *Parks Estate*, 31 Utah 261, 87 Pac. 900, and *Free v. Little*, 31 Utah 449, 88 Pac. 407, there can be no doubt that upon the completion of payment or other performance by the purchaser, his interest would be such that his wife's dower right would attach.

The cases on this point from other jurisdictions are collected and summarized in an Annotation in 66 A. L. R.

65. As to the rule where the purchaser has performed his part of the contract, the author states:

“According to the weight of authority, a wife has dower in lands which her husband holds at the time of his death under an executory contract of purchase where the purchase price has been fully paid and the husband is in a position to compel a conveyance to himself of the legal title. While the reasons which the courts give for supporting this rule are not uniform, they are generally based upon the theory that in such a case the vendor is considered to be a trustee of the legal title for the benefit of the purchaser, and some courts hold that such a complete equitable title is an ‘estate of inheritance’ within the meaning of the dower statutes.”

For an example of the cases upholding the wife’s dower right in this situation, see:

In re Reids Estate, 26 Cal. App. 2d 362, 79 Pac. 2d 451

In re Kellchers Estate, 133 Misc. 581, 232 N. Y. S. 680

In re Bosharts Estate, 177 N. Y. S. 567, aff’d 177 N. Y. S. 574

Ehrlich v. Tritt, 316 Ill. 221, 147 N. E. 40

Knights v. Knights, 300 Ill. 618, 133 N. E. 377

We emphasize that the original property was withdrawn from the trust by Henry A. Alexander. After withdrawing the original property from the trust, he used it to purchase and acquire the property that is now the subject matter of this action. The legal situation presented is exactly the same as it would be if Henry A. Alexander had

purchased the property for cash and directed the seller to convey the legal title to a trustee. The moment Henry A. Alexander withdrew the original property from the trust he became the owner of the complete legal and equitable title. He used this complete legal and equitable title to purchase the property now in litigation. Having paid the full purchase price for the property in litigation, he became the owner of the full and complete equitable title to it. He could not cut off his wife's inchoate dower by directing the DeYoungs to convey the legal title to the trustee.

POINT IV

THERE WAS NO EVIDENCE WHATSOEVER TO SUPPORT THE CONCLUSION THAT THE DEFENDANT AT ANY TIME RELINQUISHED OR PARTED WITH HER INTEREST IN SAID PROPERTY.

The trial court's decision in this case was in no way predicated upon the assumption that the defendant had released or relinquished her dower right. The Findings of Fact, however, were not specific enough to preclude this question from being raised. An argument to the effect that the defendant had surrendered her dower right was made by counsel of plaintiff, but it gained no support from the facts of the case.

It should be borne in mind that the amendment to the Trust Agreement, which purported to give the defendant the use and occupancy of the property after Henry A. Alex-

ander's death was not executed until almost four years after the parties were married. There was no evidence of an antenuptial agreement between the defendant and her husband. She was not a party to the Amendment and there was no reason to believe that she surrendered her dower rights in return for the privilege given to her under it. Counsel stressed the fact that the defendant owned real property at the time of her marriage and that she later disposed of said property. There was no relation shown, however, between her dealings in her own separate property and the Trust created by her husband and the acquisition of the property in question. The mere fact that she had property of her own in no way affects her dower right in her husband's property.

A wife's dower right both at common law and under the modified statutory provisions has been favored by the law, and the courts have been reluctant to find a release or relinquishment of a wife's dower right in the absence of a clear and unequivocal act on her part or where barred by specific legislation.

Gee v. Baum, 58 Utah 445, 199 Pac. 680;

Rook v. Horton, 190 N. C. 180, 129 S. E. 450;

Mathews v. Marsden, 230 Pac. 775, 71 Mont. 502;

Taliaferro v. Alexander, 80 F. 2d 172.

An examination of the record in this case discloses no fact or circumstances that would support a finding that the defendant had parted with her statutory one-third interest in the property allegedly held in trust for her husband Henry A. Alexander.

CONCLUSION

On the basis of the evidence before the trial court, defendant, Hannah Wilson Alexander, was entitled to her statutory one-third interest in the real property in question or the proceeds thereof. Whether the proposed Trust Agreement is deemed a nullity or given full effect according to its terms, defendant was entitled to her dower interest. A contrary result would abrogate the plain and unambiguous meaning of Section 74-4-3 U. C. A. 1953, and contravene the strong policy in favor of safeguarding this right. Under the authorities and arguments presented herein, the Decree of the trial court should be reversed.

Respectfully submitted,

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Received two copies of the foregoing Brief of Appellant
this _____ day of _____, 1953.

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